

# The Equality Act Codes of Practice post consultation report

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## **The Equality Act 2010**

The Equality Act 2010 (the Act) brings together discrimination law introduced over four decades through legislation and regulations. It replaces most of the previous discrimination legislation, which is now repealed, and applies to England, Scotland and Wales.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.

An important purpose of the Act is to create a single approach to discrimination against people with different protected characteristics, where this is appropriate. However, there are some important differences in the way that discrimination is defined, particularly for disability.

The Act has also brought in provisions to strengthen the law by making discrimination unlawful in circumstances not covered under previous discrimination law. Broadly speaking, discrimination in most areas of activity against people with protected characteristics, as described in the Act, is now unlawful. These areas of activity include, for example, employment, education, housing, and the provision of services and the exercise of public functions. An organisation may have duties under more than one area of the Act, for example if it employs people and provides services to customers.

## **The Codes of Practice**

The main purpose of the Codes of Practice is to provide detailed explanations of the provisions in the Act and to apply legal concepts in the Act to everyday situations. This will assist courts and tribunals when interpreting the law and help lawyers, advisers, trades union representatives, human resources departments and others who need to apply the law. As with the Act, the Codes apply to England, Scotland and Wales.

Because the Act is long and complex, the Codes are detailed, and some parts may be difficult to understand for someone with no knowledge of discrimination law. The Equality and Human Rights Commission (the Commission) is also producing a parallel series of practical guidance which assumes no knowledge of the law. The practical guidance has

been designed to relate closely to the Codes and will help people to use the Codes and the Act.

The Codes are a crucial component of the preventative framework and, together with the practical guidance produced by the Commission, will:

- help those who have duties under the Equality Act to understand their responsibilities and how to avoid disputes
- help individuals 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
- ensure that anyone who is considering bringing legal proceedings under the Equality Act 2010, or attempting to negotiate equality in the workplace, understands the legislation and is aware of good practice in employment.

The Commission has prepared and issued the Codes under the Act on the basis of its powers under the Equality Act 2006. These are statutory Codes. This means they have been approved by the Secretary of State and laid before Parliament. The Codes do not impose legal obligations. They are not an authoritative statement of the law; only the tribunals and the courts can provide such authority. However the Codes can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Codes that appears to them relevant to any questions arising in proceedings. If those who have duties under the Act's provisions follow the guidance in the Codes, it may help to avoid an adverse decision by a tribunal or court in such proceedings.

## **Methodology**

Section 14 of the Equality Act 2006 (EA 2006) enables the Commission to issue a Code of Practice in respect of specified areas of discrimination legislation, to assist in compliance with the legislation and to promote equality of opportunity. The EA 2006 also requires that we publish for consultation proposals for any Code of Practice. We also adhere to consultation criteria included in the Government's Code of Practice on Consultation.<sup>1</sup>

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<sup>1</sup> HM Government Code of Practice on Consultation 2008 <http://www.berr.gov.uk/files/file47158.pdf>

To meet our responsibilities under the EA 2006 and Code of Practice on Consultation our methodology incorporated the following elements:

- 'Pre-consultation' activity with a virtual key stakeholder reference group.
- Publication of the draft Codes for consultation, and notification sent to stakeholders via a range of media.
- Allowed 12 weeks for participants to respond, ensuring that they had scope to influence the final drafts.
- Provided a questionnaire to minimise the burden on consultees.
- Advertised the consultation on our website, ebulletins and at stakeholder events and via their membership networks.
- Encouraged participants to engage informally throughout the consultation period, assisting them with queries and concerns as they drafted their submissions.
- Created an external expert reference group to facilitate access of specialist stakeholders to the consultation process.
- Analysed responses carefully, taking submissions into account in the redrafting phase.
- Producing this report to honour our commitment to provide feedback to participants following the consultation.

## **Consultation**

The draft Codes were published in January 2010 as part of a series planned by the Commission to support the introduction of the Equality Act 2010. This Act brings together lots of different equality laws, many of which we have had for a long time. By doing this, the Act makes equality law simpler and easier to understand.

