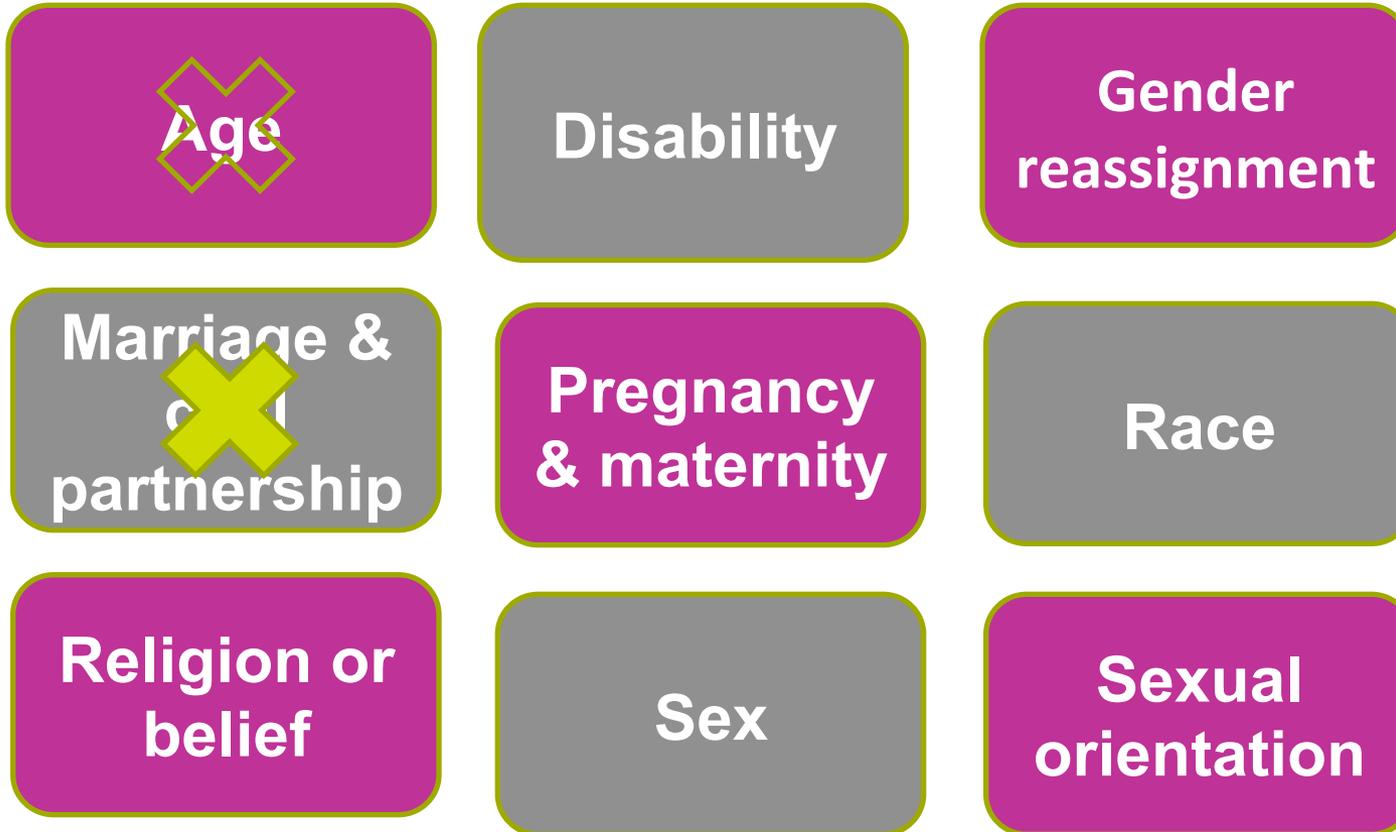




Equality Act 2010: Prohibited Conduct and Remedies

The protected characteristics



Prohibited Conduct

Prohibited conduct

- Direct discrimination (s 13)
- Indirect discrimination (s 19)
- Discrimination arising from disability (s 15)
- Duty to make reasonable adjustments (ss 20 & 21)
- Harassment (s 26)
- Victimisation (s 27)
- Gender reassignment absence from work (s16)
- Pregnancy and maternity unfavourable treatment (s18)
- Equal pay (ss 64-71)

Direct discrimination (s.13)

- Direct discrimination occurs when a person treats another less favourably than they treat or would treat others **because of** a protected characteristic
- Direct discrimination cannot be **justified** except in age discrimination
- Also provides protection from direct discrimination and harassment because of our **association** with others or because of the perception of the person discriminating.

