



Equality and
Human Rights
Commission

Scotland

Equality Act 2010

Handbook for Advisers
—
Scotland

Contents

Introduction	3
Section A Protected Characteristics	5
Section B Unlawful (and lawful) conduct	11
Section C Application of equality law in different sectors	18
Section D The Public Sector Equality Duty	47
Section E Equality and Human Rights Commission: its role and legal powers	51
List of abbreviations	54
Endnotes	55
Contacts	56

Introduction

The aim of this handbook is to provide a brief overview of the Equality Act 2010 and to act as a reference guide. It is not designed to be a comprehensive summary of equality law. Instead advisers are encouraged to use this as a starting point to direct further reading.

Advisers should bear in mind that clients may not initially present their problem as a discrimination case but nonetheless may have a claim under the Equality Act 2010. This protects against six forms of prohibited conduct because of nine protected characteristics in a range of contexts: services, public functions, premises, work, education, and associations. Advisers should be aware that although there may be general rules, a number of exceptions apply. Not all discrimination is unlawful.

This handbook only applies to the application of equality law in Scotland. This handbook is up to date, and links are correct, as at 9 March 2020, but advisers should ensure that they check for any changes in the law which may be of relevance to their query. If you have a query about a discrimination law issue arising in a case, the Equality and Human Rights Commission may be able to assist with second-tier advice.

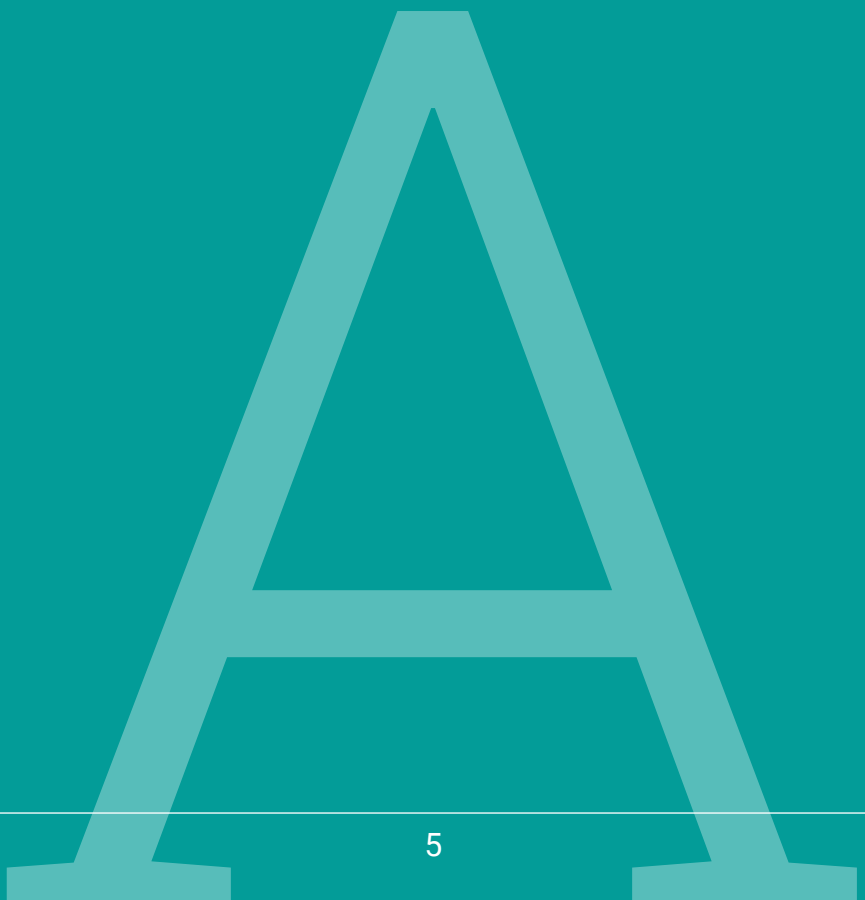
The Commission cannot give advice to individuals but more information about the role of the Commission and how to contact the legal team can be found in section E.

Checklist for advisers:

- Has the person suffered a disadvantage?
- Is any disadvantage 'because of' a protected characteristic?
- Does any potential discrimination fall under an exception?
- Is there a justification applicable?
- What court or tribunal will it be raised in and what remedies are available?
- What is the time limit and when did it commence running?¹

Section A

Protected characteristics



Age

The Act does not define an age group; it could be narrow or wide. It could be relative, for example 'younger than me', and can be a particular age.

Disability (s.6)

A person has a disability if he or she has a physical or mental impairment that has a substantial, long-term adverse effect on his/her ability to carry out normal day-to-day activities.

There are some general points to consider:

- Physical or mental impairment includes sensory impairments.
- 'Substantial effect' need only be more than minor or trivial.
- 'Long-term' means that it has lasted or is likely to last at least 12 months, or for the rest of the person's life.
- Progressive conditions are treated as a disability from the moment there is any impairment that has some adverse effect on ability to carry out day-to-day activities, provided the future adverse effect is likely to become substantial.
- There is no exhaustive list of day-to-day activities but normal work-related activities are included, although highly specialised work activities are not.

