

Back to the Classroom – the Equality Act 2010 and Education Bodies

As of 11 September 2017, the Equality and Human Rights Commission is offering funding and other legal assistance for claims concerning discrimination in education. The Commission’s objective under this new Scheme is to increase access to justice for those victims of discrimination involving schools, further or higher education institutions or general qualifications bodies. The Commission may be able to assist by offering funding for front line advice and representation or by taking appropriate cases in house.

This article explores the obligations owed by education bodies in terms of the Equality Act 2010 and the types of cases where the Commission may be able to offer assistance under the new Scheme.

Some Key Concepts

The Equality Act 2010 (“the Act”) makes it unlawful to discriminate against, harass or victimise someone on the basis of a protected characteristic – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The Act covers a range of areas of activity, such as employment, service provision and housing (and in practice, some organisations may have obligations in more than one capacity), but the focus of the Commission’s new Scheme is squarely on the duties owed by education bodies in terms of Part 6 of the Act; that is, schools and education authorities, further or higher education institutions (“FE/HE institutions”) and general qualifications bodies.

The provisions apply to all schools in Scotland, irrespective of how they are managed or funded and include public and private schools, special schools and publicly funded nurseries. Further and higher education institutions include universities, colleges and certain “designated institutions” providing higher education. A general qualification body is an authority or body, which can confer a relevant qualification; in Scotland the only general qualification authority is the Scottish Qualifications Authority (SQA).



In short, the principle underpinning Part 6 of the Act is that current or prospective pupils and students (and in limited circumstances former pupils or students) should not be discriminated against by schools, FE/HE institutions or general qualifications bodies on the basis of a protected characteristic. It is also unlawful to harass or victimise a pupil or student. It is important to note that in the context of the Part 6 provisions, there is no protection against marriage and civil partnership discrimination and the schools provisions also specifically preclude their application to age as a protected characteristic.

In order to put these provisions in context, it is useful to briefly outline some of the conduct rendered unlawful in terms of the Act. A detailed analysis is outwith the scope of this article and the following represents only a brief overview. For a more in depth analysis, readers are directed to the Commission's Technical Guidance for Schools in Scotland (<https://www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-scotland>) and Technical Guidance on Further and Higher Education (<https://www.equalityhumanrights.com/en/publication-download/equality-act-2010-technical-guidance-further-and-higher-education>). For ease, the term "student" is used throughout this article to refer to all those protected under Part 6 of the Act. The term "body" shall be used for all those with duties under Part 6, unless identified as specifically applying to a certain type of education body, such as a school or college.

Unlawful discrimination may take the form of direct discrimination, indirect discrimination, discrimination arising from disability or failure to make reasonable adjustments.

Direct discrimination

Direct discrimination may occur where a student is treated less favourably than others because of a protected characteristic. This includes discrimination by association (for example where a friend or family member has that characteristic) and discrimination by perception (where a student does not in fact have a protected characteristic, but is perceived to have it). Within the context of the school provisions, direct discrimination can never be justified. For FE/HE institutions, direct age discrimination may not be unlawful if it can be objectively justified.



Indirect discrimination

Indirect discrimination occurs where a body applies an apparently neutral provision, criterion or practice (“PCP”), which puts or would put a student with a protected characteristic at a particular disadvantage. In order for a claim to be made for indirect discrimination, it must be shown that (a) a PCP has been (or would be applied) to all; (b) that it puts students with a protected characteristic at a particular disadvantage compared to others; (c) that a particular student has, in fact, been put at that disadvantage, and (d) that the PCP cannot be objectively justified. All four conditions must be present for indirect discrimination to have occurred. Indirect discrimination can be justified if the body is able to demonstrate that their action was a proportionate means of achieving a legitimate aim.

