

Children's Rights Alliance
for England



Equality Matters for Children

A guide for children's services
on the Equality Act 2010

The Children's Rights Alliance for England (CRAE) protects the human rights of children by lobbying government and others who hold power, by bringing or supporting test cases and by using national and international human rights mechanisms. We provide free legal information and advice, raise awareness of children's human rights, and undertake research about children's access to their rights. We mobilise others, including children and young people, to take action to promote and protect children's human rights. Each year we publish a review of the state of children's rights in England.

Karon Monaghan QC from Matrix Chambers wrote this publication.

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Children's Rights Alliance for England

94 White Lion Street
London
N1 9PF

T: **020 7278 8222**

E: **info@crae.org.uk**

W: **www.crae.org.uk**

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1. Introduction

This guide is for local authority children's services and voluntary organisations providing services to children and young people.

Its aim is to explain the rights that children and young people have under the Equality Act 2010 ('the Equality Act'); and to set out the duties that are imposed on children's services and voluntary organisations when they are carrying out their functions and providing services.

All people working with, and for, children and young people in the statutory and voluntary sectors must be aware of the Equality Act because:

- It guarantees many rights for children and young people which children's services either must uphold themselves, or can support children and their families to protect
- If rights in the Equality Act are violated by children's services or voluntary organisations, they will be committing an *unlawful act* and a child or young person will have the right to go to court and claim compensation.

In addition to giving rights to children and young people, the Equality Act imposes *duties* on local authorities, including children's services – and, in some circumstances, voluntary organisations – to take action directed at promoting equality. To ensure these duties are complied with, children's services and voluntary organisations (in respect of some of their activities) must take positive steps to meet certain equality objectives.

It is usually helpful to consider the Human Rights Act 1998 alongside the Equality Act, and this is briefly considered at the end of this guide.



2. Overview of the Equality Act

The Equality Act is now the main source of UK equality law. The values underpinning it are those reflected in many human rights instruments, including respect for the dignity and worth of all people.

Respect for human dignity is a core theme running through all equality guarantees and equality is an essential prerequisite to respecting dignity. In this way equality and human rights are intimately linked. This can be seen in the United Nations Convention on the Rights of the Child (CRC) which contains its own equality guarantee, requiring states to respect and ensure the rights in the treaty to each child without discrimination, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The CRC is founded on respect for the inherent dignity of each child as its preamble and its substantive provisions make clear. The Equality Act gives concrete realisation to some of the rights in the CRC and should be viewed as a tool for securing respect for the inherent dignity of all children and young people.

The Equality Act brings together discrete legislative measures addressing discrimination connected to sex, race, disability, religion and belief, sexual orientation and age, developed from the 1960s onwards. The Act repealed and largely replicated:

- The Sex Discrimination Act 1975;
- The Race Relations Act 1976 (as amended);
- The Disability Discrimination Act 1995 (as amended);
- The Religion and Belief Regulations 2003;
- The Sexual Orientation Regulations 2003;
- The Equality Act 2006 (which addressed religion and belief discrimination outside the spheres of employment and occupation); and
- The Sexual Orientation Regulations 2007 (which addressed sexual orientation discrimination outside the spheres of employment and occupation).

Children's services and voluntary organisations working with children and young people will be familiar with many of the concepts under the Equality Act. But there are some important differences from previous legislation and so care needs to be taken to make sure that the Equality Act and its impact are fully understood.

The Equality Act extends protection beyond previous legislation and creates **new concepts of discrimination**. It is important, therefore, that children's services and voluntary organisations do not simply rely on old guidance or training.

The Equality Act at a glance

Identifies the “protected characteristics” as:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion and belief
- Sex
- Sexual orientation

Defines “prohibited conduct” as:

- Direct discrimination
- Indirect discrimination
- Discrimination arising from disability
- Reasonable adjustments
- Harassment
- Victimisation

Makes it unlawful to engage in prohibited conduct relating to a protected characteristic in the context of certain activities (“the unlawful acts”). These activities are:

- Providing services
- Exercising public functions
- Letting, selling or managing accommodation
- Clubs
- Providing education and community services
- Providing work and the treatment of workers
- In relation to those relationships that have come to an end

Imposes duties on public bodies and voluntary organisations in respect of some activities. These are known collectively as the “public sector equality duty”.

Allows children’s services and voluntary organisations to take positive action to ensure that the needs of all children are met.

The Equality Act does not require children’s services and voluntary organisations, or other bodies concerned with promoting the interests of children and young people, to treat all children in the same way. It recognises that children and young people, like all people, may require varied and different treatment to ensure they are treated fairly and their particular needs met. This is explained more fully below.



3. Protected characteristics

The Equality Act prohibits discrimination, harassment and victimisation connected to the “protected characteristics”. It also imposes duties on public bodies and voluntary organisations in certain circumstances, including a duty to make reasonable adjustments. The meaning of “discrimination”, “harassment” and “victimisation” and the duties are explained below (pages 13-19).

It is not just people who have the protected characteristics that are protected: in most circumstances, people who are associated with others who have the relevant protected characteristics are also protected. This applies to parents, daughters and sons and siblings. People who are perceived to have those characteristics are also protected. This is explained below.

The protected characteristics are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion and belief
- Sex
- Sexual orientation

Age

Age means chronological age. It refers to a particular age (for example, children under the age of 16) as well as an age group (for example, children between the ages of 13 to 16). Age groups may also be relative (for example, 'younger than me').

Disability

The meaning of "disability" and "disabled person" is an autonomous meaning under the Equality Act. This means that, however those expressions might be defined under other laws or guidance, for example under social security laws, unless they match the definition under the Equality Act those other definitions are irrelevant.

The Equality Act states a person has a "disability" if she or he:

- Has a physical or mental impairment; and
- The impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

A reference to a disabled person under the Equality Act is a reference to a person who has a disability.

The Equality Act applies to a person who has had a disability as well as to a person who has a disability now. This means if a child or young person has had a disability in the past, she or he is protected under the Equality Act.

As to each of the elements above:

"Physical or mental impairment" does not have any technical meaning. Anybody who is impaired physically or mentally will satisfy this condition. An impairment may result from illness or it may consist of an illness; and it may be visible or invisible. It does not matter whether it is possible to categorise a condition as either a physical or a mental impairment and the underlying cause of any impairment may be hard to establish. It is not necessary to identify how any impairment was caused.

A disability can arise from a wide range of impairments which can be:

- Sensory impairments, such as those affecting sight or hearing
- Impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME)/chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy
- Progressive, such as motor neurone disease, muscular dystrophy, forms of dementia and lupus (SLE)
- Organ specific, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease
- Developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia
- Learning difficulties
- Mental health conditions and mental illnesses, such as depression, schizophrenia, eating disorders, bipolar affective disorders, obsessive compulsive disorders, as well as personality disorders and some self-harming behaviour.

An impairment has a substantial adverse effect on a person's ability to carry out normal day-to-day activities if its effect is more than minor or trivial and it interferes with activities that are normal for many of us. These activities will include things like eating, washing and dressing, playing, walking or going outside.

A girl has had anorexia for a long period of time and this restricts her ability to engage in eating. This would be an impairment which has a substantial adverse effect on her ability to carry out normal day-to-day activities.

In general, specialist activities – like playing an instrument to a very high standard or international competition level gymnastics – will not be seen as “normal” day-to-day activities for these purposes. However, closer examination of how these actions are performed might shed light on whether the child’s normal day-to-day activities are adversely affected.