Section A - Protected Characteristics

- The effects of treatment are disregarded.
- Certain conditions such as HIV, cancer and multiple sclerosis are expressly included.
- A person certified by an ophthalmologist as blind, severely sight-impaired, sight-impaired or partially sighted has a 'deemed disability'.
- Certain conditions are expressly excluded such as hay fever (except where it aggravates another condition), a tendency to steal or set fires, voyeurism, addiction to alcohol (although health conditions arising from an addiction to alcohol could amount to a disability), exhibitionism, and a tendency to physical or sexual abuse of others. If you are dealing with a case involving an excluded condition and disability you should seek specialist advice as the law in this area is complex.

For more detail: see Schedule 1 as well as HM Government (2011), 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', which is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf and Equality Act 2010 (Disability) Regulations 2010, available at <http://www.legislation.gov.uk/uksi/2010/2128/contents/made>.

Gender reassignment (s. 7)

A person has this protected characteristic if he/she is proposing to undergo, is undergoing or has undergone a process, or part of a process for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

This definition has a broad scope under the Act. It includes people who propose to reassign their sex but have not yet started the process or have not completed it, as well as those who have been through the process in the past. Reassignment includes medical gender reassignment, but this is not a requirement.

Marriage and civil partnership (s. 8)

This does not cover single people, divorcees, fiancés, cohabitees, and so on.

Pregnancy and maternity (s. 17-18)

The protected period in non-work cases (s.17) covers the whole of a woman's pregnancy as well as 26 weeks following the birth (or stillbirth after more than 24 weeks of pregnancy).

Section 18 applies to work cases where the protected period commences when a woman becomes pregnant and ends either two weeks after the end of the pregnancy or, if entitled to ordinary and additional maternity leave, at the end of that period or when she returns to work if that is earlier.

Race (s. 9)

This includes colour, nationality and ethnic or national origins.

Religion or beliefs (s. 10)

Religion includes any religion as well as a lack of religion. Belief means any religious or philosophical belief and includes a lack of belief.

Sex (s. 11)

Sex includes reference to a man or to a woman.

Sexual orientation (s. 12)

This means a person's orientation towards people of the same sex, the opposite sex and either sex. It relates to feelings as well as actions, and manifestations such as appearance, dress, and social life.

Section B

Unlawful (and lawful) conduct

B

Direct discrimination (s. 13)

This occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic. The following points apply:

- It is lawful to treat a disabled person more favourably.
- It includes discrimination by association (for example, where a friend or partner or carer has the characteristic).
- It includes discrimination by perception (for example, where the person does not actually hold the protected characteristic but is perceived to have it).
- It includes cases where the person does not, and is known not to have the characteristic, but nonetheless is treated less favourably because of it.
- Direct discrimination cannot be justified except in the case of age discrimination (see objective justification below).

Indirect discrimination (s. 19)

This occurs when an apparently neutral policy (provision, criterion or practice) is applied:

- That puts people sharing a protected characteristic at a particular disadvantage, and;

- That puts the individual at that disadvantage.

Indirect discrimination can be justified if it is 'a proportionate means of achieving a legitimate aim' (see objective justification below).

Discrimination arising from disability (s. 15)

This occurs where a disabled person is treated unfavourably, where this treatment is because of something arising in consequence of the disabled person's disability, and where it cannot be shown that this treatment is a proportionate means of achieving a legitimate aim (see objective justification below).

- No comparator is required.
- There is no discrimination if it can be shown that the employer/service provider did not know and could not be expected to know that the disabled person had the disability.

Failure to make reasonable adjustments (s. 20 and 21)

Where the Act imposes a duty to make reasonable adjustments (see Section C below), this can comprise three requirements:

1. Where a provision, criterion or practice (PCP) puts disabled people at a substantial disadvantage compared to those who are not disabled, to take reasonable steps to avoid the disadvantage.
2. Where a physical feature puts disabled people at a substantial disadvantage, compared with people who are not disabled, to avoid that disadvantage.
3. Where not providing an auxiliary aid puts disabled people at a substantial disadvantage compared with people who are not disabled, to provide that auxiliary aid.

The person subject to the duty is not entitled to require the disabled person to pay the costs of compliance with the duty: see s. 20 (7).

Harassment (s. 26)

There are three types of harassment:

1. Harassment related to a relevant protected characteristic, which occurs where a person engages in unwanted conduct related to a relevant protected characteristic that has the purpose or effect of violating another's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for another. The following points apply:

- Unwanted conduct could include spoken or written words or abuse, imagery, graffiti, gestures, and so on.
- Perception and association are included.
- The relevant protected characteristics are: age, disability, gender reassignment, race, religion or belief, sex or sexual orientation (not marriage and civil partnership or pregnancy and maternity).
- Be aware that in some sectors additional protected characteristics are excluded from the harassment provisions. This is discussed further under the relevant sections below.
- In assessing the effect of the harassment, consider the perception of the person who may have been harassed (subjective test) as well as whether it is reasonable for the conduct to have that effect (objective test) and the other circumstances of the case.

