

Women making a change

Tools for Equality and Rights

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MAKING SENSE OF EQUALITY AND HUMAN RIGHTS

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What does equality mean?

- ▶ *'An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish.'*
- ▶ *'An equal society recognises people's different needs, situations and goals and removes the barriers that limit what people can do and can be.'*
- ▶ *'Such a society would recognise:*
 - ▶ *a positive role required of institutions in removing barriers or constraints and making sure that opportunities to flourish are real;*
 - ▶ *that some people may need more and different resources to enjoy genuine freedom and fair access to opportunities;*
 - ▶ *that a life of genuine and valuable choices for each individual leads to a better society for everybody; and*
 - ▶ *that its aim should be to narrow gaps in real opportunities and real freedoms, not by reducing the freedoms of some but by increasing the opportunities of those suffering persistent disadvantage.'*

Source: Fairness and Freedom, Final report of the Equalities Review, 2007, p16.

What is a protected characteristic?

- ▶ When one may have legal protection from discrimination and/or there may be a duty to promote equality under the Equality Act 2010.
- ▶ There are **9** protected characteristics: 1) age; 2) disability; 3) gender reassignment; 4) marriage and civil partnership; 5) pregnancy and maternity; 6) race; 7) religion or belief; 8) sex; and 9) sexual orientation.
- ▶ As the oldest of the protected characteristics, the most extensive protections apply in relation to **sex, race and disability**.
- ▶ Less extensive protections apply in relation to **age** (service-delivery under 18's are not protected), **religion or belief and sexual orientation**.
- ▶ The least extensive protections apply in relation to **gender reassignment, marriage and civil partnership and pregnancy and maternity**.
- ▶ For example, it is unlawful to **directly discriminate** in relation to all 9 protected characteristics in **employment or work but the direct discrimination provisions on services and public functions** do not cover **marriage and civil partnership [s 28(1)]**. Indirect discrimination does not include pregnancy and maternity [s.19 (3)]. The harassment provisions do not cover pregnancy and maternity or marriage and civil partnership [s.27 (5)].

What is a protected characteristic?

1. **Age**
 2. **Disability**
 3. **Gender reassignment**
 4. **Marriage & civil partnership**
 5. **Pregnancy & maternity**
 6. **Race**
 7. **Religion or belief**
 8. **Sex** – means *‘being a man or a woman’*.
 9. **Sexual orientation** – same sex, bi-sexual or heterosexual
- ▶ **Strongest legal protections**
 - Disability
 - Race
 - Sex
 - ▶ **Weaker legal protections**
 - Age
 - Religion or belief
 - Sexual orientation
 - ▶ **Weakest legal protections**
 - Gender reassignment
 - Marriage & civil partnership
 - Pregnancy & maternity

What is direct discrimination?

- ▶ Direct discrimination occurs when a person treats another person less favourably than they treat or would treat others because of a protected characteristic. [Employment CoP (3.2): Oct. 2010]
- ▶ This is where a woman (or man) is treated less favourably than a person of the opposite sex in comparable circumstances is, or would have been treated, because of her (or his) sex [Source: Old Gender Equality Duty statutory code of practice].
- ▶ Examples, less favourable treatment because someone:
 - **has** a protected characteristic;
 - is **thought to have** a protected characteristic (discrimination by perception);
 - is **associated with someone** with the protected characteristic (discrimination by association);
- ▶ **Racial segregation** is a form of direct discrimination.

What is indirect discrimination?

- ▶ *'Indirect discrimination occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages people with a protected characteristic. Where a particular group is disadvantaged in this way, a person in that group is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it.'* [Equality Act 2010, s. 19 (1)]
- ▶ *'Indirect discrimination applies to all the protected characteristics, apart from pregnancy and maternity'.* [Equality Act 2010, s. 19 (3)]
- ▶ It may be indirect discrimination if a particular group, protected under the 2010 Act, is disadvantaged and someone in that group is disadvantaged by a provision, criterion or practice. However if the organisation **applying the provision, criterion or practice can objectively justify** it then it will not be considered to be indirect discrimination. Justification would be that this is a proportionate means of achieving a legitimate aim.[Equality Act 2010, s. 19 (2)]
- ▶ *'Indirect discrimination can also occur when a policy would put a person at a disadvantage if it were applied. This means, for example, that where a person is deterred from doing something, such as applying for a job or taking up an offer of service, because a policy which would be applied would result in his or her disadvantage, this may also be indirect discrimination.'* [Explanatory notes to the Equality Act 2010, para. 79]

If a rule, provision or criteria can be justified it is not indirect discrimination.