A child plays the piano to a high standard, and often takes part in public performances. She has developed juvenile idiopathic arthritis causing pain, swelling and stiffness around her hands and wrists. She can continue to play the piano, but not to such a high standard; and she has to take frequent breaks to rest. This would not of itself be an adverse effect on a normal day-to-day activity. However, as a result of her impairment, the girl also finds it difficult to operate the computer and dress herself. This is an adverse effect on a normal day-to-day activity.

In considering whether an effect is more than minor or trivial, the way in which the activity is undertaken, or the time it takes for a person to carry out the activities, will be relevant.

A 10 year-old child has cerebral palsy. The effects include muscle stiffness, poor balance and unco-ordinated movements. The child is still able to do most things for himself, but he gets tired very easily and it is harder for him to accomplish tasks like eating and drinking, washing and getting dressed. Although he has the ability to carry out everyday activities such as these, everything takes longer compared to a child of a similar age who does not have cerebral palsy. This amounts to a substantial adverse effect.

An impairment is long-term if:

- It has lasted at least 12 months; or
- The total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or
- It is likely to last for the rest of the life of the person affected.

The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect. Where an impairment has a substantial effect on a child or young person and then stops, but is likely to recur, then the substantial effect is treated as continuing. This covers impairments which have a substantial adverse effect but whose effects are intermittent – for example asthma, the symptoms of arthritis or epileptic seizures.

In looking at whether a child or young person has an impairment that has a substantial adverse effect, when the effects are mitigated because of the impact of medication or other measures (like equipment such as a wheelchair or adapted computer keyboard) or assistance, it is necessary to consider whether *without* that medication, or without those other measures or assistance, the impairment would have a substantial adverse effect.

Some impairments are treated as disabilities whatever their effects and even if asymptomatic. These are HIV infection, cancer and Multiple Sclerosis. Some people are also treated as disabled automatically and these are people who are certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist. However, a person who is short or long-sighted, and whose sight can be improved with glasses, will not be disabled unless even with glasses their sight impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

A severe disfigurement (though not if it consists of a tattoo or piercings) is to be treated as having a substantial adverse effect on a person’s ability to carry out normal day-to-day activities. These will include large birth marks, scars, limb or postural deformation (including restricted bodily development) or diseases of the skin. Whether or not they are severe may depend on where they are located so that a large facial birth mark may be severe whereas it would not be if it were on a child’s back.

Some behaviours and impairments are excluded from Equality Act protection. These are:

- Addiction to, or dependency on, alcohol, nicotine, or any other substance (other than in consequence of the substance being medically prescribed)
- The condition known as seasonal allergic rhinitis (hayfever), except where it aggravates the effect of another condition
- Tendency to set fires
- Tendency to steal
- Tendency to physically or sexually abuse others
- Exhibitionism
- Voyeurism.

However, it is only those particular behaviours and impairments that are excluded. Children and young people will be protected in respect of other impairments, even if related.

A young person has a conduct disorder that has lasted several years and which causes him to engage in violent physical fights and stealing. It also causes him to lie and to take risks with his own health and safety. The conduct disorder, as an impairment which has a substantial and long-term adverse effect on the young person's ability to carry out normal day-to-day activities, would be a disability. However, the young person would not be protected by the Equality Act in relation to any discrimination experienced because of his violence or stealing.

A young person has developed an alcohol dependency and suffers from depression as a consequence. He finds it difficult to get to school and so is late on several occasions. The school punishes him by excluding him for a number of days. The boy can claim that his school has discriminated against him because of something arising in consequence of his disability and has failed to make "reasonable adjustments" (see below). This is because the exclusion arose from the effects of his depression even though the underlying cause of it was alcohol dependence.

Important: the above guidance applies to children just as much as to adults. However, a physical or mental impairment experienced by a child **under six years old** is to be treated as having a substantial and long-term adverse effect on the ability of that child to carry out normal day-to-day activities *if it would normally have a substantial and long-term adverse effect on the ability of a person aged six years or over to carry out normal day-to-day activities*. This special provision ensures that, where a child is too young to have developed the capacity to act in the respects contemplated by the disability provisions in the Equality Act – for example, to wash or dress, or in the case of a baby, to walk or sit unaided – they will still be recognised as disabled if their impairment/s would have that effect in an older child or adult.

Gender reassignment

Gender reassignment is a major process which involves a person reassigning their sex and the Equality Act covers people who have undergone, are undergoing or are proposing to undergo gender reassignment. It is not necessary for this to be under medical supervision. It may involve consistently changing dress and the social attributes of gender.

After many years of identifying as a boy, a girl decides that she wants to live as a boy. She tells her parents what she wants to do and explains she is deeply serious about it. The girl is protected from then on because she is proposing to undergo gender reassignment. It does not matter if she later changes her mind. She then begins to dress as a boy, including at school, and to be consistently identified as a boy. He is then undergoing gender reassignment and again is protected under the Equality Act.

Marriage and civil partnership

Marriage and civil partnership are legally recognised relationships. A person must be at least 16 years old to marry or enter a civil partnership and if under the age of 18 will require the consent of their parent or guardian. Where a care order has been made, the consent of the local authority will also be required.

Pregnancy and maternity

Pregnancy and maternity refers to pregnancy and the 26 week period following birth (where treatment is referable to birth). Outside the sphere of work, protection also covers breastfeeding up to 26 weeks. In work, it also covers a reference to pregnancy-related illness.

Race

Race includes a person's colour; nationality and ethnic or national origins; and a reference to people who share a particular protected characteristic – in this context, this is a reference to people of the same racial group.

The reference to ethnic and national origins will cover a wide range of groups, including Roma, Irish Travellers and Sikhs, amongst others.

A racial group may comprise more than one distinct racial group, for example Black Caribbean people or British Asian people.

The protected characteristic of race covers a wide range of groups that share ethnic origins, including some which share a religion, so may also be protected under religion and belief – for example, Jews and Sikhs.

Religion or belief

Religion includes any religion and includes a lack of religion.

To be protected under the Equality Act, any religion must have a clear structure and belief system. Denominations or sects within a religion can also comprise a religion or belief, such as Protestants and Catholics within Christianity.

Philosophical beliefs (and a lack of them) are also covered. To be protected such a belief must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not in conflict with the fundamental rights of others.

Examples of religions protected would be the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. Beliefs such as humanism and atheism would also be covered.

Sex

Sex means being a man or a woman, or a girl or a boy.

Sexual orientation

Sexual orientation is a reference to a sexual orientation towards people of the same sex (in other words, the child or young person is gay or lesbian); people of the opposite sex (in other words, the child or young person is heterosexual); or people of either sex (in other words, the child or young person is bisexual).



4. Prohibited conduct

The Equality Act prohibits direct discrimination (including pregnancy and maternity discrimination); indirect discrimination; discrimination arising from disability; a failure to comply with the duty to make reasonable adjustments; and harassment and victimisation. The meaning of each of these terms is given below.

Direct discrimination

Direct discrimination occurs when a person is treated less favourably than another person has been, or would be, treated because of a protected characteristic.

A local play centre decides that Irish Traveller children cannot join in organised activities because the parents of other children using the facilities object to their involvement. This would be direct discrimination.

It is not possible to justify direct discrimination. This means that, unless there is a specific exception – for example in the context of same sex or faith schools when some exceptions apply – it will be unlawful, if it occurs in the context of the activities described below.

