The protected characteristics

- Age
- Disability
- Gender reassignment
- Marriage & civil partnership
- Pregnancy & maternity
- Race
- Religion or belief
- Sex
- Sexual orientation
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 ‘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**.

  \[ S.118(1) \text{ EA 2010} \]

- ‘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:-
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Scotland Legal Team

Legal powers

Equality Bulletin