2. Sexual harassment (unwanted conduct of a sexual nature).

3. Less favourable treatment because a person submits to or rejects conduct of an unwanted sexual nature, or that is related to gender reassignment or sex.

Victimisation (s. 27)

This occurs where a person carries out a protected act and is subjected to a detriment as a result.

- A protected act could be bringing proceedings under the Act, giving evidence in relation to proceedings under the Act, making an allegation that a person has contravened the Act or doing any other thing for the purposes of or in connection with the Act.
- ‘Detriment’ could include refusing to provide a service, terminating a service or providing a service on less favourable terms, or disciplining or sacking someone, or refusing someone access to benefits.

Objective justification

Three types of discrimination can be objectively justified in some circumstances: direct age discrimination, all forms of indirect discrimination, and discrimination arising from disability.

Section B - Unlawful (and lawful) conduct

The person seeking to justify the discrimination is required to demonstrate that their action was a proportionate means of achieving a legitimate aim.

It may assist to ask yourself: is the aim of the PCP legitimate, or in other words, is it legal and nondiscriminatory, representing a real, objective consideration? If so, is the means of achieving the legitimate aim proportionate? Is it appropriate and necessary in all circumstances? Considering the range of possible responses, is this the least discriminatory alternative?

Positive action (s. 158)

Positive action is distinct from positive discrimination, which is unlawful. In limited circumstances the Act permits voluntary positive action, which is a proportionate means of achieving the aim of:

- Enabling or encouraging people who suffer a disadvantage to overcome it, or
- Meeting different needs of people with a particular characteristic, or
- Enabling or encouraging people with a particular characteristic to participate in an activity where uptake is particularly low.

In the context of recruitment, employers can, in tightly prescribed circumstances, use positive action measures where there is a tie-break situation: see s. 159.

Section C

Application of equality law in different sectors



Services and public functions (Part 3)

Overview

This Part of the Act applies to the provision of services including goods and facilities to the public, whether in the private, public or voluntary sector, and whether for payment or not.

It also applies to the provision of a service in exercise of a public function; or a function of a public nature, whether exercised by a public authority or another person such as a private company: see s. 31.

Protected characteristics

Protections under Part 3 do not apply to marriage and civil partnership or to age in relation to under-18s.

Harassment provisions apply to Part 3 only in relation to: age (18 and over), disability, gender reassignment, race and sex: see s. 29 (8).

Unlawful conduct

A service provider must not discriminate against a person or victimise him/her in relation to the terms of service, by terminating provision of the service or by subjecting the person to any other detriment. A service provider must not harass a person requiring or using the service: see s. 29.

Reasonable adjustments

The duty to make reasonable adjustments for disabled people is an anticipatory duty in the context of services and public functions. A service provider and a body exercising a public function must anticipate the needs of potentially disabled customers: see s. 29 (7). The duty includes the first, second and third requirements (see Schedule 2).

However, the requirements of the duty to make reasonable adjustments in this context are significantly modified by Schedule 2: see Statutory Code of Practice on Services, Public Functions and Associations, paras 7.7 and 7.12.

A service provider is not required to take any step which would fundamentally alter the nature of the service or the nature of the trade or profession. A body exercising a public function is not required to take any step that it has no power to take.

Exceptions

There are a number of exceptions set out in Part 14 relating to matters such as national security, charities and sport.

Section C - Application of equality law in different sectors

There are exceptions in s. 197 relating to age, and see also the Equality Act 2010 (Age Exceptions) Order 2012 (SI 2012/2466), which covers age-related holidays and age criteria in immigration control and financial services.

Schedule 23 contains further exceptions to Part 3 in relation to nationality discrimination where required by law, and for organisations relating to religion or belief as well as in the provisions for communal accommodation.

Remedy and time limits

The remedy for a contravention of Part 3 would generally be a civil action at the Sheriff Court. The time limit is **six months** less a day: see s. 114. The Court has a range of disposals such as declarator, interdict, specific implement, damages and expenses.

Ordinary Cause Rule 44.2 requires the writ to be intimated on the Equality and Human Rights Commission. The Court must appoint an assessor unless the sheriff is satisfied that there is good reason for not doing so: see s. 114 (8).

In addition, actions of a public authority can be challenged by way of judicial review.

Further reading:

EHRC (2011), '**Services, public functions and associations: statutory code of practice**'. Available at www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

Transport (Parts 3 and 12)

Overview

Claims relating to the use of transport vehicles are generally services claims under Part 3. In addition there are specific provisions relating to transport for disabled people in Part 12 that are complex, and advisers should be aware that not all the provisions are in force.