### **Pre-consultation activity:**

During the early stages of the production process, a virtual reference group was established to support development of both Codes of Practice and non-statutory guidance. This group comprised around 400 UK-wide organisations representing the public, private and voluntary sectors. In early September 2009, during the initial scoping and drafting phase, this group was asked to review a proposal document for the Statutory Codes of Practice. The document set out our approach, gave an overview of work to date, and established a clear timetable for delivery. We also asked for feedback on two key points:

- a) suggested priorities for detailed interpretation

- b) suggestions for practical examples that relate to the specific contexts in which discrimination actually happens and to the real practice of service providers or employers. These should illustrate a point or aim to demonstrate what the law means, or deal with a common area of confusion.

Respondents submitted suggestions directly to the Codes of Practice Manager, who incorporated, where appropriate, the recommendations.

### **Statutory consultation:**

Between January and April 2010 we consulted on three draft codes: Employment; Services, Public Functions and Associations; and Equal Pay. In addition, we launched a simultaneous consultation on non-statutory guidance in the areas of employment (incorporating equal pay provisions), services and education.

When we drafted these Codes we were acutely aware that they should reflect the needs, expectations and language of the people who were going to use them. The public consultation was not only a statutory requirement but also an essential part of the drafting process; allowing us to take on board the comments, concerns and recommendations of a diverse group of expert and specialist stakeholders thereby ensuring that the Codes are as useful and informative as possible.

The consultation documents were based on the version of the Equality Bill brought from the Commons on 3 December 2009. Additional consultation events were held to consult key stakeholders on amendments made to the Bill after we had published our draft Codes. This resulted in substantial rewriting of parts of the Codes, particularly to the Employment Code to reflect the revisions made to the recruitment provisions by Section 60 which prohibits enquiries about disability and health before an offer of employment is made.

Final versions of the Codes are based on the version of the Bill which received Royal Assent on 8 April 2010.

### **Stakeholder participation**

Over 100 submissions were received from expert stakeholders in response to our consultation. See Appendix I for details of respondents.

We hosted round-table review meetings with key stakeholders for each of the protected characteristics and for key sectors. We also hosted 10 regional events<sup>2</sup> with attendees drawn from the public sector, business organisations and the voluntary sector.

## Expert Reference Group

Two meetings were held with an expert reference group in May 2010 to look at general issues where there were fundamental differences of opinion between stakeholders. This group consisted of 10 legal experts from across sectors (government, trade unions, employment law, business sector, voluntary sector etc). The issues covered were:

- audience and accessibility of the Codes
- length and ease of navigation
- use of language in the Employment Code, for example the term ‘employee’ as opposed to ‘worker’
- the extent to which the Codes should include good practice and how such good practice information should be distinguished from legal compliance. This related to all the Codes, but there were particular concerns about the chapters of the Employment Code dealing with recruitment and issues arising during employment
- for the examples used in the Codes, striking the right balance between reflecting discrimination in a realistic way and avoiding offensive stereotypes.

The expert reference group was asked to consider specific legal issues where there was a difference of views including:

- manifestation of religion or belief
- definitions of direct and indirect discrimination
- how the Codes should explain comparators and objective justification and where these explanations should be situated
- tension between an employer’s obligations towards a disabled employee based on actual or imputed knowledge of disability, and the worker’s right to privacy
- the explanation of discrimination arising from disability and the examples associated with this explanation
- whether gender dysphoria should be presented as an impairment falling within the definition of disability.

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<sup>2</sup> These events were primarily to consult on draft non-statutory guidance but attendees also commented on the draft codes.

## **Post-consultation revisions to the Codes**

### **a. Provisions removed**

Following the general election in May 2010, the new coalition government indicated that there were a number of provisions in the Act which they would not commit themselves to implementing and this necessitated substantial revisions to the Codes. These provisions are as follows:

- the socio-economic duty
- positive action tie-breaks
- mandatory pay audits for private sector companies.

