

9. Equal Opportunities and School Governors

This chapter outlines how equality legislation applies to schools, both in their role as employers and in the way they provide education to the pupils in their care.

Background

1. This chapter is intended to operate as a general guide to the law and not as a comprehensive guide to good practice for governors. Governing bodies should ensure that schools comply with all aspects of discrimination law. The best way to do this is to ensure that principles of fairness and equality are applied in everything that the school does. Links to specific guidance on aspects of good practice are included where appropriate, and sources of more detailed guidance on the law are also flagged up.

2. The Equality Act 2010 (“the 2010 Act”) consolidates and replaces the previous discrimination legislation for Wales, England and Scotland. It also strengthens the law to support progress on equality. Detailed guidance has already been made available for schools.

The Protected Characteristics

3. The 2010 Act protects people from discrimination based on protected characteristics. The protected characteristics are as follows:

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

General Prohibitions

4. The governing body of a school must not discriminate in their roles as educators or employers against:

- job applicants;
- existing members of staff;
- a child seeking admission to the school; and
- existing pupils.

5. It must not discriminate either directly or indirectly on the grounds of any of the protected characteristics (though age is only a protected characteristic in terms of their role as employers, and not in relation to its pupils).

Definitions of Discrimination

6. Under the law, there are different categories of discrimination, with differences in the legal framework surrounding them.

7. “Direct discrimination” happens when a person is treated less favourably than others in comparable circumstances because of a protected characteristic. Direct discrimination is generally unlawful. However, it may be lawful in the following circumstances:

- where there is an ‘occupational requirement’ for a job holder to be of a particular age;
- where a disabled person is treated more favourably than a non-disabled person;
- where the 2010 Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful.

8. “Discrimination by association” is a form of direct discrimination that occurs if a school treats a person less favourably because of that person’s association with another person who has a protective characteristic

9. “Discrimination by perception” is another form of direct discrimination against a person who is wrongly thought to have a particular relevant characteristic, or is treated as if they do have that characteristic.

10. “Indirect discrimination” occurs when a provision, criterion or practice is applied equally to all but has the effect, or would have the effect, of placing members of one or more protected groups at a substantial disadvantage as a result. Indirect discrimination is unlawful unless it can be shown to be a proportionate means of achieving a legitimate aim. An example might be a physical strength test, which could discriminate against women in relation to a job that involves teaching, but might be justified in relation to a non-teaching job that involves substantial heavy lifting. The relevant protected characteristics that may give rise to a claim of indirect discrimination are age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; and sexual orientation.

11. “Combined discrimination” takes place when a person is treated less favourably because of a combination of two of the specified relevant characteristics. Those protected characteristics that will be relevant for the purposes of this form of discrimination are age; disability; sex; sexual orientation; gender reassignment; race; and religion or belief.

12. “Discrimination arising from disability” this occurs when a disabled person is treated unfavourably not because of the person’s disability but because of something

arising from, or in consequence of, the person's disability such as the need to take a period of disability related absence.

13. "Victimisation" is the practice of treating a person less favourably because they have taken action in respect of discrimination, for example by bringing a complaint or giving evidence for a colleague. Victimisation is also unlawful.

14. "Harassment" is any unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them. The relevant protected characteristics are age; disability; gender reassignment; race; religion or belief, sex; and sexual orientation. Harassment is also unlawful in some of the situations covered by discrimination law.

Discrimination Against Job Applicants or Existing Members of Staff

15. The governing body must not discriminate against an applicant for a post, or against an existing member of staff, on grounds of the protected characteristics. However, unlike other discrimination strands, direct age discrimination will not be unlawful if it can be shown to be objectively justified. In relation to disability but no other strand, there is an obligation to make reasonable adjustments in order to remove the substantial disadvantage created by the disability.

16. Governors need to ensure that there is no unlawful discrimination in relation to matters such as:

- recruitment procedures and selection standards;
- conditions of employment;
- opportunities for promotion;
- transfer;
- training or other benefits;
- discipline and grievance procedures; and
- dismissals.

