



# **Evictions** and the Equality Act 2010

# Equality law and eviction proceedings

Section 35 of the Equality Act 2010 says that a person who manages premises, including the owner, must not discriminate against another person who occupies the premises, by evicting that other person, or taking steps to evict him. “Premises” includes a house. Section 35 applies to private landlords as well as social landlords like local authorities and housing associations.

This leaflet is about how section 35 affects eviction proceedings. In this leaflet “pursuer” means the person who is seeking an order from the court, for the eviction of the “defender”, the person occupying the premises.

## What is discrimination, under the 2010 Act?

Under the Act, people have “protected characteristics”, like race, sex, sexual orientation, religion and disability.

There are various ways in which people can be discriminated against, which are related to their protected characteristics, which the Act makes unlawful. These are different types of “prohibited conduct”. In relation to evictions, the most important types of prohibited conduct are:

**“Direct Discrimination”**, which happens when a person treats another person less favourably than others, because of a protected characteristic.

**“Indirect Discrimination”**, which happens when an apparently neutral policy (provision, criterion or practice) is applied, but which puts people with a protected characteristic at a disadvantage. Indirect discrimination can be justified if it is a proportionate way of meeting a legitimate aim.

**“Discrimination arising from disability”** which happens when a disabled person is treated unfavourably, because of something that is a consequence of her disability. That type of discrimination can also be justified if it is a proportionate way of meeting a legitimate aim. (See opposite for more information).

If a person takes steps to evict an occupier of premises, in a way that amounts to discrimination under the Act, that is unlawful.

## Discriminatory evictions can be stopped

The courts have decided that an occupier can defend eviction proceedings on the basis that eviction would be unlawful under section 35. The most important case was the decision of the Supreme Court in the case *Aster Communities v Akerman-Livingstone*, in 2015. That case concerned discrimination arising from disability. But, section 35 can be used as a defence if eviction is unlawful discrimination on the basis of any form of prohibited conduct, in relation to any of the protected characteristics.

## Lawful occupation and types of occupation

A section 35 defence can be used by any person in “lawful occupation” (the Act does not protect squatters). A person who occupies under a verbal or written agreement, like a lease, is in “lawful occupation”. If the premises are the occupier’s home, she is still in “lawful occupation” if the agreement has been terminated, because she cannot be evicted without a court order. If the owner/landlord raises an action in court, the occupier has the protection of section 35, if the eviction amounts to unlawful discrimination.

Section 35 applies to private landlords as well as social landlords like local authorities and housing associations. It may provide a defence to eviction proceedings, even if there is no other basis on which the occupier could

stop the eviction order being granted. Even if the person pursuing the eviction proceedings would otherwise have an absolute right to obtain an eviction order under the law, the court cannot grant the order, if it would be contrary to section 35.

## Proportionality

Indirect discrimination, and discrimination arising from disability, can be justified, if the treatment is “a proportionate means of achieving a legitimate aim”. This is called the “proportionality” test. It has four steps. In eviction proceedings, the pursuer would have to pass all four steps, in relation to eviction of the defender.

The steps are:

- First, is the pursuer’s aim sufficiently important to justify limiting the defender’s rights?
- Secondly, is the measure (eviction) rationally connected to the pursuer’s aim (i.e. will it achieve that aim)?
- Thirdly, are the means chosen (eviction proceedings) no more than is necessary to accomplish the aim?
- Fourthly, are the disadvantages caused to the defender, by the loss of his home, disproportionate to the pursuer’s aims?

In practice, it is the third of these steps that is often the most important. This involves asking: could the pursuer use a less intrusive measure without unacceptably compromising the achievement of that aim? An example of how this test might work in practice is given opposite.

It is important to note that the Supreme Court in *Aster Communities v Akerman-Livingstone* decided that the proportionality defence under the Equality Act 2010 was different and arguably easier to establish than a proportionality defence under human rights law.

## Discrimination arising from Disability

Section 15 (discrimination arising from disability) applies to eviction proceedings when the pursuer’s reason for seeking an eviction order is something that is a result, effect or outcome of a disabled person’s disability. Most of the recent cases about unlawful discrimination in evictions have involved disabled people suffering from a mental health condition, whose behaviour is related to that condition.