Direct discrimination might arise because of unconscious prejudice. Less favourable treatment because of a protected characteristic need not be intentional for it to be unlawful.

Where it results in less favourable treatment, stereotyping will also be directly discriminatory. Making assumptions about children and young people based on their personal characteristics is not appropriate and may be unlawful direct discrimination.

This is so even if the stereotype matches the experience of some or even many people with that characteristic. This is because the fact that something is true of many people within a group does not mean assumptions can be made about individuals within that group.

The fact that most refugee children will have English as a second language, and many will require extra tuition in English, will not be true of all refugee children. A school which takes all refugee children out of mainstream English classes for special tuition, without individual assessment, will be acting unlawfully because the treatment will be directly discriminatory on grounds of national or ethnic origin.

A youth club leader introduces a policy of searching young people before they come into the club because of a recent spate of stabbings in the area. He subjects young Black boys to more intrusive and intensive searches because he believes Black boys are more likely to be involved in gangs and therefore engaged in violent activities. This is an example of direct discrimination.

A voluntary organisation provides training in learning skills for young people who have left education early and wish to return to education. The course organiser refuses admission to a young Roma woman because, without any assessment, he assumes she is unlikely to be ready and should undertake a literacy class first. This is an example of direct discrimination.

To test whether there has been direct discrimination, it is necessary to compare the treatment meted out to a child or young person to the treatment that a child or young person without his or her protected characteristic has received or would have received.

Important: racial segregation will always be unlawful direct discrimination. This occurs where groups are deliberately separated by reference to their race, including colour or ethnic or national origins, unless one of the exemptions in the Equality Act applies (for example, in relation to positive action, see pages 30-31 below).

Also, where the protected characteristic is pregnancy or maternity, a young person does not have to show that she has been treated unfavourably in comparison to a person who is not pregnant or who has not given birth. Instead, any unfavourable treatment because of pregnancy, or because she has given birth, will be direct discrimination.

Important: it is **not** direct discrimination to treat a disabled student more favourably than a non-disabled student. The Equality Act allows reasonable adjustments to be made in appropriate cases and otherwise more favourable treatment to be afforded to disabled children and young people to meet their particular needs. This is explained below.

Direct discrimination goes wider than prohibiting less favourable treatment against a child or a young person because of her or his own protected characteristic/s. The Equality Act prohibits treatment *because* of a protected characteristic: this means if a child or young person is treated less favourably because of another person's protected characteristic, this will also be directly discriminatory.

A local voluntary organisation that provides mentoring for young boys who are at risk of coming into conflict with the law invites men from the local community to volunteer to act as mentors. The voluntary group provides training for those volunteering and one of the workers is nominated to sift applications from the local community and select those that would be suitable for this training. The management committee of the organisation instructs the worker not to offer training to any Muslim men because they have concerns that the local Mosque may be harbouring some men with extreme fundamentalist views which might be dangerous. The worker refuses to go along with this instruction because he thinks it is based on prejudice and is discriminatory. His duties are then changed and another worker is given the task of selecting applicants for training. The first worker to whom the instruction was given is allocated more mundane duties. This is direct discrimination, since the worker has been treated less favourably because of a protected characteristic – namely the characteristic of religion or belief. It does not matter that the religion or belief is not that of the worker himself but of applicants, or potential applicants, for the training.

Direct discrimination also protects a child or young person against less favourable treatment because of a *perceived* protected characteristic. Even if a child or young person does not have the protected characteristic, if another person treats them less favourably because they think that they have that characteristic, then they are directly discriminating against that child or young person.

A young woman chooses to wear trousers, play football and manifests interests that are usually associated with boys and is treated less favourably because of an assumption that she is a lesbian or transgendered. This will be direct discrimination even if she is not, in fact, a lesbian or transgendered.

Where the protected characteristic is pregnancy or maternity, then a person is only protected against direct discrimination where they themselves are actually pregnant or have given birth. It is also direct sex discrimination to treat a female less favourably because she is breastfeeding a child.

A children's home organises a family day for children who reside in the home. Children are told that they can invite their close family members, family friends or carers to a summer barbeque. A young girl who is resident in the home is told not to invite her mother who has a history of mental illness. The girl's mother has bipolar disorder which has been successfully treated with medication and was not the cause of the girl being looked after by the local authority. The carers at the home have simply assumed, on the basis that she has a mental illness, that it would be "safer" not to have the child's mother attend the party. This would be direct discrimination against the girl because she has experienced less favourable treatment in being denied the opportunity to invite her mother, because of her mother's disability.

Indirect discrimination

Indirect discrimination occurs where a person applies a provision, criterion or practice in the same way to all people within the relevant group but which is such that it puts – or would put – children and young people sharing a particular protected characteristic at a particular disadvantage when compared with persons who do not share it.

This form of discrimination, therefore, is concerned with policies or practices which are applied equally across the board but which adversely affect children and young people having a particular protected characteristic.

A school which imposes a rule that all boys should have short and neat haircuts will indirectly discriminate against Sikh boys who do not wish to cut their hair and who wish to wear a turban in accordance with their beliefs.

A youth centre prohibits the wearing of any jewellery at all. This is because it wants to discourage extravagant displays of jewellery which may pressure other young people into feeling stigmatised because they do not have the means to buy expensive clothes or jewellery. This may indirectly discriminate against Sikh children who may be required to wear the Kara.

A drama after-school club run by a voluntary organisation tells the children participating that they must attend Church for at least six consecutive weeks if they want a part in the Christmas performance. This will be indirect discrimination against children who are not Christians, or who have no religious beliefs.

A rule which prohibits plaiting or corn rows, as part of a school uniform policy, will indirectly discriminate against African-Caribbean boys and girls.

Indirect discrimination, unlike direct discrimination, may be “justified” where it is a proportionate means of achieving a legitimate aim. This means that, if there is a good reason for the rule, and it is appropriate and necessary to impose it, then it might be lawful. The more disadvantage a rule causes, the less likely it is to be justified.

For justification to be established, it must be shown that the policy or practice pursues a legitimate aim. A legitimate aim as a reason or objective must represent a significant and real purpose.

A young person with cerebral palsy experiences difficulty in controlling muscles and movements. In science classes, his teacher restricts the experiments that he is able to undertake without assistance from the teacher so that, where they involve Bunsen burners or the use of chemicals which might be dangerous if spilt, he is required to participate by observing the experiments which his teacher performs. The school imposes this rule and says it would impose it on any student, whether disabled or not, who experiences difficulties in manually managing equipment and substances. The reason or justification for this is health and safety. Although this is likely to be indirectly discriminatory against students with cerebral palsy and similar impairments, it is likely to be justified as a proportionate means of achieving a legitimate aim.

Discrimination arising from disability

Discrimination arising from disability occurs where a child or young person is treated unfavourably because of something arising in consequence of their disability and that treatment cannot be shown to be a proportionate means of achieving a legitimate aim. This is similar to, but different from, direct discrimination.

Direct discrimination requires that the treatment afforded to a disabled person is less favourable than that which would have been afforded to another person *in the same or similar circumstances*.

A wheelchair user is refused a Saturday job in a shop because she cannot reach the top shelves. This treatment will not be direct discrimination if the shop would treat all people who could not reach the top shelves in the same way. However, it is discrimination arising from disability. The shop will have treated the young person unfavourably because of something arising in consequence of her disability, namely her wheelchair use and her inability to reach the top shelf, both of which are attributable to her disability.

