



# ED&I and Dignity at Work Guidance: Prohibited Conduct

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## 1. Prohibited Conduct under the Equality Act 2010

1.1. The following types of prohibited conduct are detailed the [Equality Act 2010](#):

- Direct discrimination.
- Indirect discrimination.
- Discrimination arising from a disability.
- Harassment related to a protected characteristic.
- Sexual harassment.
- Victimisation.

1.2. No minimum length of continuous employment is necessary for a discrimination claim to be made to an employment tribunal. Protection starts from when a role is advertised through to the last day of employment and beyond to include references.

### Direct Discrimination

1.3. Direct Discrimination occurs when a person is treated less favourably directly as follows:

- **Ordinary direct discrimination**, because of a protected characteristic they possess.
- **Direct discrimination by association**, because of a protected characteristic of someone they are connected to, such as a friend, family member or colleague.
- **Direct discrimination by perception**, because of a protected characteristic they are thought to have, regardless of whether this perception by others is actually correct or not.

1.4. The relevant protected characteristics are: age; disability; gender reassignment (including gender identity and expression); marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex (formerly referred to as gender) and sexual orientation.

- 1.5. Direct discrimination is generally unlawful. However, it may be lawful in the following circumstances:
- Where the protected characteristic is age and the less favourable treatment can be justified as a proportionate means of achieving a legitimate aim.
  - In relation to the protected characteristic of disability, where a disabled person is treated more favourably than a non-disabled person.
  - Where the Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful.
- 1.6. All forms of direct discrimination could involve a decision not to employ someone, to dismiss them, withhold training or promotion, lead to poorer terms and conditions or deny contractual benefits because a protected characteristic.
- 1.7. In general, to decide whether an employer has treated a worker with a protected characteristic “less favourably”, a comparison must be made with how they have treated other workers - or would have treated them in similar circumstances - who do not share that protected characteristic.
- 1.8. If the employer’s treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is likely that the treatment will be less favourable.

### **Indirect Discrimination**

- 1.9. Indirect discrimination is usually less obvious than direct discrimination and can often be unintended.
- 1.10. Indirect discrimination occurs where a provision, criterion, or practice (PCP) is applied equally to a group of staff or job applicants, but has (or will have) the effect of putting those who share a certain protected characteristics at a particular disadvantage when compared to others without the characteristics in the group, and the employer is unable to justify it.

- 1.11. The relevant protected characteristics are: age; disability; gender reassignment (including gender identity and expression); marriage and civil partnership; race; religion or belief; sex (formerly referred to as gender) and sexual orientation.
- 1.12. As such, indirect discrimination applies to all protected characteristics apart from pregnancy and maternity (although, in pregnancy and maternity situations, indirect sex discrimination may apply).
- 1.13. A member of staff or job applicant claiming indirect discrimination must show how they have been, or could be, personally disadvantaged.
- 1.14. To demonstrate indirect discrimination, a comparison between workers with the protected characteristic and those without it is required.
- 1.15. They must also show how the application of the PCP has or might disproportionately disadvantage other staff or job candidates with the same protected characteristic.
- 1.16. The act does not define a PCP. However, in the workplace, the term is most likely to include an employer's policies, procedures, rules and requirements, whether written down or not. Examples might include recruitment selection criteria, contractual benefits, or a redundancy scoring matrix.
- 1.17. In some limited circumstances, indirect discrimination may be justified if it is "a proportionate means of achieving a legitimate aim", in other words "objective justification".
- 1.18. However, it is very unlikely an employer would be able to justify discrimination arising from a disability if the unfavourable treatment could have been prevented by a reasonable adjustment.