Discrimination arising from a disability

Discrimination arising from disability may occur where a disabled student is treated unfavourably because of something arising *as a consequence of* their disability. Discrimination arising from disability is distinct from direct discrimination in that the unfavourable treatment is because of something connected with the student’s disability, not because of the disability itself. It also differs from the other types of discrimination because the test is whether the treatment is *unfavourable* rather than *less favourable*, meaning there is no need for a comparator i.e. there is no requirement to compare a disabled student’s treatment with that of another person. Again, this type of discrimination may be justified by the body responsible for the alleged discrimination if it can be shown to be a proportionate means of achieving a legitimate aim. It is very unlikely that discrimination arising from disability will be able to be justified if reasonable adjustments have not been made. It will also not amount to unlawful discrimination if the body can demonstrate that they did not know and could not be expected to know that the student had a disability. This would be rare in an educational context however where the school or university is likely to have some knowledge of their student’s circumstances.



Failure to make reasonable adjustments

Bodies also have a duty to provide reasonable adjustments for disabled students to enable them to fully participate in their education and to allow them to enjoy the other benefits, facilities and services provided. This includes a duty to provide auxiliary aids and services for disabled students. This duty is an anticipatory, rather than reactionary, one and there is an obligation to consider in advance what disabled students generally may require and what adjustments may be made for them. It is not possible to justify a failure to make reasonable adjustments; the question is whether or not the adjustment was reasonable for the body to make. Factors such as resources, the practicality of the adjustment, health and safety requirements and the interests of other students will often be taken into account when determining reasonableness. The duty to make reasonable adjustments for disabled students does not apply to a provision, criterion or practice that constitutes a “competence standard” i.e. an academic, medical, or other standard applied for the purpose of determining whether or not a student has a particular level of competence or ability. The issue of competence standards can be complex and a detailed examination is outwith the scope of this article. Again, further discussion can be found within the Commission’s Technical Guidance on Further and Higher Education.

Example: A primary school pupil suffers from diabetes and is not receiving assistance at school with blood sugar readings and administration of insulin. The school’s failure to make arrangements which adequately meet his healthcare needs would amount to a failure to make reasonable adjustments.

Harassment and victimisation

Finally, it is unlawful for a student to be harassed on the basis of a protected characteristic or victimised in response to their carrying out a “protected act” i.e. bringing proceedings under the Act, doing something for the purposes or in connection with the Act, including giving evidence or information in connection with proceedings or alleging a breach of the Act. Both “harassment” and “victimisation” have specific definitions under the Act.

Forms of Unlawful Conduct

The Act specifically sets out the parameters within which a body's obligations operate. In essence, it is unlawful for a body to discriminate against, harass or victimise a student in the context of: seeking admission; accessing education or benefits; deciding on whom to confer qualifications or the terms on which those qualifications are conferred; in the course of an exclusion process; or by subjecting the student to any other detriment.

Admissions and applications

It is unlawful for a body to discriminate against or victimise a student in the arrangements it makes for deciding who is offered or refused admission and in the terms on which it offers admission. The Act does not prohibit the setting and applying of admissions criteria, but such criteria must not discriminate against applicants with a particular protected characteristic and, if necessary, reasonable adjustments should be made to the application process (though not the admissions criteria) for disabled applicants.

In limited circumstances schools can select pupils on the basis of ability or aptitude without this amounting to unlawful discrimination. This will only be the case if the way in which the ability is assessed is itself not discriminatory.

Example: A girl with learning difficulties applies to go to a school that selects its intake on the basis of academic ability. She is provided with reasonable adjustments, but still fails the entrance exam and is refused admission. Although her poor performance was as a direct result of her disability, and would appear to be discrimination arising from a disability, the refusal to admit her would not be unlawful as it is a result of a permitted form of selection.



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

It is unlawful to discriminate against or victimise a student in the availability or manner in which education is provided, the way a body affords access to a benefit, facility or service, or by subjecting a student to any other detriment. It is generally unlawful (subject to certain limited exceptions, discussed below) for a body to refuse to provide education or access to any benefit, facility or service on the basis of a protected characteristic or to arrange the provision of education or access to a benefit, facility or service in such a way that students with certain protected characteristics are unable to access them. This covers educational and non-educational services, including leisure and sporting activities, afterschool and homework clubs, extracurricular trips and facilities such as libraries, cafeteria and IT facilities.

