



# **Housing Allocations and the Equality Act 2010**

# Housing allocations and the Equality Act

Under the Equality Act, it is unlawful for a public authority, or a body which exercises a “public function” to discriminate against people in the way that it exercises its public functions. These bodies are also subject to the “Public Sector Equality Duty” (“PSED”).

## Social Landlords

Local authorities are public authorities under the legislation. Registered social landlords (RSLs), including most housing associations, are bodies which exercise a “public function” in relation to housing. These “social landlords” have “allocation” policies. These set out the landlord’s rules about how people get on the waiting list for housing, and the way in which the social landlord will deal with their applications. When it comes to allocations, RSLs are subject to the same statutory rules as local authorities. Those rules are set out in sections 19 to 21 of the Housing (Scotland) Act 1987. This leaflet is about how equality law affects the way that “social landlords” deal with allocations. It also gives some general information about the legal rules in relation to allocation policies.

## The rules in the 1987 Act

Section 20 of the 1987 Act sets out rules about the way that social landlords can prioritise, exclude or suspend people on their waiting list for housing. Under section 21, the landlord must publish its rules in relation to allocations, or any amendments to those rules. In 2018, there will be changes to the law which will require a social landlord to consult with certain groups, including existing tenants and applicants on the housing list, before changing its rules. Also, social landlords will be able to impose a requirement that an application must have remained in force for a minimum period before an applicant is eligible for the allocation of housing.

## **“Reasonable preference”**

Under the statutory rules, social landlords must ensure that in their policies, a “reasonable preference” is given to certain classes of people. This includes people who are homeless or threatened with homelessness, and people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions.

The social landlord must show positive favour to applications which fall into any of the “reasonable preference” categories. They should be given a reasonable head start.

Social landlords must identify the way in which they determine priorities within their allocation schemes. Some allocation schemes are based on awarding points to applicants. Some schemes are based on grouping applicants into “bands”. In many schemes a combination of the two methods is used. In a points-based scheme, points could be awarded to reflect different categories of need, for example for medical and welfare needs, overcrowding, etc, and further points may reflect the length of time that an applicant has been waiting for accommodation after having been accepted onto the scheme. If a banding system is adopted, applicants are placed in various groups, according to their circumstances. Within each band, applicants may be prioritised by points and/or by date order, reflecting the degree of their need and their waiting time.

## **Challenging policies and decisions**

The statutory rules do not provide any right of appeal or review against decisions made by social landlords in the formulation of allocation policies, or the conduct of particular applications. Therefore, such decisions can be subject to scrutiny by a court or tribunal through judicial review proceedings in the Court of Session. Such proceedings must be raised within 3 months from date of the decision. Allocation policies have been successfully challenged in the courts, particularly in England.

## **Unlawful discrimination in allocation policies**

In recent years, one of the key grounds for challenging policies has been that the social landlord’s rules unlawfully discriminate against certain applicants. Two different arguments have been used: 1) that the policy indirectly discriminates against certain classes of people, contrary to section 19 of the Equality Act 2010; 2) that the policy is contrary to the Human Rights Act 1998, because it contravenes article 14 of the European Convention on Human Rights (ECHR). Applicants have also argued that, in the formulation or amendment of the policy, the social landlord has failed to comply with the Public Sector Equality Duty, under part 11 of the 2010 Act. These arguments are quite complex.

Note that these are not the only ways in which an allocation policy could unlawfully discriminate against applicants, but they appear to be the most common issues in practice. It should also be noted that equality law challenges to allocation policies are often combined with other arguments such as:

- the social landlord isn't complying with the "reasonable preference" rule;
- it is applying rules that are not in its published policy;
- it is not applying the rules that are in its published policy.

## Indirect discrimination

Indirect discrimination happens when a policy treats everyone in the same way, but the effect or result of the policy is to put some or all people with a protected characteristic (such as race, disability, sex) at a disadvantage. If a person with the protected characteristic suffers that disadvantage, he can complain of indirect discrimination. This type of discrimination can be justified by the social landlord, if it is "a proportionate way of meeting a legitimate aim."