Occupational Requirements

17. There are specific legal provisions which recognise that there may be some narrow circumstances where employers will be allowed a defence to a claim of less favourable treatment on a particular "discrimination" ground. These are based on a particular relevant characteristic being an "occupational requirement" for a particular job (see individual discrimination strands for details). The burden of establishing such defence rests with the employer. In the main it will only apply in respect of treatment linked to recruitment and refusing someone a post or training, and, in some circumstances, to dismissal from a post.

18. Schools should bear in mind that an occupational requirement must be legitimate. A preference, however strongly held, for someone of a particular

protected characteristic to take up a job is not of itself an occupational requirement, and in those circumstances it will not be sufficient to raise an occupational requirement as a defence to a claim of discrimination.

Discrimination against a child seeking admission or an existing pupil

19. The governing body of a school must not discriminate against a person

- in the arrangements it makes for deciding who is offered admission as a pupil;
- in respect of the terms on which it offers to admit the person as a pupil;
- by not admitting the person as a pupil.

20. The governing body must not discriminate against a pupil

- in the way in which it provides education for the pupil;
- in the way it affords the pupil access to a benefit, facility or service;
- by not providing education for the pupil;
- by not allowing the pupil access to a benefit, facility or service;
- by excluding the pupil from school;
- by subjecting the pupil to any other detriment.

21. The governing body must not harass a pupil or a person who has applied for admission as a pupil. A pupil's gender reassignment; religion or belief; or sexual orientation will not be a relevant protected characteristic for the purpose of claims of harassment in a school setting.

22. The governing body must not victimise a pupil.

23. The above matters cover all activities covering school life and mean that everything a school does must be non-discriminatory and requires schools to review their practices and procedures to ensure that they do not discriminate against pupils.

24. The governing body also has a duty to take such steps, as it is reasonable to take, to avoid as far as possible by reasonable means, the substantial disadvantage which a disabled pupil experiences, or may experience, because of disability. This is known as the "reasonable adjustment duty". It means that schools must anticipate where barriers to learning lie and take action to remove them as far as they are able. Schools should not wait until a disabled pupil has arrived or been disadvantaged before making reasonable adjustments.

25. The duty to make reasonable adjustment in relation to pupils does not include making major alterations to the physical features of the school because this must be considered as part of the school's planning duties under the 2010 Act.

The Public Sector Equality Duty

The general duty

26. Section 149 of the 2010 imposes a general duty on the governing body of a school to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by the 2010 Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

27. Having due regard means consciously thinking about the three aims of the general duty as part of the process of decision making. This means that consideration of equality issues must influence the decisions reached by governing bodies.

28. Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

- remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

29. The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

30. Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and those who do not share it involves having due regard, in particular, to the need to tackle prejudice, and to promote understanding.

31. The 2010 Act expressly states that this duty may involve treating some persons more favourably than others, but that is not to be taken as permitting conduct that would otherwise be prohibited under the Act.

Specific duties

32. The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 (S.I. 2011/1064) (“the 2011 Regulations”) imposes specific duties on governing bodies to enable better performance of the general duty.

33. The 2011 Regulations place the following requirements upon governing bodies:

- to publish its “equality objectives” no later than 2 April 2012. The objectives must be designed to enable the governing body to better perform the general duty. If an equality objective is not published in respect of one or more of the protected characteristics, the governing body must publish its decision not to do so. The governing body must review its equality objectives within four years of their initial publication and at least once every four years subsequently. The equality objectives may be revised or remade by the governing body at any time. If the governing body revises an objective without remaking it, then the revision must be published as soon as possible;
- to publish a statement which sets out the steps it has taken or intends to take in order to achieve each equality objective and the anticipated timescales involved. **If an equality objective is revised or remade by the governing body, it must either amend the statement or publish a new one;**
- to make appropriate arrangements to monitor its progress in order to fulfil each objective and to monitor the effectiveness of the steps it has taken to fulfil each objective;
- to give due regard to relevant information that it holds when considering and designing its equality objectives;
- To seek the involvement of those persons that it considers represents the interests of persons who share one or more of the protected characteristics and who have an interest in the way the governing body carries out its functions. This requirement applies to the following activities:
 - considering and designing equality objectives;
 - carrying out an assessment of whether there are things or that could be done that contribute or would be likely to contribute to a governing body’s compliance with the general duty;
 - carrying out an assessment of the likely impact of the proposed policies and practices, of policies or practices that it has decided to review and any proposed revisions to those policies and practices on compliance with the general duty; and
 - publishing or reviewing a Strategic Equality Plan);