Part 3 (services) will apply to disability discrimination claims only in relation to certain land vehicles listed in Schedule 3 (Part 9), for example a mini bus, a bus, a private hire/ rental vehicle, a public service vehicle, a taxi, a tram, a rescue vehicle and vehicles working on a system of guided transport, for example monorails. Ships and hovercraft are not yet covered by the Act as regulations under s. 30 have not yet been enacted, though there are European regulations that relate to ships and aeroplanes.

The provisions relating to taxi accessibility, at Chapter 1, ss. 160–167 of the Act, came in to force on 6 April 2017 - taxi and private hire vehicle drivers who have accessible vehicles are obliged by law to:

- Transport wheelchair users in their wheelchair
- Provide passengers in wheelchairs with appropriate assistance, and
- Charge wheelchair users the same as non-wheelchair users.

Section C - Application of equality law in different sectors

Drivers who are unable to provide assistance for medical reasons can apply to their licensing authority for an exemption from these requirements.

These requirements complement the provisions relating to the carrying of assistance dogs in ss. 168–173.

Airports, stations, platforms, ticket offices are all covered by the services provisions.

Part 12 (Chapter 2) deals with transport for disabled people. Under this Part public service vehicles are covered by Public Service Vehicle Accessibility Regulations 2000 (as Amended), and trains are covered by Rail Vehicle Accessibility (non-interoperable rail system) Regulations 2010.

Protected characteristics

Protections under Part 3 do not apply to marriage and civil partnership or to age in relation to under-18s.

Harassment provisions apply to Part 3 only in relation to: age, disability, gender reassignment, race and sex.

Reasonable adjustments

In general terms, the first, second and third requirements of the duty to make reasonable adjustments apply to transport service providers; however, the duty is significantly customised in this context by Schedule 2. For example, it is never reasonable for a listed service provider to be required to alter a physical feature, except where specifically permitted.

Exceptions

Air transport is exempt from the provisions relating to direct disability discrimination, discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments: see Schedule 3, Part 9. The Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014 came into force on 1 December 2014 and replace a criminal enforcement regime with a civil one.

Remedy and time limits

The remedy for a contravention of Part 3 would be a civil action at the Sheriff Court. The time limit is **six months** less a day. The Court has a range of disposals such as declarator, specific implement, damages and expenses.

See page 21 above on intimation and assessors.

Section C - Application of equality law in different sectors

Where accessibility regulations are in force, such as the public service vehicle (PSV) and rail accessibility regulations above, a breach would be a criminal offence.

Enforcement of the Civil Aviation Regulations is by the Civil Aviation Authority, which has a range of powers.

Further reading:

EHRC (2015), 'Your passport to a smooth journey: top tips for disabled and less mobile air passengers'. Available at https://www.equalityhumanrights.com/sites/default/files/passport_to_a_smooth_journey_july_2015.pdf.

Premises (Part 4)

Overview:

This Part of the Act applies to the disposal and management of premises.

Premises includes the whole or part of a property but a short-term let, such as a holiday let, and premises provided in the exercise of a public function, such as a police cell or accommodation in a hospital ward, are not included as they are covered by Part 3. See s. 32.

Section C - Application of equality law in different sectors

Disposal' could include selling, letting, subletting or granting an occupancy right: see s. 38.

People whose permission is required for disposal of premises are covered as well as those who manage premises such as property management agencies, estate agencies and housing associations: see ss. 34–35.

Protected characteristics

Part 4 does not apply to the protected characteristics of age or marriage and civil partnership.

Harassment provisions apply only to disability, gender reassignment, race and sex: see s. 33 (6).

Unlawful conduct

A person who has the right to dispose of premises must not discriminate against or victimise another person, for example by offering the premises on less favourable terms, by refusing to let or sell the premises or by less favourable treatment.

Harassment is also unlawful: see s. 33.

Reasonable adjustments

The first and third requirements of the duty apply to a controller of let premises and a controller of premises to let: see s. 36 and Schedule 4. In the context of premises the duty is not anticipatory and the controller must first receive

Section C - Application of equality law in different sectors

a request by, or on behalf of a tenant or a person who is considering occupying the premises.

Section 37 covers adjustments to common parts in Scotland. The Relevant Adjustments to Common Parts (Disabled Persons) (Scotland) Regulations 2020 came into force in February 2020 and set out the process for getting the consent of other owners to make adjustments to common parts of the property. The consent of a majority of owners is sufficient and no one can unreasonably withhold their consent.

Further reading:

Scottish Government, (2020), '**Adapting common areas of property: guide**'. Available at <https://www.gov.scot/publications/guide-adapting-common-parts/>

Right to adapt tenancies

The second requirement of the reasonable adjustment duty does not apply in this context and there is no requirement for controllers to take any step to remove or alter a physical feature; however, certain adjustments such as to signs, notices, taps and door handles, and door entry systems are not considered to be alterations of a physical feature and so the duty would apply to them. See Schedule 4, para 2 (9).