In addition, the coalition government decided they wanted to review implementation of certain other provisions and refer some of these provisions to the new Reducing Regulation Committee. All reference to these provisions has therefore been removed from the Codes, pending the government's new implementation schedule:

- Public Sector Equality Duty
- Dual Discrimination

In addition, the provisions relating to age in the provision of Services, Public Functions and Associations are not expected to come into force before 2012. Therefore the reference to protected characteristics in this Code does not include age

### **b. Stakeholder concerns – generic issues**

- i. A number of respondents were unhappy with particular provisions in the Equality Act. However, while understanding stakeholder concerns this was clearly outside the remit of the consultation as the Codes must reflect the provisions in the Act as approved by Parliament.
- ii. Many respondents were concerned about the length and structure of the Codes and it was felt that the text would benefit from additional signposting and cross-

referencing. Some picked up inconsistencies in the terminology used and others felt more work needed to be done on definitions and core concepts. Most welcomed the inclusion of good practice though some thought it would be better placed in the accompanying non-statutory guidance. Some respondents wanted a clear distinction between what was a legal requirement and what was good practice. A number of respondents also wanted specific reference to case law, and particularly to seminal judgments. A number of stakeholders believed that the Commission's function in enforcing compliance needed to be highlighted.

**While we made every effort to keep the draft Codes as brief as possible we cannot escape the fact that the Equality Act 2010 brings together existing law currently contained in 35 Acts, 52 Statutory Instruments, 13 Codes of Practice and 16 European directives. However, sections that respondents felt were poorly structured or unclear have been rewritten and additional signposting and cross referencing has been included. Revisions have also been made to core definitions and terminology, to ensure consistency. Where references are made to good practice, this is clearly distinguished from text that deals with legal compliance. In the interests of brevity, it was decided not to include express references to case law, although several of the examples have been based on seminal judgments.**

- iii. The majority welcomed the inclusion of examples and many requested and suggested revisions and additional examples.

**A comprehensive review of all examples was conducted and a number were added, amended or replaced and certain examples were deleted. For example, following stakeholder requests we have now included examples of discrimination because of lack of belief, as well as examples to illustrate discrimination based on the manifestation of a religion or belief, and examples of harassment based on sexual orientation.**

- iv. Trade unions were unanimous in their view that insufficient attention had been paid to their role in the workplace and that the Codes should refer to the positive impact of trade unions, with a positive recommendation to consult with trade unions.

**The main purpose of the Codes is to provide a clear statement of the law under the Equality Act 2010. This statute is not the primary vehicle for the law relating to trade unions. However, we have made sure that the chapters in the Employment Code relating to good practice make reference to the important and positive contribution of trade unions to equality and diversity in the workplace.**

- v. Stakeholders from the business sector wanted the Commission to provide infallible guidance: advising them what they could and could not do to ensure they would not fall foul of the law. However, legal practitioners wanted the exact opposite; arguing that the courts and tribunals are the final arbiters in individual cases.

**We have made every effort to be as clear as possible as to whether a particular practice is definitely unlawful, or may be unlawful under certain circumstances. We have done this by ensuring that examples have concluding statements summing up whether the practice described is lawful, unlawful or may be unlawful unless objectively justified or subject to an exception.**

- vi. Particularly in relation to the Employment Code, some business stakeholders wanted advice tailored more specifically to reflect the different realities for small and large businesses. They also wanted a clearer distinction between practice required for legal compliance and practice that may assist legal compliance but is not required by the Act.

**We have ensured the Codes reflect the fact that large businesses and small businesses may have different approaches. For example, large businesses may have more formal policies and practices than small businesses. By separating out legal compliance from good practice to assist compliance, we believe the Codes reflect the fact that larger businesses and the public sector often approach equality and diversity in a different way and that sections in the Codes on good practice may have more relevance to these organisations. However, we do not distinguish between legal compliance for different sectors, because all businesses, no matter what their size, must comply with the law.**

- vii. Various transsexual stakeholder groups responded to the formal consultation and also participated in the parallel consultation events taking place on the non-statutory guidance.

**Feedback from the consultation events was incorporated into the employment and services codes where appropriate, particularly on issues of confidentiality, use of single sex services and the legal definition of transgender.**

### **c. Equal pay**

- Stakeholders did not want the Equal Pay Code incorporated into the Employment Code.