Indirect discrimination (s.19)

- Indirect discrimination may occur when an apparently neutral policy (provision, criterion or practice) is applied which puts people sharing a protected characteristic at a particular disadvantage.
- The complainer has to be affected
- This can be justified if it is “a proportionate means of achieving a legitimate aim”

Reasonable adjustments (s.20)

- Where a disabled person is (or would be) placed at a **substantial disadvantage** compared to non-disabled people by:
 1. A provision, criteria or practice (PCP),
 2. ~~A physical feature or*~~
 3. Not providing auxiliary aids and services (e.g. audio-visual fire alarms)
- Then there is a duty to make reasonable adjustments to overcome the disadvantage
- Failing to make a reasonable adjustment is unlawful discrimination

*Doesn't apply to Part 4 (Premises) (see Schedule 4 EA2010 & The Equality Act 2010 (Disability) Regulations 2010)

What is reasonable?

Some factors:

- Whether step is likely to be effective,
- Extent to which the step is practicable,
- The financial and other costs and resources of the service provider,
- Resources already spent on adjustments,
- Availability of financial or other assistance,
- Extent of disruption,
- Need for planning permission/ consents

Discrimination arising from disability (s.15)

- Treatment of a disabled person amounts to discrimination where:
 - The disabled person is treated unfavourably;
 - This treatment is because of something arising in consequence of the disabled person's disability; and
 - It cannot be shown that this treatment is a proportionate means of achieving a legitimate aim
- Unless it was not known, and could not reasonably be expected to have been known, that the person has the disability.

Harassment

Harassment occurs when a person engages in:

- **unwanted conduct** which is **related to a relevant protected characteristic** and which has the **purpose or the effect** of:
 - violating another's dignity; or
 - creating an intimidating, hostile, degrading, humiliating or offensive environment for another.

Victimisation

- A person is victimised if they carry out a **protected act** and are subjected to a **detriment** as a result.
- **Protected acts** include bringing proceedings under the Act, giving evidence, making allegations that a person has contravened the Act or doing anything relating to the provisions of the Act
- **Detriment** includes anything which the service user might reasonably consider changed their position for the worse or placed them at disadvantage e.g.
 - not providing that person with a service
 - the terms of the service provided
 - terminating service provision to that person

Individual remedies

Sheriff Court

- The Sheriff Court has jurisdiction to determine a claim relating to a contravention of Part 4 (premises) *[S.114(1)(b) EA2010]*
- The sheriff has power to make any order which could be made by the Court of Session in proceedings for reparation or on a petition for judicial review. *[S.119(3) EA2010]*
- An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis). *[S.119(4) EA2010]*

Sheriff Court – level of damages

- Injury to feelings calculated according to **Vento scale** (*Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871)
 - lower band of £800 to £8,400
 - middle band of £8,400 to £25,200
 - upper band of £25,200 to £42,000
 - exceptional cases may exceed £42,000

Sheriff Court – level of damages

- The Lower Band applies to “less serious cases” where the act of discrimination is a one-off or isolated occurrence.
- The Middle Band applies to serious cases that do not fall within the Higher Band.
- The Higher Band applies to the most serious cases, for example where there has been a lengthy campaign of discrimination and/or harassment.
- See ‘Joint Presidential Guidance for Employment Tribunals’
<https://www.judiciary.gov.uk/wp-content/uploads/2015/03/vento-bands-presidential-guidance-20170905.pdf>
- See ‘How to work out the value of a discrimination claim’
https://www.equalityhumanrights.com/sites/default/files/guide_to_quantifying_discrimination_claims_oct17.pdf

Sheriff Court – time limit

- Proceedings may not be brought after the end of—
 - (a) the period of **6 months** starting with the date of the act to which the claim relates, or
 - (b) such other period as the county court or sheriff thinks **just and equitable**.