In addition, a tenant of a Scottish Secure or Short Scottish Secure tenancy has a right to apply for consent to carry out work including alteration and improvements, addition of

Section C - Application of equality law in different sectors

fixtures and fittings and erection of garages, sheds and other structures. This right is not limited to disabled people but the nature of any disability would have to be considered in assessing the reasonableness of the request for consent. See Housing (Scotland) Act 2001 Part 2 (Chapter 1) and Schedule 5. The landlord must respond within one month and can consent with or without reasonable conditions or can withhold consent, but cannot unreasonably do so. If there is no response within one month, the landlord is taken to have consented. The tenant may, in some circumstances, be entitled to be compensated for the cost of the improvement work at the end of the tenancy. A tenant aggrieved by the landlord's decision can appeal to the Sheriff Court by summary application within 21 days.

A tenant of a private let tenancy has a right to request consent from the landlord to carry out work necessary for the accommodation, welfare or employment of a disabled person.

The landlord must respond within one month and can consent with or without reasonable conditions or can withhold consent but cannot unreasonably do so. If there is no response within one month, the landlord is taken not to have consented, see Housing (Scotland) Act 2006, Part 1, Chapter 7. If the tenant is aggrieved by the decision, there is a right to appeal to the sheriff within **six months** of notification of the decision: see s. 64 (6).

Exceptions

Schedule 5 provides various exceptions in relation to disposal of premises, for example private disposal of premises by an owner-occupier who is not using an estate agent, and small premises with shared areas which are part-occupied. Schedule 23 contains further exceptions to Part 4 in relation to nationality discrimination where required by statute or the executive, for organisations relating to religion or belief as well as provision of communal accommodation.

Remedies and time limits

The remedy for a contravention of Part 4 would be a civil action at the Sheriff Court. The time limit is **six months** less a day: see Part 9. The Court has a range of disposals such as declarator, specific implement, interdict, damages and expenses. Part 4 could potentially assist in defending actions for eviction.

See Page 21 above on intimation and assessors.

Further reading:

Discrimination in Housing Toolkit.

Available at <https://www.citizensadvice.org.uk/scotland/housing/discrimination-in-housing/>

Work (Part 5)

Overview:

Part 5 of the Act provides protection against discrimination, harassment and victimisation in the context of work, which covers all stages from advertising, recruitment and selection, to employment and post-employment as well as occupational pension schemes, employment training and equal pay.

There are also provisions addressing the duties of employment service providers, trade organisations and local authorities obligations in respect of councillors carrying out their duties: see ss. 55–59. Qualifications bodies are also covered (see s. 53), and are defined as authorities or bodies that can confer an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular profession or trade. See separate provisions for General Qualifications Bodies under Part 6 (education).

Similarly, workers who may not be an ‘employee’ such as contract workers, police officers, devil advocates, partners, members of limited liability partnerships and personal and public office holders are expressly protected under the Act: see ss. 41–52. However some office holders are excluded such as offices of the House of Commons and House of Lords: see Schedule 6.

Section C - Application of equality law in different sectors

Whether people are self-employed or are in fact workers/employees can be difficult to determine. For example in 2018 the UK Supreme Court ruled that an independent contractor, who wore the company's uniform and drove branded vehicles, was an employee and was therefore protected by equality law.

Volunteers are not covered by the employment provisions.

The position of interns is less clear and would depend on the facts and circumstances of the contractual arrangements.

Members of the armed forces are expressly covered, but not in relation to age and disability. A requirement for service in the armed forces that the person is a man or is not a transsexual may be lawful if it can be justified as a proportionate means of ensuring combat effectiveness: see Schedule 9 (4).

Protected characteristics

All protected characteristics are covered by Part 5 but be aware that:

- There are additional provisions for pregnancy and maternity in the workplace to be found at s. 18, including unfavourable treatment because of the pregnancy, because of pregnancy-related illness, because a woman is on compulsory maternity leave or for a reason related to exercising the right to ordinary or additional maternity leave.

Section C - Application of equality law in different sectors

- A worker treated less favourably because of association with a pregnant woman may also have a claim.
- There are additional provisions for absence from work due to gender reassignment: see s. 16.
- Direct discrimination on the basis of marriage and civil partnership in the context of work, does not apply by association and perception: see s. 13 (4).

Unlawful conduct

An employer must not discriminate against or victimise a job applicant or worker: see s. 39 (1)–(4).

- This applies to job applicants in terms of the arrangements made for deciding to whom to offer employment, the terms of the job offer and where an applicant is not offered employment.
- This applies to workers as to their terms of employment, opportunities for promotion, transfer, training, benefits, facilities and services, dismissal and any other detriment.

An employer must not harass a job applicant or worker.