**Stakeholders welcomed the Commission's decision to maintain a separate Code on equal pay between women and men.**

- Trade unions and employers felt that the new provisions on obtaining and disclosing pay information required further explanation.

**The sections on these provisions have been redrafted.**

- Some stakeholders believed that the examples in the Code were too focused on the public sector.

**This has been addressed.**

- Trade unions also wanted the role trade unions play in achieving gender equality in the workplace highlighted.

**Their role has been indicated where appropriate.**

- The section on occupational pensions was redrafted in response to critical comments from stakeholders who found it confusing.

**The revised draft was considered and approved by a number of external experts.**

#### **d. Employment**

- Religious and non-religious organisations made a number of comments, many conflicting with each other.

**While we took account of these comments as far as possible, our main concern was to ensure that the Code represented the Act as clearly and accurately as possible.**

- A number of concerns were raised regarding data protection issues, particularly in relation to transgender, and employment monitoring requirements. **These sections have been redrafted.**
- Employers wanted further clarification on their duty with regard to knowledge of an employee's disability and their duties with regard to protecting confidential employee information. **This text has now been clarified and expanded.**
- Trade unions also objected to the section which indicated employers were not legally required to have an equality policy, believing this sent out an unnecessarily negative message. **This section has now been strengthened and now indicates that having an equality policy will assist employers to meet their compliance obligations.**

- Age-related stakeholders, and employers, called for more clarity on retirement and redundancy issues. **These sections are now much improved and the examples have been reviewed.**
- Several stakeholders requested more information about paid and unpaid time off for workers in relation to disability and transgender issues. **This area has been strengthened.**

**The section on third party harassment in employment, a new provision under the Act, has been reworked in response to stakeholder comments.**

#### **e. Services, public functions and associations**

- A number of concerns were raised about the exceptions, in particular the exceptions for charities, single sex services and separate services. **These sections have been revised as a result.**
- Concerns were expressed about the examples which were considered either too negative or reinforced stereotypes. **These were addressed in our comprehensive review of examples.**

## **Post-consultation activity**

Codes 'road-testing':

The Commission agreed to 'road-test' the Codes with a selection of key users, to assess how useful and accessible the guidance is, before returning final drafts to GEO.

Participants were identified from the following areas:

- Employment Tribunal Judges
- HR professionals
- Discrimination lawyers
- Trade Union representatives
- Equality and Human Rights Commission Helpline Advisers

Participants were identified by approaching the President of the Employment Tribunals, the Discrimination Law Association, the Employment Law Association, the Employers Forum on Disability, the TUC Legal Officers Network, and the Commission's Helpline.

Participants were sent a copy of the draft Codes of Practice and were asked to undertake a short exercise in order to assess how useful the documents are.

This exercise comprised a scenario (for Employment these were: dismissal, reasonable adjustments and harassment; for Services, Public Functions and Associations these were: reasonable adjustments and harassment). Participants were asked to answer one of the scenarios and then to feed back to us on three key areas:

- how easy was it to find the information needed to resolve the scenario
- was the level of detail sufficient
- how did participants find the content – clarity, language and tone.

Participants were also given space to make general comments. We made it clear from the outset that we were not asking for feedback on the wording or concepts within the text. We stated that as the text had been agreed with the GEO, and that the legal interpretation had been thoroughly reviewed by a range of equality legislation experts, we were confident that the text was a thorough and correct interpretation of the Equality Act 2010. We did say though that if participants found anything that appears to be a clear misinterpretation, to inform us so that we could review it.

### **User feedback:**

For the Employment Code we received 14 written responses. For the Services, Public Functions and Associations Code we received 6.

### **Employment:**

Generally the feedback was positive and the Employment Code was widely viewed as being well written, clear and accurate and having an appropriate tone. For the most part, road-testers seemed to be able to find their way around the Code when

addressing the scenarios – and some presented us with very detailed analyses of the relevant law.

There were several comments that the Code would be difficult to follow for lay users – especially with some of the more complex sections. But it was also recognised that it would be more appropriate for lay users to use the non-statutory guidance, at least in the first place.

Participants also commented on the length of the Code – although they accepted that a comprehensive Code would inevitably have this problem, and recognised that an index would definitely assist navigation.