S.118(1) EA 2010

- ‘Just & equitable’ is a term familiar from other contexts such as claims of negligence and personal injury

Sheriff Court – time limits

- Court will consider prejudice to parties in light of all the circumstances including:
 - Length of and reasons for the delay, including health reasons
 - Likely effect of the delay on the cogency of the evidence
 - The extent to which Respondent has cooperated with requests for information
 - How quickly the claimant acted on becoming aware of the grounds of claim, including obtaining appropriate advice (see *British Coal Corporation v Keeble* [1977] IRLR 336 EAT)
 - An assessment of the strength of the case (see *Hutchison v Westward Television* [1977] IRLR 69 EAT)

How to calculate time limits

(6) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

Section 118(6) EA 2010

- Section 118(6)(a) creates a rolling time-bar BUT this won't apply to discrimination caused by a failure to act.
- A failure to make reasonable adjustments will almost always constitute a failure to act.
- It may be easier to satisfy 'just and equitable' test in this scenario (see further *Monaghan on Equality Law (2nd. Ed.)*(paras 14.54 – 14.56))

Commission Powers

Our regulatory role

- To challenge discrimination and to protect and promote human rights in Britain
- Identify and tackle areas where there is discrimination or where human rights not protected
- Share our human rights remit in Scotland with Scottish Human Rights Commission

Strategic litigation powers

- Legal assistance (s.28)
 - Support victims of discrimination
 - Legal representation and discrimination cases with a HR element
 - Strategic litigation policy
- Third party interventions (s.30)
 - Equality and human rights
 - Add value or develop an area of the law
 - Strategic litigation policy
 - Recent welfare reform cases (PIP mobility, 2-child rule)
- Casework and second tier advice

Enforcement powers

- Inquiries (s.16)
 - Any matter which relates to equality or human rights
 - Compel people to give evidence
 - Make recommendations to any person
 - Must have regard to recommendation
 - 'Housing and disabled people: Britain's hidden crisis'* (May 2018)
- Investigations (s.20)
 - Unlawful act in breach of EA 2010
 - Compel evidence
 - Unlawful act notice (s.21)
 - Glasgow City Council, Metropolitan Police

Strategic litigation powers

- Applications to court (s.24)
 - Unlawful acts under Equality Act 2010
 - If failing to comply with s.23 agreement
 - Interdict / injunction
 - e.g *EHRC v Fergus Wilson* (November 2017)
- Judicial Review (s.30)
 - If public body taken a decision or acted or failed to act
 - Breach of EA 2010 or HRA
 - Challenge to DWP's WCA criteria as indicators of suicide risk

Enforcement powers

- Binding agreements (s.23)
 - Suspect unlawful act in breach of EA 2010
 - Agree not to commit unlawful act or take action, or refrain from taking action
 - Agree not to investigate or issue unlawful act notice
 - NHS Tayside
- PSD assessment (s.30) and compliance notices (s.31)
 - Compliance with general and specific duties
 - HM Treasury 2010 Spending Review
 - Pre-enforcement work with listed public authorities

Housing Inquiry

- Published in May 2018, the report found that:
 - disabled people are too often demoralised and frustrated by the housing system
 - there is a significant shortage of accessible homes
 - installing home adaptations involves unacceptable bureaucracy and delay
 - disabled people are not getting the support that they need to live independently

Recommendations include ensuring that a minimum of 10 per cent of new-build homes across all tenure types are built to a wheelchair-accessible standard.

Executive summary:-

<https://www.equalityhumanrights.com/sites/default/files/housing-and-disabled-people-scotland-hidden-crisis-executive-summary.pdf>

Contact details and more information

Frank Jarvis – Frank.Jarvis@equalityhumanrights.com
legalrequestscotland@equalityhumanrights.com (0141 228 5951 and ask to speak to someone in the legal team)

Scotland Legal Team

<https://www.equalityhumanrights.com/en/commission-scotland/legal-work-scotland>

Legal powers

<https://www.equalityhumanrights.com/en/our-legal-action>

Equality Bulletin

<https://www.equalityhumanrights.com/en/legal-work-scotland/legal-work-scotland/equality-law-bulletin>