The governing body may also involve or consult such other persons as it considers appropriate.

- to take all reasonable steps to ensure that any documents or information that the governing body is required to publish are accessible by persons who share one or more of the protected characteristics. This means that a governing body must take into account all of a person's protected characteristics, and if there are a range of steps that it would be reasonable for the governing body to take to make the documents or information accessible then it must take all of those steps;
- to make appropriate arrangements to ensure that it identifies the relevant information that it holds and identifies and subsequently collects the relevant information that it does not hold;
- to carry out an assessment in order to identify relevant information which identifies whether there are things being done by the governing body that contribute to its compliance (or otherwise) with the general duty and things that could be done to contribute to its compliance. In carrying out such an assessment, the governing body must have due regard to any relevant information that it has already identified, or collected and holds. The governing body should look for evidence (relevant information) both internally and externally which may be used, for example, in equality impact assessments;
- to make arrangements in order to assess the likely impact of proposed policies and practices on its ability to comply with the general duty, as well as the impact of any policy or practice that it has decided to review or any proposed revision to a policy or practice. There must be arrangements in place for the publication of reports regarding these assessments where they demonstrate that there is likely to be a substantial impact on an authority's ability to comply with the general duty. Also, the governing body must monitor the impact of its policies and practices on its ability to comply with the general duty;
- in each year, to collect specified employment information related to the school's employees and publish that information. This information may be set out in the governing body's annual report;
- to make such arrangements as it considers appropriate for promoting amongst the school's employees knowledge and understanding of the general duties and the additional duties which flow from it;
- when considering what its equality objectives should be, the governing body must have due regard to the needs in respect of the school's employees to have equality objectives which address the causes of any pay differences. Those pay differences are between those that do share a protected characteristic and those that do not;

- to publish an action plan which sets out any policy it has relating to the need to address the causes of any gender pay difference and any gender pay equality objective that has been published by the governing body;
- to make a Strategic Action Plan (“SEP”) no later than 2 April 2012. The SEP is intended to be a central vehicle for the various matters required by the 2011 Regulations so that there can be a single point of access for the public. The SEP must contain a statement setting out a description of the governing body, its equality objectives, details of the steps it has taken or intends to take in order to fulfil those objectives, the timescale for the fulfilment of the objectives, and details of arrangements it has made or intends to make to comply with the 2011 Regulations. The SEP can be revised or remade at any time, though it must be published as soon as possible after it has been made or remade. If the SEP has been revised but not remade, the governing body must publish its revisions. The SEP itself may form part of another published document. The governing body is under an obligation to keep its SEP under review;
- to publish a report in respect of each reporting period (1 April to 31 March except for the period ending 31 March 2012, when the reporting period will commence on 6 April 2011). The report must not be published later than 31 March in the reporting period in question. This report may form part of another published document.

Compliance with the public sector equality duty

34. The Equality and Human Rights Commission (EHRC) has powers to enforce the general and specific duties imposed on governing bodies by issuing a compliance notice to order the governing body to discharge its duties within a certain timescale.

35. Much of UK legislation, as regards equal opportunity in the employment and vocational training field, reflects European Union (EU) Law. In addition to UK legislation, in certain circumstances, employees in the public sector may rely directly on EU law. Normally, however, EU rights such as a right to equal pay, equal treatment and non-discrimination on certain grounds are enforced in the UK through national legislation which has been shaped to reflect EU law.