Overall, participants were reasonably satisfied that the Employment Code of Practice was couched in clear and accessible language, that the information contained within was comprehensive, and easy to follow, and that the tone was appropriate for its intended audiences.

A particularly positive comment received was from an Employment Tribunal Judge, who stated that the Code ‘continues in the tradition of earlier Codes (especially the style developed by the Disability Rights Commission) of stating the law succinctly, explaining what it means, giving examples of how it works in practice, and giving advice on policy and approach. That is a good template to adopt.’ A similar comment was made by one respondent to the Services, Public Functions and Associations Code road-testing (see below).

### **Services, Public Functions and Associations Code:**

As with the Employment Code, respondents felt that the Services, Public Functions and Associations Code was quite bulky but acknowledged that this was because of the scope of the Act. On the whole, the content was felt to be clear and the language and tone appropriate.

Respondents stated too that the introduction to the Code provided an overview of what information is contained in each section or part of the Code in an easy to understand format. This, combined with indexing and headings, meant that the Code was well structured, so that users could jump straight to sections of particular interest ‘quickly and confidently’.

It was also acknowledged that though the law is complex, the terminology used in the Code was well explained and simple to understand. The frequent use of case studies was also identified as useful, aiding further understanding.

As touched on above the language and tone was deemed to be pitched at the right level, being free from jargon as much as possible but without compromising on the level of detail. And it was felt that the level of detail contained within would be helpful for those who are more experienced with equality discrimination such as CAB and other specialist advisers.

# Appendix 1 Respondents

a:gender  
Accord Coalition  
Adult Directors of Social Services  
Age Concern  
All Mod Cons  
An-Nisa  
Association of School and College  
Leaders  
Barnardos  
BBC  
British Humanist Association  
British Retail Consortium  
British Stammering Association  
Buckinghamshire County Council  
Cardiff University  
Carers UK  
Catholic Bishops Conference of  
England and Wales  
Catholic Education Service  
CEMVO  
Centre for Accessible Environments  
Changing Faces  
Charity Commission  
Charity Law Association  
Chartered Institute of Housing  
Christian Concern for our Nation and  
the Christian Legal Centre  
Chwarae Teg  
Devon County Council  
Discrimination Law Association  
District Judge, Principal Registry of  
the Family Division  
Diversity Solutions  
ECAS  
EEF Manufacturers Organisation  
Employers Forum on Disability  
Employment Lawyers Association  
Equality and Diversity Forum  
Equality and Human Rights  
Commission Disability Committee  
Evangelical Alliance

Fawcett Society  
Finance and Leasing Association  
Gires  
Government Equality Office (GEO)  
Heriot-Watt University  
Hinckley and Bosworth Borough  
Council  
HM Revenue and Customs  
Institute of Equality and Diversity  
Practitioners  
Law Society  
Law Society: Lawyers with  
Disabilities Division  
Leeds County Council  
Liverpool John Moores University  
Local Government Employers  
London Development Agency  
London Voluntary Service Council  
Maternity Action  
NASUWT  
National Aids Trust  
National Golf Clubs Advisory  
Association  
NHS Employers  
Nuffield  
National Union of Journalists  
National Union of Teachers  
Police Advisory Board for England  
and Wales  
Police Federation England and  
Wales  
Press for Change  
Pricewaterhousecooper LLP  
Prospect  
Public and Commercial Services  
Union  
Recruitment and Employment  
Confederation  
Royal National Institute of Blind  
People  
Scottish Council on Deafness  
Scottish Government  
Scottish Out of School Care Network  
Scottish Trades Union Congress  
Scottish Women's Aid  
SCS Sofas  
Lewis Silkin

Skill  
Staffordshire Police  
Stonewall  
Stonewall Housing  
Strathclyde Fire and Rescue  
Suffolk Constabulary  
City and Council of Swansea  
Tees Esk and Wear Valleys NHS  
Foundation Trust  
Thompsons Solicitors  
Trade Unions Congress  
Unison  
Unite  
University of Wales  
Vegan Society  
Welsh Local Government  
Association  
Wiltshire Council  
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Women's Resource Centre  
YMCA

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