### Discrimination arising from - an example

Brian has paranoid schizophrenia. He is the tenant of a housing association. He lives in a flat. Brian’s condition sometimes causes him to do things that are antisocial, like playing loud music. The housing association decides to raise proceedings seeking an eviction order. In this case, the housing association would be treating Brian unfavourably, because of behaviour that was a consequence of his disability. The onus would be on the housing association to show that the eviction was proportionate.

It does not matter if the housing association can show that it would also evict a non-disabled person who acts in the same way as Brian. Section 15 is not about equal treatment. In *Aster Communities v Akerman-Livingstone*, Baroness Hale, one of the judges, said:

“Parliament has...expressly provided, in sections 15 and 35, for disabled people to have rights in respect of the accommodation which they occupy which are different from and extra to the rights of non-disabled people. Landlords may be required to accommodate, or to continue to accommodate, a disabled person when they would not be required to accommodate, or continue to accommodate, a non-disabled person.”

So, in the example, this may involve the housing association doing something else, instead of simply seeking to evict Brian. This would be a “less intrusive measure”, under step 3 of the proportionality test. He could be given additional support by social services or mental health professionals, perhaps to review his medication. Sound attenuation measures could be installed in his flat. There could be a specific agreement on permitted hours for the playing of music rather than the general prohibition on anti-social behaviour contained in his tenancy agreement. If his relationship with his neighbours has become very poor, the housing association or the local authority could consider moving him to other accommodation, with support.

Section 15 is not only relevant to antisocial behaviour cases. It would apply, for example, where a person was

disabled by chronic depression, and due to that condition, had fallen into arrears of rent.

The nature of the “less intrusive measures” that could be taken by the pursuer will depend on the circumstances. For example, if Brian had a private landlord, rather than a housing association tenancy, it may be more difficult for the landlord to take the measures described in the last paragraph.

However, whether the pursuer is a private landlord or a social landlord, the third step in the proportionality test means that the landlord has to say what alternatives to eviction, if any, have been considered, and to give reasons for their rejection.

### **Discrimination arising from Disability – evidence**

Where a person wants to defend eviction proceedings by relying on sections 15 and 35, she will probably have to produce medical evidence, for example from a psychiatrist, confirming that: a) she is a “disabled” person under the statutory rules, and b) the behaviour which prompted the pursuer to raise the proceedings (such as the non-payment of rent, or the playing of loud music), was caused by that disability. In a case where eviction relates to non-payment of rent, it would be particularly important to establish how the non-payment of rent is linked to the tenant’s disability. For example it may be that the tenant cannot consistently engage with support, respond to correspondence or complete forms because of severe depression, affecting their ability to pay their rent.

In a case like Brian's, it might also be helpful for the person giving medical evidence to say what type of support or other measures could help in addressing the behaviour.

### **Disability arising from discrimination – knowledge of the condition**

A person does not unlawfully discriminate against another person under section 15, if he can show that he did not know, and could not reasonably have been expected to know, that the other person had the disability.

However, it is difficult for a pursuer in eviction proceedings to rely on this rule. That is because section 35 makes it unlawful to discriminate against a person by evicting him *“or taking steps for the purpose of securing [his] eviction...”* The 2010 Act recognises that eviction is not a single event. It happens at the end of a process. That process will typically involve the service of a notice, then the raising of proceedings, pursuing those proceedings, and the enforcement of the eviction order. All of these steps may be regarded as unfavourable treatment under section 15.

So, it is arguable that once a person defends the proceedings on the basis that he is disabled, the pursuer then has knowledge of the disability. If the disabled person can show that the eviction order is sought because of something arising in consequence of his disability, the pursuer would then have to show that the eviction meets the proportionality test.

## **Conversion of Scottish secure tenancies**

Where there has been antisocial behaviour at a tenancy, a social landlord can serve a notice converting the tenancy from a “Scottish secure tenancy” to a “short Scottish secure tenancy”. This is detrimental for the tenant, because he loses his security of tenure. The tenant can appeal to the sheriff if he is aggrieved by the decision to convert the tenancy. If the antisocial behaviour is due to a disability, then unlawful discrimination under section 35 could be one of the grounds for an appeal.

**For further information and advice:**

[shelterscotland.org/getadvice](https://shelterscotland.org/getadvice)

[equalityhumanrights.com/en/commission-scotland](https://equalityhumanrights.com/en/commission-scotland)

[shelterscotland.org](https://shelterscotland.org)

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