Reasonable adjustments

An employer is under a duty to make reasonable adjustments: see s. 39 (5). The first, second and third requirements apply, subject to Schedule 8. The duty commences if the employer:

- Knows or could reasonably be expected to know that a disabled person applies or may apply for the post, or
- Knows that a worker has a disability and is likely to be placed at a substantial disadvantage.

Where the employer does not know, they must take reasonable steps to find out whether a worker or an applicant requires a reasonable adjustment, however enquiries must be handled with sensitivity. There is a prohibition on **pre-employment health enquiries**: see s. 60.

Exceptions

There are a number of exceptions relating to matters such as occupational requirements, non-contractual payments to women on maternity leave and benefits dependent on marital status, and so on: see Schedule 9, and for exceptions relating to age in particular, Schedule 9, Part 2.

Section C - Application of equality law in different sectors

Schedule 23 contains further exceptions to Part 5 in relation to nationality discrimination where required by statute or the executive provision of communal accommodation and training provided to non-European Economic Area residents.

Equal pay

The Act gives women and men the right to equal pay for equal work: see ss. 64–66. The Act also makes pay secrecy clauses unenforceable: see s. 77; and covers maternity pay equality: see ss. 73–75.

Occupational pensions

An occupational pension scheme includes a non-discrimination rule, by which a responsible person must not discriminate against another in carrying out any function in relation to the scheme and must not harass or victimise anyone in relation to the scheme, subject to exceptions and limitations: see s. 61.

Remedy and time limits

The employment tribunal has jurisdiction to consider a complaint under Part 5. The tribunal has a range of disposals including declarators, individual recommendations, compensation and reinstatement.

Section C - Application of equality law in different sectors

The time limit is usually **three months less** a day: see Part 9, Chapter 3, as well as the different rules for members of the armed forces.

Advisers should also be aware that ACAS must be notified, via an Early Conciliation Notification form, if a tribunal claim is being lodged. They will offer an opportunity to use Early Conciliation. More details can be found here:

<http://www.acas.org.uk/index.aspx?articleid=4028>.

Further reading:

EHRC (2011), 'Employment: statutory code of practice' and EHRC (2011), 'Equal pay: statutory code of practice'. Both available at: <https://www.equalityhumanrights.com/en/advice-and-guidance/equality-act-codes-practice>

EHRC (2020), 'Sexual harassment and harassment at work: technical guidance', available at <https://www.equalityhumanrights.com/en/publication-download/sexual-harassment-and-harassment-work-technical-guidance>

Discrimination in Work Toolkit, available at <https://www.equalityhumanrights.com/en/publication-download/sexual-harassment-and-harassment-work-technical-guidance>

Education (Part 6)

Chapter 1: Schools

Overview:

Responsible bodies have duties under the Act in relation to the schools they manage. In Scotland, the responsible body for a public school or nursery is the education authority. The responsible body for a grant-aided school is its management board and for an independent school is the proprietor. The duties in relation to private nurseries would come under Part 3.

Protected characteristics

This part of the Act does not apply to marriage and civil partnership or age. The harassment provisions only apply to disability, race and sex: see s. 85 (10).

Unlawful conduct

A responsible body must not discriminate against or victimise an applicant or pupil regarding admissions, the provision of education, access to benefits, facilities and services, exclusions or any other detriment. In addition, a responsible

Section C - Application of equality law in different sectors

body must not harass an applicant or a pupil. In relation to victimisation of pupils: see provisions regarding conduct of parents under s. 86.

Reasonable adjustments

The first and third requirements of the duty to make reasonable adjustments apply to the responsible body (see s. 85 (6) and Schedule 13) but there is a duty to plan to improve access for disabled pupils generally. The reasonable adjustment duty is anticipatory in this context. The Scottish Qualifications Authority has specified some adjustments that are not to be made, which may be relevant in this context. See Chapter 3 below.

Exceptions

There are exceptions to Part 6 (Chapter 1) contained in Schedule 11. In particular, single-sex schools are lawful, as are single-sex boarding arrangements. Independent denominational schools are permitted to give preference to members of their denomination when deciding who to admit to the school and the exceptions also concern their acts of worship and religious observance, whereas Education Authorities can only discriminate on religious grounds in relation to placing requests.

Schedule 23 contains further exceptions to Part 6 in relation to nationality discrimination where required by statute or the executive, as well as the provision of communal accommodation.

Remedies and time limits

Except for disability discrimination claims, the remedy for a contravention of Part 6 is a claim to the Sheriff Court within **six months** less a day of the alleged discrimination. The Court has a range of disposals such as declarator, specific implement, damages and expenses. See Page 21 above on intimation and assessors.

Disability discrimination claims under Part 6 (Chapter 1) are made to the First-tier Tribunal for Scotland (Health and Education Chamber) (formerly the Additional Support Needs Tribunal) within the same same six-month time limit. The First-tier Tribunal has a range of remedies including ordering a letter of apology, a change in policy and procedure, but it cannot award damages. See Schedule 17, Part 3 for procedural matters.