## Types of rules that have given rise to challenges

The recent caselaw has particularly focussed on three types of allocation rules which have been adopted by some local authorities in London. These rules have the aim of creating stable communities and rewarding tenants and applicants for certain types of conduct. They are:

- "residency rules" – these give some degree of preference to applicants who have resided in the authority's area for a given period of time, or give little or no preference to applicants who have not;
- "working households" – these favour applications from households which include a person who has been employed for at least a certain number of hours per week, over a minimum period; and
- "model tenant rules" – this favours existing tenants seeking transfers, who have not been in breach of their tenancy agreements for specified periods of time.

In the recent caselaw, the courts have found that "residency rules" indirectly discriminate against some women, particularly those who have had to move out of their home, due to domestic violence. Women are much more likely to suffer domestic violence than men. They often seek accommodation in the social rented sector, in another area. They are penalised by residency requirements.

The courts have also found that giving a priority to “working households” unlawfully discriminates against disabled people and older people, who are less likely to be in work. It also indirectly discriminates against women, who are less likely to be in work due to caring commitments.

The particular type of “model tenant” rule considered in the relevant cases was not found to indirectly discriminate against any of those groups. However, it is possible that other “model tenant” rules, or any other rule which accords a preference to a group of people, could be found to indirectly discriminate against women, disabled people, or other groups protected by the Equality Act.

## Justification

As described above, a policy or rule is not necessarily unlawful because it indirectly discriminates against applicants sharing a protected characteristic such as sex or disability. Indirect discrimination may be justified, if it is: “a proportionate means of achieving a legitimate aim”. This is called the “proportionality” test. It has four parts. The person seeking to justify the discrimination has to show that the answer to all four of the following questions is “yes”:

- First, is the landlord’s aim sufficiently important to justify limiting the rights of the applicants who are subject to indirect discrimination?
- Secondly, is the relevant rule in the policy rationally connected to the pursuer’s aim (i.e. will it achieve that aim)?

- Thirdly, are the means chosen (being the rules in question) no more than is necessary to accomplish the aim?
- Fourthly, are the disadvantages caused to the applicants, as a result of the rules that indirectly discriminate against them, 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 social landlord use a less intrusive measure without unacceptably compromising the achievement of that aim?

In some of the cases, the court has found that the landlord was able to justify the indirect discrimination. In other cases, the landlord has failed to do so, and the policy has been declared unlawful.

In deciding whether the policy is justified, the court may decide to give the landlord the benefit of the doubt. That is because the task of setting allocation policies can be difficult and complex. Under the law, that task is given to the social landlord, not the courts. However, there have been cases in which the court has found that the landlord’s policy is unlawful, under the 2010 Act.

## Article 14 of ECHR

Article 14 states that the enjoyment of the rights and freedoms in the European Convention on Human Rights must be secured without discrimination. In some of the recent cases, allocation policies have been challenged under the Equality Act, and also under article 14.

These arguments are apt to succeed or fail together, because the same proportionality test is applied.

However, in other cases article 14 alone has been argued. Under the 2010 Act, only persons having a “protected characteristic” can claim that discrimination against them is unlawful. Article 14 explicitly identifies other possible grounds for discrimination, such as political opinion, property and “other status”. Therefore, article 14 has been used in cases where the discrimination was said to be based on some other status. For example, in one of the recent allocations cases, the status relied upon was that of “private sector tenant”. In another, the status was “care-leaver”.

There is, however, some doubt about whether allocations policies can be challenged under article 14, because it is not “free-standing”. It applies only to the enjoyment of the other rights and freedoms under the ECHR. So, it must be shown that the case falls within the “ambit” of another article. In housing law cases, it is invariably combined with article 8, the right to respect

for “private and family life, home and correspondence”.

## The Public Sector Equality Duty - PSED

The PSED means that the social landlord must have “due regard” to the need to advance equality of opportunity and good relations between people who share a relevant protected characteristic (like disability, race, sexual and sexual orientation) and persons who do not share it. It must do this when formulating policies, changing them, or making decisions under the policy. Advancing equality of opportunity can mean removing or minimising disadvantages suffered by people, that are connected to that characteristic. Or it could mean taking steps to meet the particular needs of persons who share a relevant protected characteristic.

If the social landlord does not comply with the PSED, the operation of its policy may be challenged in judicial review proceedings.

The PSED is described in one of the other leaflets in this series: “Homelessness and Equality Law Act 2010”.

**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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