This form of discrimination does not apply unless the person meting out the treatment knows, or could reasonably have been expected to know, that the child or young person has the disability. The treatment may also be justified if it is a proportionate means of achieving a legitimate aim.

A sports club expels a young member who has Tourette's Syndrome because he regularly shouts out distracting the other participants. This is likely to be discrimination arising from disability and, unless it can be justified, it will be unlawful.

Reasonable adjustments

The Equality Act imposes a duty to make reasonable adjustments so as to accommodate disabled children and young people. A failure to comply with the duty to make reasonable adjustments is unlawful when it falls within the circumstances described below.

What is a reasonable adjustment depends on things like whether it is practicable for an organisation to take any particular step and the cost of making any adjustment, having regard to financial resources. A small organisation with limited resources would not be expected to spend money that is not available on adjustments. Usually adjustments can be made by changing the way an organisation does things (starting at a different time; taking breaks; communicating more clearly, for example) and sometimes adjustments may be funded by external funders. Where expensive adjustments are required to accommodate a disabled child, and funding is not available, an organisation will not be expected to meet the costs of these if its budget and size are too small to do so. It is important always to think carefully about this because sometimes the disabled child themselves or their family members will be able to find a solution which suits everybody.

The reasonable adjustments duty comprises three elements.

Firstly, where a **provision, criterion or practice** puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it is necessary to take such steps as it is reasonable to have to take to avoid the disadvantage.

Secondly, where a **physical feature** puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it is necessary to take such steps as it is reasonable to have to take to avoid the disadvantage.

Thirdly, where a disabled person would, but for the provision of an **auxiliary aid**, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it is necessary to take such steps as it is reasonable to have to take to provide the auxiliary aid.

A substantial disadvantage means something more than minor or trivial.

Where the provision, criterion or practice, or the need for an auxiliary aid or service, relates to the provision of information, the steps which it is reasonable to take include steps to ensure that the information is provided in an accessible format.

A failure to comply with any of the elements of the duty cannot be justified.

In general (and in relation to the areas below, unless it is said otherwise), the duty is an **anticipatory duty**. It is also a **continuing duty**. This means steps have to be taken in anticipation that disabled children and young people will be using services, participating in clubs, attending school and so on. It is not permissible to wait until a disabled child or young person actually uses a service before making reasonable adjustments. Service providers must plan for disabled children and young people who may need or access the service in the future, as well as those disabled children and young people to whom services are already being provided.

It does not matter whether a service provider knows the child or young person is disabled; the duty applies anyway. But once the service has become aware of a disabled child's or young person's needs, it must take reasonable steps to meet those needs.

Notwithstanding this, children's services are not required to take any steps which are outside their statutory powers.

Organisations must take reasonable steps to ensure that services are provided in the same way to disabled children and young people as to non-disabled and young people. As a general rule, and unless there is a strong justification for why not, disabled children and young people should have access to the same services and care in the same places as their non-disabled peers.

In deciding whether any adjustment is reasonable, it will be necessary to consider things like:

- Whether any particular steps would be effective in overcoming the substantial disadvantage that disabled children and young people experience in accessing the service/s;
- The extent to which it is practicable for an organisation to take the steps;
- The cost of making the adjustment; the financial resources of the organisation; and how much it has already spent on adjustments;
- The extent to which the taking of any steps would cause disruption.

There are a number of children in the care of a local authority who are deaf or who have a deaf parent. Children's services employ a social worker who is a qualified BSL user so as to ensure that the children and parents can communicate effectively about the care and services provided. This is likely to be regarded as a reasonable adjustment.

Sometimes it will be reasonable to provide information in other formats such as Braille or in tape recordings. This will depend on the organisation's resources but the important thing is to plan in advance and to not assume these obligations can wait until the need arises (by which time it may be too late).

It is likely to be a reasonable step for children's services, and voluntary organisations where they have the resources, to provide written information it supplies to children, young people and their parents in print sizes and designs which are more accessible to sight impaired users.

It is also likely to be a reasonable step to provide "easy read" versions using clear, accessible language. This will make it easier for some people with a hearing impairment (for whom English is in effect a second language) and learning disabilities. Information provided in Braille would also be a reasonable adjustment.

Harassment

There are three types of harassment under the Equality Act. These are:

- Harassment related to a relevant protected characteristic;
- Sexual harassment;
- Less favourable treatment because a person submits to, or rejects, sexual harassment or harassment related to sex.

The first form of harassment occurs when a person engages in unwanted behaviour which is related to a relevant protected characteristic; and the conduct has the purpose or effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim. In other words, if a person intends to insult or offend a child or young person for a reason which relates to a protected characteristic, this will be harassment. But it may also be harassment if the person does not intend to insult a child or young person but that is the effect of what they do or say. Where a person does not intend to offend or insult, in deciding whether it has the effect mentioned, the victim's perception must be taken into account, along with any other circumstances; and regard must be had to whether it is reasonable for the conduct to have that effect.

A care worker constantly refers to a Muslim child's father as 'one of those bomber people'. The child feels upset and frightened by these comments. The care worker doesn't mean to upset or frighten him but thinks it is a joke and makes jokes about other children and their families. This is likely to be harassment because, although the care worker doesn't intend to cause upset or frighten the child, that is the effect of the care worker's remarks. The child's response would be considered in any discrimination claim.

The second form of harassment occurs where a person engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

A girl attends a youth club where there is a disco every Friday. One of the youth workers regularly comments that she looks “sexy” and says her clothes “lead him on”. He frequently tells her that she is making him think bad thoughts and that if she were a bit older he would act on these thoughts.

In the above example, the youth worker asks the girl for a kiss and she says ‘no’. He then bars her from the youth club. That would be harassment because she has rejected the unwanted conduct which was of a sexual nature.

The treatment by the youth worker is sexual harassment. If the youth worker had made these comments on only one occasion, and the conduct had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim, this would still be sexual harassment.

The third form of harassment occurs where a person engages in unwanted conduct of a sexual nature, or is related to gender reassignment or sex; the conduct has the purpose or effect of violating the victim’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim; and, because of the victim’s rejection of or submission to that conduct, the person treats the victim less favourably than he would treat the victim if she or he had not rejected or submitted to the conduct.

Again, in determining whether any unwanted conduct has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment, the victim’s perception must be taken into account, along with any other circumstances. Regard must be had to whether it is reasonable for the conduct to have had that effect.

Pregnancy and maternity are not protected under the harassment provisions explicitly. However, unwanted conduct which is connected to pregnancy will amount to harassment related to sex and in this way harassment connected to pregnancy and maternity will be covered.

Whether or not any unwanted conduct is “related to” a protected characteristic will depend not only on whether or not the victim has the protected characteristic herself or himself, but whether there is some connection between the harassment and the protected characteristic. As with direct discrimination described above, this would include, for example, situations where the victim is associated with someone who has the protected characteristic, or is wrongly perceived as having the protected characteristic.

A care worker in a children’s home repeatedly asks a young boy who is resident in the home whether he is gay and whether he wishes to go to a gay club. He mimics the way the boy walks and behaves in an exaggerated way to suggest that he is gay. The boy is not, in fact, gay (which the care worker knows). This is unwanted conduct related to a protected characteristic, namely sexual orientation, which has the purpose or effect of violating the boy’s dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for him.