Further reading:

EHRC (2014), 'Technical guidance for schools in Scotland' and EHRC (2014), 'Reasonable adjustments for disabled pupils: Scotland'. Available at: https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-schoolsinscotland-2015_0.pdf and https://www.equalityhumanrights.com/sites/default/files/reasonable_adjustments_for_disabled_pupils_scotland_0.pdf

Education (Part 6)

Chapter 2: Further and higher education

Overview:

Responsible bodies have duties under the Act in relation to the institutions they manage. In Scotland, the responsible body of a university or designated institution is the governing body.

The responsible body of a college of further education is whoever is responsible for its management, for example the board of management or board of governors: see s. 91 (11) and (12).

The responsible body for a course of further or higher education secured by a local authority, or providing a recreational and training facility in Scotland would be the education authority: see ss. 92 and 93.

Protected characteristics

This chapter does not apply to marriage and civil partnership.

The harassment provisions therefore only apply to the characteristics of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

Unlawful conduct

A responsible body must not discriminate against or victimise an applicant or student regarding admissions, the provision of education, access to benefits, facilities and services, exclusions or any other detriment including conferring or withholding a qualification: see s. 91. A responsible body must not harass an applicant or a student. For provisions relating to discrimination, harassment or victimisation of former students: see s. 108.

Reasonable adjustments

The first, second and third requirements of the duty to make reasonable adjustments applies to the responsible body in terms of ss. 91 (9), 92 (6), 93 (6) and Schedule 13.

Exceptions

There are exceptions to Part 6 (Chapter 2) contained in Schedule 12, relating to matters such as single-sex institutions, institutions with a religious ethos, occupational requirements, benefits depending on marital status and childcare.

Schedule 23 contains further exceptions to Part 6 in relation to nationality discrimination where required by statute or the executive, as well as the provision of communal accommodation.

Remedies and time limits

The remedy for a contravention of Part 6 would generally be a claim to the Sheriff Court within **six months** less a day of the alleged discrimination. The Court has a range of remedies such as declarator, specific implement, damages and expenses. See Page 21 above on intimation and assessors.

Further reading:

EHRC (2014), 'Technical guidance on further and higher education'. Available at: <https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf>

Education (Part 6)

Chapter 3: General qualifications bodies

Overview:

This part of the Act places duties on general qualifications bodies; in Scotland the only body is the Scottish Qualifications Authority (SQA): see s. 96.

Protected characteristics

This chapter does not apply to marriage and civil partnership. The harassment provisions therefore only apply to the characteristics of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

Unlawful conduct

A qualifications body must not discriminate against or victimise a person regarding: conferring, varying or withdrawing a qualification or subjecting the person to any other detriment. A responsible body must not harass a person who holds or applies for a qualification: see s.96.

Reasonable adjustments

The first, second and third requirements of the duty to make reasonable adjustments apply to the qualifications body in terms of s. 96 (6) and Schedule 13.

Exceptions

The appropriate regulator (SQA) can specify exceptions to the duty to make reasonable adjustments under certain circumstances, in terms of s. 96 (7)–(11). These are available on their website: <http://www.sqa.org.uk/sqa/64698.html>

Remedies and time limits

The remedy for a contravention of Part 6 would generally be a claim to the Sheriff Court within **six months** less a day of the alleged discrimination. The Court has a range of disposals such as declarator, specific implement, damages and expenses. See Page 21 above on intimation and assessors.

If the complaint relates to the SQA exceptions, the challenge is by judicial review.

Further reading:

EHRC (2014), 'Technical guidance on further and higher education'. Available at: <https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf>

Associations (Part 7)

Overview:

This Part of the Act places duties on associations of persons where the association has 25 or more members, admissions are regulated by the association's rules and there is a selection process, and the association is not a trade union or professional organisation, which would come under Part 5: see s. 107 and s. 57.

Protected characteristics

This part of the Act does not apply to marriage and civil partnership. The harassment provisions only apply to the characteristics of age, disability, gender reassignment, race and sex: see s. 103.

Unlawful conduct

An association must not discriminate against or victimise an applicant, associate or member in relation to matters such as membership, affording access to a benefit, facility or service, terms of membership, rights of associates or any other detriment: see s. 101.

Section C - Application of equality law in different sectors

An association must not harass a member, an applicant or an association.

There are further provisions in relation to discrimination, harassment and victimisation of guests, at s. 102.

Reasonable adjustments

There is an anticipatory duty on associations to make reasonable adjustments, which includes the first, second and third requirements: see s. 103 and Schedule 15. The definition of the three requirements is significantly customised by Schedule 15: see para 7.8 of the code of practice.

Exceptions

There are special provisions regarding positive action in relation to the selection of candidates for political parties, in terms of s. 104. Schedule 16 contains exceptions relating to matters such as health and safety, and makes it clear that single characteristic organisations are permitted. See Schedule 23 for exceptions for organisations relating to religion and belief and communal accommodation.