Example: A college that has a number of Muslim students does not provide Halal food in its canteen, which results in the Muslim pupils being unable to eat lunch within the campus. This will probably be a case of indirect religion or belief discrimination because the college is unlikely to be able to justify this action.

In many cases, discrimination may be unintentional. Bodies must be live to their obligations and must ensure that policies and procedures are not discriminatory, even if they believe the policy is there to protect students with a certain protected characteristic.

Example: A pupil with a visual impairment is told that he is not allowed to attend a school camping trip because he will be unable to take part in most of the activities. The school makes no attempt to make the activities accessible. This is direct disability discrimination, which the school is unlikely to be able to justify because of its failure to make reasonable adjustments.



Exclusion from school or studies

It is unlawful for a body to discriminate against or victimise a pupil by excluding him or her because of or for a reason related to a protected characteristic. The Act does not prohibit bodies from excluding students with protected characteristics, but does prohibit exclusion because of their protected characteristics or discrimination during the exclusion process. Behaviour and exclusion policies that result in a higher proportion of students with a particular protected characteristic being excluded are likely to result in indirect discrimination unless their application can be objectively justified. Bodies have a duty to make reasonable adjustments to the exclusion process for disabled students and in circumstances where they fail to do so the exclusion is unlikely to be capable of objective justification.

Example: A pupil with autism is excluded for repeatedly getting up from his seat during lessons and disrupting other pupils. It is the school's policy that persistent disruptive behaviour is punished by exclusion. If the school excludes him, this may amount to discrimination arising from a disability. The school is under a duty to make reasonable adjustments to its policy, which may mean disregarding some of the disruptive behaviour or working with the pupil and teaching staff to find a way to help him remain in his seat during lessons.

Conferring Qualifications

It is unlawful for a general qualifications body to discriminate against, harass or victimise a student in the arrangements it makes for deciding on whom to confer qualifications, and the terms on which those qualifications are conferred. It also places a duty on general qualifications bodies to make reasonable adjustments for disabled students. Section 96(7) of the Act gives the SQA, as the appropriate regulator of general qualifications in Scotland, the power to specify where reasonable adjustments to National Qualifications should not be made. In doing so, the SQA must have regard to the need to minimise the extent to which disabled persons are disadvantaged, and the need to protect the integrity of, and maintain public confidence in the



qualification, whilst also ensuring that the disabled candidate knows that their qualifications will not be regarded as inferior because reasonable adjustments have been made. Further information regarding where reasonable adjustments will not be made can be found on the SQA website and in their report on the outcome of the Consultation: Reasonable Adjustments in National Qualifications in Scotland.

Example: A visually impaired student is concerned that requiring to read a large amount of text as part of her Higher English exam may prove particularly difficult and time consuming and will place her at a disadvantage. The SQA provides her with an exam paper in enlarged font in order that she can read the paper without difficulty.

“Any other detriment”

The Act says that a body must not discriminate against a student by subjecting them to “any other detriment.” This is essentially a catch all provision designed to take account of any other instances of discrimination, which may not be caught by the more specific provisions. “Detriment” is not defined by the Act, but is interpreted very broadly. It is generally taken to mean some disadvantage and can include denial of an opportunity or choice, or anything that a reasonable student would consider altered his or her position for the worse.

Exceptions

There are some limited exceptions to Part 6 provisions. In particular, single sex schools are lawful, as are single sex boarding arrangements. Independent denominational schools are permitted to give preference to their denomination when deciding who to admit and acts of worship or other religious observance organised by or on behalf of a school are not covered by the provisions prohibiting religious or belief discrimination. In addition, these obligations do not apply to the content of the curriculum. There are further exceptions relating to communal accommodation, charities and certain action required by law.

How the Commission can help

If you have experienced discrimination in education and cannot access the legal assistance you need (or if you are a solicitor or advisor who has been approached by such an individual) the Commission would like to hear from you. You can get in touch with us by completing the “Request for Assistance” form and sending it to us at legalrequestscotland@equalityhumanrights.com. You may also call us on 0141 228 5951 if you have any questions regarding a request or the Scheme in general.