Victimisation

Victimisation occurs where a person experiences a detriment – which means some disadvantage – because they have done something under, or by reference to, the Equality Act.

The Equality Act states that a person victimises another if she or he subjects that other to a detriment because she or he has done a “protected act” or she or he believes that she or he has done, or may do, a protected act.

A protected act means bringing proceedings under the Equality Act; giving evidence or information in connection with proceedings under the Equality Act; doing any other thing for the purposes of, or in connection with, the Equality Act; or making an allegation (whether or not express) that she or he, or another person, has contravened the Equality Act. In summary, a protected act relates to complaints or legal proceedings aimed at defending rights in the Equality Act or helping those who are trying to defend rights under the Equality Act.

A person is not protected against victimisation where she or he has given false evidence or information, or made a false allegation, if the evidence or information or allegation is made in bad faith.

The Scouts receive a complaint from a Muslim boy who says the Scout Master keeps making offensive remarks about Muslims, calling them suicide bombers and extremists. He leaves the Scouts but pursues his complaint with them. Another boy supports his complaint by writing to explain he had overheard the remarks. The Scout Master tells the second boy that he is no longer welcome and should join another Scout pack. This would constitute victimisation against the second boy.

In the example above, the first boy does not make a complaint but instead tells the second boy. In fact, the allegation is false and the first boy knows that it is, but is looking for an excuse to leave the Scouts because he wants to take up football instead. The second boy does not know the allegation is false but simply repeats it. The first boy is told that he would not be welcome back because of the allegation and the second boy is excluded because he repeated the allegation. There would not be victimisation of the first boy because he made a false allegation and he made it in bad faith – he knew it was false and made it to avoid Scouts. However, the second boy who repeated the allegation did not know it was false and he did not repeat the complaint in bad faith and therefore the decision to exclude him would amount to victimisation.

The victimisation provisions are modified in the context of schools so extending the protection beyond students, and prospective students, who have done one or other of the protected acts, to parents and siblings who have done a protected act. This means that victimisation of a student because of a complaint made by her or his parent or sibling is outlawed in the context of schools. An act will not be a protected act, however, where a false complaint is made by a parent or sibling of the child and the child has acted in bad faith, though where the child has acted in good faith, even if the allegation is false and is made in bad faith by a parent or sibling of the child, the child is protected against victimisation.

A student makes a complaint against his school claiming that he has suffered discrimination by a member of staff because he is Asian. The student's sister, at the same school, is protected against any detriment by the school because of her brother's complaint, even if it is later found out that the brother was not acting in good faith.



5. Scope of Equality Act protection and provision

The Equality Act covers a wide range of activities. These are:

- The provision of goods, facilities and services;
- The exercising of public functions;
- The provision, letting and management of accommodation;
- Clubs;
- Education, including in schools and further education institutions and community services;
- Work;
- Activities closely connected to the above but where the relationships have come to an end.

Discrimination and harassment (where they relate to the protected characteristics), victimisation and a failure to carry out reasonable adjustments are unlawful in a wide range of circumstances falling within the activities above.

These unlawful acts apply both to acts **and** omissions or failures to act. It is no answer, then, to say that an organisation did nothing, if the reason it did nothing was because the child or young person had a particular protected characteristic (e.g. was female or male; White or Black).

Services

It is unlawful for children's services in relation to the services that they provide to the public (or a section of the public) to discriminate, harass or victimise a child or young person or their families, or to fail to make reasonable adjustments, when providing those services, or by refusing to provide those services. Sometimes a service provider will not be directly discriminating against a child, young person or their family in providing a service by treating them differently because they have a particular protected characteristic but will still be acting unlawfully. Where a service provider applies criteria which disadvantage a child, young person or their family, because they, or one of them, have a protected characteristic (because they are Black, Roma, disabled etc), this may amount to indirect discrimination (and sometimes discrimination arising from a disability or a failure to make reasonable adjustments), as is addressed above.

A voluntary organisation which provides services to the public (or a section of the public) would also be acting unlawfully if it discriminated, harassed or victimised, or failed to make reasonable adjustments for, a person wanting or using those services.

A section of the public includes children, young people and families or other groups of service users.

A reference to services includes services, goods and facilities. A provider of services is anyone who is concerned with the provision of services to the public, or to a section of the public, whether or not for payment.

These provisions do not apply to age discrimination, so far as relating to persons who have not attained the age of 18 (or marriage and civil partnership). This means that children can be discriminated against on the grounds of their age in relation to the provision of services. **However, this does not affect the ability of children and young people to bring such claims based on other protected characteristics.**

A young Black boy seeks the assistance of his social worker because he is being bullied by a teacher at school. He thinks the bullying is because he is young and Black. His social worker is not sympathetic and refuses to take it up with the school. The boy believes his social worker shares his school's view that, because he is a young Black boy in an area where there is widespread gang membership, that he must be a member of a gang and his teacher's behaviour is justified. The boy would not be able to bring a claim that he had been discriminated against by his social worker in the provision of services because he is young (under 18) but he would be able to bring a claim against her based on the fact that he is Black.

In relation to harassment, the protected characteristics of religion or belief and sexual orientation are not covered. However, harassment connected to sexual orientation or religion or belief will generally amount to direct discrimination so will be unlawful.

A youth leader in a local community centre taunts a young girl because her parents are atheist and do not allow her to attend church with other members of the group for Sunday services. The youth leader would not taunt her if her parents were not atheist and so she is less favourably treated because of her parents' beliefs. This would be direct discrimination.

It is unlawful to discriminate, harass or victimise a person by not providing a service to them, or providing it on different terms or stopping the service or by subjecting them to any other detriment. A "*detriment*" means any disadvantage.

A youth centre is running a free book and games borrowing scheme. Children and young people can borrow books or computer games and some games consoles. The centre allows girls to come in groups to look at the books and games but allows boys to come in only one at a time because the centre has had problems with boys stealing and the workers think that boys are more likely to steal. This would be discrimination because of sex. The fact that the boys are allowed to enter the centre and borrow books and games from it does not mean that there is not discrimination. This is because the terms on which they are able to enter the centre and borrow things from it are different from the terms applied to girls. The boys are required to wait longer and as such are subjected to a detriment.

The provision of goods, facilities and services covers a wide range of activities – including access to and use of any place available to other members of the public, including where children and young people are permitted to enter, such as parks, community centres, cinemas, shops and public libraries; accommodation in a care home or hostel; transport and travel; as well as the services of, for example, early years workers, police officers, care workers, librarians and social workers.

Websites provide access to services and goods, but may in themselves constitute a service – where they are delivering information, for example. Organisations will need to ensure that appropriate reasonable adjustments are made to any websites they operate to ensure they are fully accessible.

Services provided in detention facilities, including local authority secure children's homes, secure training centres and young offender institutions, will also be covered.

Many things done by public authorities, and sometimes voluntary organisations, will be done when exercising public functions. Some public functions, however, will not be services under the Equality Act. Generally, these will be things done in the exercising of statutory duties or discretions. This might include making a decision to commence care proceedings, for example. Some things done by public authorities, and sometimes voluntary organisations that exercise public functions, then, will not fall within the "services" provisions. Special provision is made outlawing discrimination, harassment and victimisation and imposing a duty to make reasonable adjustments in the exercising of public functions and this is explained below.