Complaints

Employment

36. The local authority or the governing body (whichever is treated as the employer for the purposes of Act) may be legally responsible for discriminatory acts against employees or applicants for jobs, including acts carried out by the head teacher or other members of staff. Complaints about discrimination should be taken up first with the employer. If the matter is not resolved through the employer's complaint procedures the complainant may decide to make a legal claim to an Employment Tribunal.

School Pupils

37. Complaints about discrimination against pupils should also be taken up first with the head teacher. If the issue is not resolved, it may then be referred to the governing body and/or the local authority. The governing body of a maintained school is required, under section 29(1) of the Education Act 2002, to have a complaints procedure to deal with all complaints relating to the school. If the school or local authority cannot sort out the problem, a parent or pupil may refer the complaint to an Equalities Mediation Service or take legal action.

38. The Welsh Ministers can give directions, using powers under the Education Act 1996, to require a maintained school or non-maintained special school in Wales to comply with its obligations under the Equality Act 2010. This enables the Welsh Ministers to require a school to stop a discriminatory practice or policy even if no complaint has been made.

Legal proceedings – alleged discrimination in schools

39. If a complaint is not resolved through internal complaint procedures (or mediation), a pupil or their parent may decide to make a legal claim against the school. Where the pupil or parent makes a claim depends on the type of discrimination they allege has taken place:

- claim about discrimination other than disability are made to a county court;
- disability discrimination claims about admissions to, or permanent exclusion from, a maintained school, are made to an Independent Education Appeal Panel;
- all other disability discrimination claims (including all claims against independent schools) in Wales are made to the Special Educational Needs Tribunal for Wales.

Who is the Employer?

40. Where the school is a community school or a community special school, the LA is the employer of all staff.

41. However, even if the local authority is technically the employer of the school staff, the governing body of a school with a delegated budget has powers over the appointment, suspension, discipline and dismissal of staff. Accordingly, where complaints are made about any discrimination concerning the exercise of those powers, it will normally be the governing body that is treated as the employer.

42. It follows that the governing body of a school with a delegated budget will generally be the respondent in Employment Tribunal discrimination cases brought by members of staff (or job applicants). However, any award of compensation or costs made by a tribunal would have to be paid by the LA where they are the actual

employer of the school staff. See the Education (Modification of Enactments Relating to Employment) (Wales) Order 2006.

Guidance

Three equality commissions – the Equality Rights Commission, the Commission for Racial Equality and the Disability Rights Commission – merged in October 2007 to become the EHRC, which has responsibilities in relation to the entire body of discrimination law.

The Codes of Practice issued by the former commissions that are referred to in this chapter are all statutory Codes of Practice. While the Codes do not in themselves impose legal obligations, they will be admissible as evidence in any proceedings brought under the relevant Acts. If any provision of a Code appears to the Court or Tribunal to be relevant to any question arising in the proceedings, it must be taken into account in determining that question. The Codes are not an authoritative statement of the law, but following the guidance in a Code may help to avoid adverse judgement in any proceedings.

Other guidance available is not statutory but has been provided (some specifically for schools) to aid understanding of the relevant legislation. Contact information and helplines for the EHRC are as follows (videophone calls are available for those who require them).

EHRC Helpline Wales
Freepost RRLR-UEYB UYZL
1st Floor
3 Callaghan Square
Cardiff, CF10 5BT
Tel: 0845 604 8810
Textphone: 0845 604 8820
Fax: 0845 603 8830
www.equalityhumanrights.com

The Advisory, Conciliation and Arbitration Service (ACAS) (www.acas.org.uk) is one of the organisations that offers advice to employers on complying with anti-discrimination legislation. As it points out, where effective systems are in place to ensure that an organisation's staff are treated fairly and with consideration, it is likely to encounter few problems in complying with anti-discrimination legislation. The same applies to the treatment of all members of the school community.