- ▶ *‘First, is the aim of the rule or practice legal and non-discriminatory, and one that represents a real, objective consideration?’ [Employment CoP]*
- ▶ *‘Second, if the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?’ [Employment CoP]*
- ▶ If the objective justification test is met then the action may not be considered to be an act of discrimination.

What is the public sector equality duty?

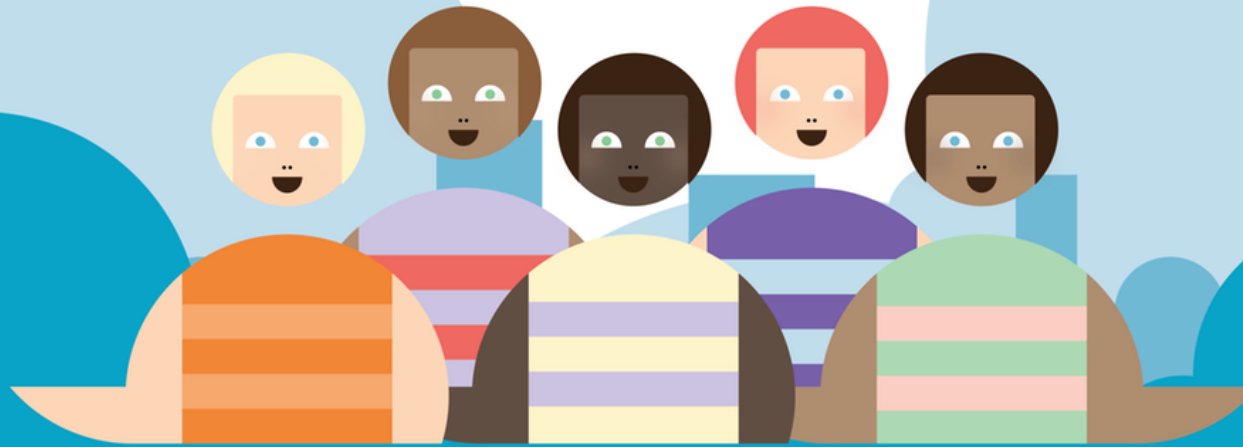
- ▶ A duty placed on public bodies and those exercising public functions.
- ▶ Section 149 (1): A public authority must, in the exercise of its functions, **have due regard to the need to:**
 - ▶ eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - ▶ advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - ▶ foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- ▶ 8 protected characteristics to which the PSEdY fully applies: 1) age; 2) disability; 3) gender reassignment; 4) pregnancy and maternity; 5) race; 6) religion or belief; 7) sex; & 8) sexual orientation;
- ▶ Applies to marriage and civil partnership but only in relation to eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.

What is due regard? Simple answers.

- ▶ The 2010 Act says, giving 'due' consideration to advancing equality [s.149 (3)]:
 - remove or minimise disadvantages;
 - taking steps to meet different needs;
 - encouraging people to participate in public life and activities in which they are under represented.
- ▶ The 2010 Act [s.149 (3)] says giving 'due' consideration to fostering good relations between different groups to:
 - a) tackling prejudice; and
 - b) promoting understanding.
- ▶ Due regard comprises two linked elements: proportionality and relevance. [Source: Old Gender Equality Duty, statutory code]
- ▶ The weight which public authorities give to gender equality should therefore be proportionate to its relevance to a particular function. The greater the relevance of a function to gender equality, the greater regard which should be paid to it. [Source: Old Gender Equality Duty, statutory code]
- ▶ **Ah but the real and more complex question is how the courts assess 'due regard.'**

How has equality legislation helped women?

- ▶ Yes, the Equality Act 2010:
 - sets out what is lawful;
 - has helped to change attitudes about what is right and wrong;
 - allows women to legally challenge discrimination;
 - includes equal pay legislation;
 - provides a framework for advancing equality;
 - Increased rights in relation to flexible working;
 - the PSED should encourage public bodies to address issues such as equal pay, domestic violence, job segregation etc., poor life chances and opportunities for different groups of women associated with class, disability, pregnancy, being a mother, race etc.
- ▶ But there was along way to go and we are taking backwards steps, for example:
 - the pay of men and women is not equal;
 - more difficult for women and others to make legal challenges given employment tribunal fees, legal aid restrictions and restricted access to advice;
 - organisations and services that seek to enable women to realise their rights face cuts and some no longer exist;
 - related employment rights are being attacked by government;
 - since 2010 discrimination related to being a mother has risen [see [EHRC July 2015](#)] the PSED has been undermined.



Women making a change

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