There are many exceptions to the prohibition on discrimination and harassment in the provision of services. These allow for, amongst other things, separate and single sex services where certain conditions are met and the action taken is a proportionate means of achieving a legitimate aim. These are directed at respecting privacy and better meeting the needs of girls and boys.

The conditions are that:

- Only persons of one sex have need of the service

A voluntary organisation sets up ante natal classes for young mums.

- That the service is also provided jointly for persons of both sexes and the service would be insufficiently effective were it only to be provided jointly

Sex education classes are provided separately because it is found that young people are more open about their concerns and questions if they are in a same sex environment.

- A joint service for young people of both sexes would be less effective, and the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services

Children's services set up a group counselling service for girls who have experienced violence from partners. There is no parallel boys-only provision because of insufficient demand.

- The service is provided at a place which is, or is part of, a hospital or another establishment for persons requiring special care, supervision or attention

A voluntary organisation sets up separate hostels for young women and men who have experienced sexual abuse. The hostels each provide the same level of service, but the organisation believes a unisex hostel would be less effective.

- The service is provided for, or is likely to be used by, two or more persons at the same time and the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex

A sports centre provides separate showers for girls and boys.

- There is likely to be physical contact between a person to whom the service is provided and another person, and that person might reasonably object if they were not of the same sex

A voluntary organisation establishes a massage service to encourage relaxation in young people who have experienced trauma. They provide sessions at different times for girls and for boys to ensure that the masseurs on duty at those times are of the same sex as the young people using the service.

The examples above will be lawful if the action taken is a proportionate means of achieving a legitimate aim. These examples are good illustrations of when such action is likely to be regarded as lawful.

These exceptions apply to the exercising of a public function too.

The children's services of a local authority allocates funding for specialist abortion counselling for under 18 year-olds, contracting with a voluntary sector organisation to provide counselling for girls who are pregnant and want to consider an abortion. The local authority, in allocating funding for the service, and the voluntary organisation providing the service, could rely on the exception.

An exemption also applies in relation to communal accommodation which is provided separately or differently provided, where the provision is fair as between boys and girls.

Exemptions also apply in relation to gender reassignment to meet the needs of transgendered people and for reasons of privacy. These will only apply where the action is a proportionate means of achieving a legitimate aim.

Other exemptions are linked to providing special services for particular groups. So if, for example, a community centre has always run classes in African Caribbean hair dressing, it need not provide classes on European hair dressing.

Public functions

Many of the decisions that children's services make, or duties they perform, are done in accordance with their statutory powers or duties and can only be done by a state body (for example, a local authority) or under an arrangement with the state body concerned. When they are performing such functions, children's services are unlikely to be providing services under the Equality Act, but instead will be exercising public functions.

Public functions are not only carried out by public authorities. They can be carried out by private or voluntary organisations, for example where a voluntary organisation, charity or private company manages a secure children's home or young offender institution or when a voluntary organisation takes on responsibilities for family support.

Public function has the same meaning under the Equality Act as under the Human Rights Act.

The Equality Act makes it unlawful for a person to discriminate, harass or victimise a person in the exercise of a public function and imposes a duty to make reasonable adjustments on those carrying out public functions.

This will cover a whole range of decisions taken by children's services and voluntary groups working under arrangements with local authorities, including: child protection decisions; placing looked after children in foster care or children's homes; providing social workers; preparing care and pathway plans etc.

A Black boy is experiencing difficulties in settling into a new children's home after a placement in a foster care proved unsuccessful. The care home undertakes a preliminary assessment and concludes he would be better placed in a secure children's home. The decision is based on an incomplete needs assessment (including a failure to elicit the boy's own feelings and perspective) and stereotypical assumptions based on the fact that he is Black. This would be unlawful.

Again, these provisions do not apply to age discrimination, so far as relating to persons who have not attained the age of 18 (or marriage and civil partnership). This means that children can be discriminated against on the grounds of their age when a local authority, other public body or voluntary organisation is exercising a public function. However, children and young people are protected against discrimination and harassment based on other protected characteristics.

A 16 year-old girl who is a new mother and who has spent many of her early years in local authority care is visiting the children's services to gain help in applying for housing. Whilst she is waiting to speak to her leaving care worker she is breastfeeding her baby. She is asked to move and feed her baby elsewhere on the basis that she might offend other adults and children in the waiting area. This is likely to amount to discrimination because of pregnancy and maternity and will be unlawful.

Accommodation

The Equality Act makes it unlawful for a person who lets or manages accommodation to discriminate, harass or victimise a person who occupies, or wishes to occupy, that accommodation. These provisions only apply where the services, provisions and public functions provisions do not apply. They do not apply to short term accommodation where the child or young person usually lives elsewhere (that will be covered by the services provisions above). However, sometimes they may be relevant to children's services as where a young person is to be placed in longer term settled accommodation.

These provisions do not apply to discrimination and harassment connected to age (or marriage and civil partnership). Discrimination and harassment connected to the other protected characteristics is outlawed whatever the age (or marital/civil partnership status) of the victim.

The prohibition on harassment does not cover harassment related to sexual orientation and religion or belief though, as mentioned above, this is likely to be direct discrimination and so will be covered.

A more limited reasonable adjustments duty applies in relation to these provisions.

Clubs

The Equality Act makes it unlawful for clubs to discriminate, harass or victimise members, or potential members, of clubs (except for very small clubs with less than 25 members). Clubs are covered by these provisions whether incorporated or unincorporated; and whether they are carried on for profit or not. This means that some voluntary organisations that operate clubs, or which are themselves clubs, will be covered.

These provisions only apply when the clubs are membership clubs with admission to membership regulated by the club's rules which involves a process of selection. Otherwise, organisations describing themselves as clubs will probably fall under the services provisions above.

Many sports' clubs and youth clubs, including organisations like the Scouts or Brownies, Guides and the Woodcraft Folk, will be covered.

A club will be acting unlawfully if it discriminates, harasses or victimises a child or young person in deciding who to admit to membership; in the terms of membership; or by refusing an application for membership; and it will act unlawfully if it does any of these things so against existing members (or associate members). Guests are also protected.

There are exceptions but these generally reflect those described above under the "services" provisions.

A failure to make reasonable adjustments in respect of potential and actual members and guests is also unlawful.

Schools, further education and community services

The Equality Act makes it unlawful for schools and further education institutions to discriminate, harass or victimise a child or young person in deciding who to admit as a student; and in the treatment of students. Bullying because of these characteristics which is not addressed by the school or educational institution may amount to harassment.

As to the protected characteristics covered by these unlawful acts, age (and marriage and civil partnership) are excluded. Again, the protection against harassment does not apply in respect of gender reassignment, religion or belief and sexual orientation. However, as explained above, harassment connected to those characteristics will often amount to direct discrimination and so will be outlawed.

Protection is now afforded for the first time in respect of pregnancy and maternity and transgenderism in the case of students and prospective students.

A duty to make reasonable adjustments applies but it is somewhat modified in this context and the duty in some respects is intended to be performed through the special educational needs framework.

These provisions apply to all schools, including those maintained by a local authority, Academies and free schools, faith schools and independent schools and further education institutions.

A young person continually misses his appointments with his social worker. This is because he is regularly given detention at school purportedly for bad behaviour. He complains that he thinks he is picked on by his teacher because he is gay. If that is so, that will be unlawful and his social worker may need to address that.

A pregnant girl who is still at school and is the subject of a child protection plan is excluded from school because the school thinks that parents will be concerned about having a pregnant girl at the school. This is unlawful and children's services may have to take steps to address it.