Remedies and time limits

The remedy for a contravention of Part 7 would be a civil action at the Sheriff Court. The time limit is **six months** less a day: see s.114. See Page 21 above on intimation, disposals and assessors.

Further reading:

EHRC (2011), '**Services, public functions and associations: statutory code of practice**' Available at https://www.equalityhumanrights.com/sites/default/files/servicesscode_0.pdf

Section D

The Public Sector Equality Duty



General duty: Part 11 (Chapter 1)

There is a general duty on public bodies to have due regard to three 'needs' when exercising their public functions. The needs are to:

- 1.** Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.
- 2.** Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- 3.** Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The general equality duty applies to public authorities listed in Schedule 19 (as amended) as well as those exercising public functions, in relation to those functions. (For a consolidated list, see Technical Guidance below, at Schedule F). See Schedule 18 for exceptions to the Public Sector Equality Duty.

Specific duties: The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012

In addition there are nine specific duties for listed public bodies to help them meet the general duty:

1. To report progress on mainstreaming the general equality duty.
2. To publish equality outcomes and report progress.
3. To assess the impact of new or revised policies and practices.
4. To review existing policies and practices.
5. To gather, use and publish employee information.
6. To publish gender pay gap information.
7. To publish an equal pay statement.
8. To consider award criteria and contract conditions in relation to public procurement.
9. To use information on board members gathered by the Scottish Ministers.

The regulations list certain types of public authority covered by the specific duties but do not name each authority.

The Commission has therefore published a list of who is covered: see further reading below.

Remedies and time limits

The Commission has certain enforcement powers in relation to the Public Sector Equality Duty: see Equality Act 2006, ss. 31–32.

In addition, the actions of a public authority can be challenged by way of judicial review. A judicial review cannot enforce the specific duties (they can only be enforced by the Commission); however, failure to comply with the specific duties could be evidence of failures in relation to the general duty.

There is a time limit of **three months** minus a day for judicial review.

Further reading:

EHRC (2014), 'Technical guidance on the public sector equality duty'. Available at: https://www.equalityhumanrights.com/sites/default/files/redraft_of_psd_tech_guidance_-_v6sc.pdf

EHRC (2016), 'Public Authorities in Scotland – Who is covered by the Specific Duties under the Public Sector Equality Duty?'. Available at: <https://www.equalityhumanrights.com/sites/default/files/psd-scotland-who-is-covered-april-2019.docx>

Section E

Equality and Human Rights Commission: its role and legal powers

Section E - Equality and Human Rights Commission: its role and legal powers

The Equality and Human Rights Commission promotes and enforces the laws that protect our rights to fairness, dignity and respect. We are the National Equality Body for Scotland, England and Wales, working across the nine protected characteristics set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. We are an 'A' status National Human Rights Institution, and share our human rights mandate in Scotland with our colleagues in the Scottish Human Rights Commission. Our legal powers come from the Equality Act 2006.

Our legal powers include:

- Providing legal assistance to individuals bringing proceedings under the equality enactments. We can only fund human rights cases brought by others that also raise issues under the equality enactments. We can either provide funding or our own solicitors can act directly. More information about our casework and litigation strategy can be found at the web page below.
- Intervening in strategic cases that raise important issues under either the equality enactments, human rights law or both.
- Raising proceedings for judicial review in our own name in strategic cases that raise important issues under either the equality enactments, human rights law or both.
- Conducting inquiries and investigations.

Section E - Equality and Human Rights Commission: its role and legal powers

Information about how to contact the legal team in Scotland about a case, or for second-tier advice can be found at:

<https://www.equalityhumanrights.com/en/legal-work-scotland/legal-work-scotland/strategic-human-rights-and-equality-litigation>

For Commission assistance, email:

legalrequestscotland@equalityhumanrights.com

List of abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
EHRC	Equality and Human Rights Commission
PCP	Provision, criterion or practice
PSV	Public Service Vehicle
SQA	Scottish Qualifications Authority
s.	Section

Endnotes

1. In some circumstances time limits can be extended where the court or tribunal considers it just and equitable, but it is always advisable to make the claim on time where possible. You also need to consider when the time bar commenced – was the prohibited conduct a one-off, or a course of conduct? Remember that time limits can run from the date a decision is made, rather than from when you or your client becomes aware of the decision. Always take a cautious approach to the time bar where possible.
2. Although there could be a claim for direct discrimination: see s. 212 (5).

Contacts

This publication and related equality and human rights resources are available from the Commission's website: www.equalityhumanrights.com

Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com

The Commission welcomes your feedback. To request a hard copy, please contact: scotland@equalityhumanrights.com

EHRC Adviser Support

If you are an adviser or a solicitor you can contact the Commission's Adviser Support service for help with discrimination or human rights issues. Our legal staff can provide you with advice and support and are available during core office hours.

Email: scotlandadvisersupport@equalityhumanrights.com

Phone: 0141 228 5990

Alternative formats

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