There are some exclusions for faith based schools (in relation to their admissions policies) and single sex schools.

It is also unlawful for those who provide some community services to discriminate, harass or victimise children and young people. A failure to comply with the duty to make reasonable adjustments is also unlawful in this context. The recreational and training facilities covered are those provided in England under Sections 507A and 507B of the Education Act 1996 and include things like centres, parks and sports facilities.

Work

The Equality Act makes it unlawful for an employer to discriminate, harass or victimise an employee or prospective employee.

A failure to comply with the duty to make reasonable adjustments is unlawful, though it is somewhat different in the context of work and applies only to a prospective employee, or employee, that the employer knows of and knows is disabled.

The work provisions will apply to part-time work undertaken by young people, just as to adults. There are age exemptions, for example in relation to the minimum wage, but otherwise they apply to young people. Some voluntary organisations may employ young people, for example to help with sports activities. Children's services may also need to know about these provisions to assist children and young people they are looking after.

After the relationship has ended

The Equality Act also covers discrimination, harassment and (probably) victimisation after one of the relationships described above has ended, where the discrimination, victimisation and harassment arises out of and is closely connected to the relationship which used to exist. This will cover a situation where, for example, a child has received (or sought services from) children's services or a voluntary organisation but no longer receives, or seeks, those services.

In such circumstances reasonable adjustments must be made for disabled people even after a relationship has ended if they are put at a substantial disadvantage in comparison to people without a disability.

A young person seeks a reference from his social worker after he has left care. She refuses to provide a reference because he has become a devout Catholic and she disapproves. This would be unlawful.



6. Public sector equality duty and children's services

The public sector equality duty (PSED) is very important. Complying with the PSED will help children's services avoid unlawful discrimination, harassment and victimisation and ensure that they meet the duty to make reasonable adjustments. It will also help children's services promote equality for children, by meeting all of their needs. The duty is compulsory and compliance with it, or any element of it, is not discretionary. Children's services must comply with the PSED irrespective of how busy they are, or what resources they have. However, the size of the organisation may affect what they are expected to do to meet the PSED.

The PSED replaces the race, gender and disability equality duties but there are differences.

The duty applies to public authorities, including local authorities and therefore children's services. It also applies to any person exercising public functions. This includes voluntary organisations that are performing public functions for a local authority, including for children's services departments.

The PSED applies in respect of all the protected characteristics, except that the duties to advance equality and foster good relations do **not** apply to marriage or civil partnership. Otherwise, it applies to all of the protected characteristics, including age, and so will promote and protect children's rights whatever their characteristics.

The PSED requires that, in exercising public functions, an organisation must have due regard to the need:

- To eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by, or under, the Equality Act;
- To advance equality of opportunity between persons who share a protected characteristic and persons who do not share it; and
- To foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Each of the elements of the duty is elaborated upon so that:

- Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic, and persons who do not share it, involves having due regard, in particular, to the need:
 - To remove or minimise disadvantage suffered by persons who share a relevant protected characteristic where the disadvantage is connected to that characteristic;
 - To take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
 - To encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- Having due regard to the need to foster good relations between persons who share a relevant protected characteristic, and persons who do not share it, involves having due regard, in particular, to the need:
 - To tackle prejudice; and
 - To promote understanding.

The PSED requires that due regard must be given to each of these elements of the PSED. It is not enough to have due regard to the need to eliminate discrimination: it is necessary to have due regard to **each** of the elements above.

Due regard means proportionate regard. This may mean giving greater consideration and resources to functions or policies that have most effect on children and young people or certain groups of children and young people. It applies in exercising all public functions. These will include formulating policy; arranging schedules; organising

staff; inspecting care homes and other institutions; making procurement decisions; deciding what to spend money on; opening hours for services; and travel facilities.

It will also apply in making individual decisions in the case of children. So, children's services will need to think about the matters above and ask whether their decisions promote those aims or not – in a wide range of matters, including for example: making child protection decisions; allocating accommodation or care for a particular child; appointing social workers to children; and undertaking assessments of parenting capacity.

A local authority's children's services has decided to extend the opening hours of its library service for young people one evening a week in several areas across the city. A range of drop-in health and social care services known to be needed by teenagers will be available in the selected libraries during the pilot period. There will also be opportunities for young people to learn about local youth councils, school councils and other participation opportunities across the city, including those led by voluntary organisations. The decision to pilot this new service followed consultation with young people about the barriers preventing them accessing services and engaging in participation initiatives. This pilot would be justifiable on the grounds that such action is necessary to tackle disadvantage faced by young people and to encourage their participation in public life.

Children's services will have to introduce a policy and structure for ensuring compliance with the PSED. This may involve a checklist but they must give proper thought to each element of the PSED and not simply treat it as a tick box exercise. The elements of the PSED require substantive consideration.

There are specific duties too imposed on local authorities. These require local authorities to publish equality objectives every four years and publish information annually to demonstrate compliance with the PSED. These objectives will have to be specific and measurable. General aspirations will not be enough. These objectives will have to identify clearly what the planned outcome is; how it is proposed to get there; and how any success will be measured.

The objectives set by children's services will require careful thought and wide consultation, including with children and young people.

A local authority's children's services is concerned that Black children in its care are not thriving as well as other children in terms of educational achievement. It decides to include this as an objective and establish a system for identifying barriers to achievement and measuring Black children's progress. This would be a lawful action under the Equality Act.

Children's services will need to keep careful records to be able to show compliance with the PSED. Equality impact assessments provide a good way of ensuring (and demonstrating) that due regard is had to the aims of the PSED.



7. Positive action

The Equality Act is intended to eliminate discrimination but also to promote equality and, to that end, to ensure that the needs of particular groups are met. In certain situations, therefore, the Equality Act allows for different treatment where this promotes equality.

The Equality Act also allows for positive action in certain circumstances.

The positive action powers can help children's services promote and comply with the aims of the PSED.

Where certain conditions are met, local authorities, voluntary organisations and other bodies falling under the Equality Act may take positive action where it is a proportionate means of achieving one of the stated aims. Organisations may take positive action where they reasonably think that children or young people, or others, who share a protected characteristic:

- Experience a disadvantage connected to that characteristic; or
- Have needs that are different from the needs of persons who do not share that characteristic; or
- Have disproportionately low participation in an activity compared to those who do not share that protected characteristic, in which case an organisation may take any action which is proportionate to meet the aims stated in the Equality Act.

The aims are:

- Enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage;
- Meeting those needs; or
- Enabling or encouraging persons who share the protected characteristic to participate in that activity.

Organisations must reasonably think that one of the conditions exists. They do not need proof but will need some reason to believe they are met, either by objective evidence (such as statistics) or by reliable reports or anecdotal accounts over a period of time.

So long as the conditions above are met, organisations can take any action directed at meeting the stated aims, being as imaginative and thoughtful as possible.

In an effort to recruit more Muslim foster carers, children's services advertise for foster carers in the local Mosque and hold "taster" courses for Muslim families considering fostering, explaining the role of foster carers and the support that is available. This is likely to be lawful positive action.

Many of the boys in local authority care come from single parent families and do not have strong adult male role models in their families or immediate social environments. They are also likely to be disproportionately involved in anti-social behaviours and most of the social workers working with them are women. A voluntary organisation that works with young people is aware of this and, following discussions with the boys, considers they have a particular need for one-to-one support from men. The voluntary organisation sets up a mentoring project for boys only. This is likely to be a proportionate means of achieving one or more of the aims above (enabling boys to overcome or minimise disadvantage; meeting the needs of boys in care) and is likely to be lawful.

Statistics show that girls in care in a particular area are very much more likely to become pregnant at a young age and whilst still in their teens. A children's services authority develops a programme to provide relationship guidance to girls. The programme also introduces girls, through group work, to other girls who are pregnant to discuss their experiences. This is likely to be a proportionate means of achieving one or more of the aims above (enabling girls to overcome or minimise disadvantage; meeting the needs of girls in care) and it is likely to be lawful.

A local authority gathering information as part of its work to promote the aims in the PSED, learns that gay and lesbian young people are less likely to engage in sporting activities. Working with children's services, and by providing funding to local voluntary organisations, the local authority develops programmes targeting gay and lesbian young people, consulting with them on the reasons why their participation is low and developing activities directed at encouraging them to engage in different sporting activities. This is likely to be a proportionate means of achieving one or more of the aims above (enabling or encouraging gay and lesbian young people who share the protected characteristic to participate in that activity) and it is likely to be lawful.

A group of parents sets up a Saturday supplementary school for African Caribbean boys because they are concerned about the narrow school curriculum and lack of positive encouragement. The parents establish a charity to run the school and the governing charitable instruments identify the aims of the school, and the children who will benefit from the school. This is likely to be both a proportionate means of achieving a legitimate aim and/or for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic.

The conditions and aims may overlap but only one is required to be met before positive action can be taken.

It is never unlawful to take positive action or other action in favour of disabled people and sometimes this will be necessary to comply with the duty to make reasonable adjustments.

Positive action must be distinguished from positive discrimination, which is not permitted. Positive discrimination is action that results in less favourable treatment of another protected group.

In some circumstances it will be lawful to employ people with a particular protected characteristic to meet the needs of a positive action programme (as with, for example, male mentors). Organisations will have to show that having the particular characteristic is an occupational requirement. Guidance on occupational requirements is included in the statutory code of practice on employment (see section 10 below).

Charities may also provide benefits only to people who share a particular protected characteristic where this is in accordance with the charitable instrument that establishes or governs the charity, and is either:

- A proportionate means of achieving a legitimate aim; or
- For the purpose of preventing or compensating for a disadvantage linked to that protected characteristic.

This exception does not apply if the group of people who are to receive benefits under the charitable instrument is defined by colour.

Before obtaining charitable status, the organisation must satisfy the “public benefit test”. This may help in deciding whether any restriction meets the tests in the Equality Act.

To show that restricting its services or benefits to people who share a protected characteristic is for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic, the charity will need to demonstrate a connection between the disadvantage experienced by the group and the benefits provided by the charity.

These exceptions may be important for voluntary organisations that have charitable status and provide services to children and young people with particular characteristics.

Children’s services want to encourage arts and theatre activities for all looked after children, as few attend groups in the local community. Managers consult with children of different ages in small groups to hear what kinds of activities the children would want and enjoy. The most popular activity proposed by teenagers is Rap poetry, whereas younger children would like to have drama classes and to be able to put on an annual show for their families and staff at County Hall.

This consultation has helped children’s services better meet the needs of children in its care, as well as comply with its Equality Act duties.

Some action will not be positive action under the Equality Act but will nevertheless be lawful and help promote the general aims of the Equality Act. This will include training and raising awareness.

Training and raising awareness

It is important to train all staff and, in the case of voluntary organisations, management committees and trustees, on the duties under the Equality Act. This will help ensure that discrimination does not happen inadvertently. It will also ensure that the PSED is properly complied with and that the organisation’s work is to, the maximum extent, effective – including by, where appropriate, using positive action powers.

It is important to raise awareness of the rights and duties under the Equality Act amongst people who use, or are entitled to use, services. Through this process, children and young people will have much expertise and advice to share in discussions about complying with the Equality Act. They can also contribute to the development of policies to give effect to the Act. Consultation and engagement will have to be appropriate to the age and capacity of the children and young people whose advice is being sought.

8. Enforcement

Where a local authority or voluntary organisation commits an unlawful act, a child or young person may take them to court. A court may award compensation and in some cases may grant an injunction to make a local authority or voluntary organisation do something or desist from doing something.

There are strict time limits applicable to claims under the Equality Act so children's services or voluntary organisations may have to help a child take action quickly.

Sometimes a letter drawing attention to the discrimination will help bring an end to it. Sometimes mediation (formal or informal) will be a solution.

Where legal action is required, children's services and voluntary organisations may be able to provide crucial support to a child. Generally a child will require an adult to act as a "litigation friend" to conduct the proceedings on their behalf and a solicitor to help with this. Legal aid (to pay for a lawyer) is often available and a solicitor can advise on this.

A person, including a child or young person, may also bring proceedings to enforce the PSED when they are affected by a failure to comply with it. Again, a solicitor will be needed to help with this.

The Equality and Human Rights Commission (EHRC) can provide advice and referrals. In some circumstances, the EHRC may also support a child in taking legal action (by providing a lawyer) and may take legal action itself in respect of an unlawful act or a failure to comply with the PSED.



9. Human Rights Act

It is often helpful to consider duties under the Human Rights Act 1998 along with duties under the Equality Act. This is not a guide to the Human Rights Act but organisations will want to consider guidance on it to ensure policies on both the Equality Act and the Human Rights Act work together properly.

The Human Rights Act requires organisations to comply with the “Convention rights” in exercising public functions. The Convention rights are drawn from the European Convention on Human Rights and include, amongst other rights, a prohibition on inhuman and degrading treatment (which might include the infliction of severe physical punishments); the right to respect for family life (which will include respecting contact between children and family members unless there is a very good reason not to); the right to a fair trial (which will include proceedings being undertaken in a manner understandable to the child); and a prohibition on discrimination in the enjoyment of those rights.

Courts increasingly use the Convention on the Rights of the Child to interpret the obligations of the Human Rights Act as applied to children.

Complying with the Equality Act will help organisations ensure their human rights duties are complied with and vice versa.

10. Other resources

There is much other guidance on the Equality Act and specific aspects of it.

This includes:

Equality Act starter kit, published by the EHRC in 2011 and available at:
<http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/equality-act-starter-kit/>

Making the most of the Equality Act 2010 (young people's short guide), published by CRAE in 2011 and available at: <http://equalitymattersforchildren.crae.org.uk/>

Statutory code of practice on services, public functions and associations, published by the EHRC in 2011 and available at: http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf.

Statutory employment code of practice, published by the EHRC in 2011 and available at: http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf

Equality Act guidance, published by the EHRC in 2011 and available at:
<http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/equality-act-guidance-downloads/>

Statutory guidance on matters to be taken into account in determining questions relating to the definition of disability, published by the Department for Work and Pensions in 2011 and available at: <http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf>.

11. Feedback

CRAE would be very grateful to hear how you have used this guide to promote and protect children's rights; and to receive suggestions for how we might improve this publication in any future editions.

Please contact us at: **equality@crae.org.uk** telling us where you work; how you have used this guide; and the impact this has had on children and young people's lives.

Thank you.



Children's Rights Alliance
for England

94 White Lion Street
London
N1 9PF

T: **020 7278 8222**
E: **info@crae.org.uk**
W: **www.crae.org.uk**

Design and print www.graphicimpressions.co.uk