### **Discrimination Arising from a Disability**

- 1.19. Under the Equality Act, protection is also provided for disabled persons where:
  - An employer treats the disabled person unfavourably, and;

- This treatment is because of something arising in consequence of the disabled person's disability, for example, a tendency to make spelling mistakes arising from dyslexia, and;
  - The employer cannot show that this treatment is a proportionate means of achieving a legitimate aim.
- 1.20. This applies unless the employer does not know, and could not reasonably be expected to know, that the person has the disability.
- 1.21. Discrimination arising from disability occurs where the disabled person has been treated unfavourably because of something arising in consequence of their disability.
- 1.22. Unlike direct and indirect discrimination, an assessment of the disadvantages experienced by the disabled staff member compared to a non-disabled staff member is not required. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.
- 1.23. At an employment tribunal, a claim of discrimination arising from disability would succeed if the employer was unable to objectively justify the unfavourable treatment on the basis of a valid and non-discriminatory reason,

### **Harassment Related to a Protected Characteristic**

- 1.24. This is defined as “unwanted conduct related to a relevant protected characteristic”, which has the “purpose or effect of violating an individual’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual”.
- 1.25. Harassment takes many form and:
- Includes nicknames, threats, jokes, ‘banter’, gossip, inappropriate questions, excluding staff (for example - ignoring them or not inviting them to meetings), insults or unwanted physical contact.
  - Can be verbal, written or physical.
  - Can be a single incident or persistent behaviour.

- Can be directed towards one or more individuals by one or more people.
- 1.26. The relevant protected characteristics are: age; disability; gender reassignment (including gender identity and expression); race; religion or belief; sex (formerly referred to as gender) and sexual orientation. For pregnancy and maternity, any unfavourable treatment may be considered discrimination. There is no significant evidence that marriage and civil partnership requires protection.
- 1.27. As such, harassment related to a protected characteristic can be:
- **Ageist** - because of, or focusing on age.
  - **Disablist** - because of, or focusing on disability.
  - **Biphobic, or homophobic** - because of, or focusing on sexual orientation.
  - **Racist** - due to a person's race, colour, nationality (including citizenship), ethnicity or ethnic or national origins.
  - **Religion, or other belief based** - because of, or focusing on religious faith or belief.
  - **Sexist** - because of, or focusing on a person's sex.
  - **Transphobic** - because of, or focusing on a person's transgender identity, or expression.

### Sexual Harassment

- 1.28. Sexual harassment occurs when a person engages in unwanted behaviour "of a sexual nature, and the conduct has the purpose or effect of:
- Violating a person's dignity, an/or;
  - Creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.
- 1.29. "Of a sexual nature" can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, inappropriate touching, sexual assault,

sexual jokes, the display of pornographic material, or sending emails with content of a sexual nature.

### Features of Harassment

- 1.30. In relation to harassment, the word “unwanted” means “unwelcome” or “uninvited”. It is not necessary for the individual(s) to say that they object to the behaviour for it to be unwanted.
- 1.31. Harassment is based on the recipient’s perception of the unwanted behaviour rather than that of the harasser, and whether it is reasonable for the recipient to feel that way.
- 1.32. For harassment related to a protected characteristic, it is also not necessary for the individual(s) to have a particular protected characteristic themselves. Instead, they could be associated with someone else who does (discrimination by association), or be wrongly perceived as having a particular protected characteristic (discrimination by perception).
- 1.33. Harassment related to a protected characteristic can also apply to staff who witness harassment because of a protected characteristic and that has a negative impact on their dignity at work or the working environment, irrespective of whether they share the protected characteristics of the employee who is being harassed.
- 1.34. Differences in attitude or culture can mean that what is perceived as harassment by one person may not seem so by another. In such circumstances, the perpetrator may not fully understand the impact of his or her behaviour. The defining feature, however, is that the behaviour is unwanted.
- 1.35. Many forms of behaviour may constitute harassment. Although not intended to be exhaustive, these include:
  - **Threatened or actual physical contact** ranging from touching to serious assault.



- **Verbal and written communication** through lewd, offensive and inappropriate jokes, remarks, “banter”, gossip, slander, insults, threats, emails, use of social media and excluding staff, on the basis of relevant protected characteristics (harassment related to a protected characteristic), of a sexual nature (sexual harassment) or in a wider sense (harassment and, or stalking).
- **Visual displays** of posters, images, graffiti, slogans, obscene gestures, flags, bunting or any other offensive material (which may include inappropriate screensavers, social media and desktop wallpaper).

### Victimisation

1.36. Victimisation occurs when a staff member experiences what the law terms as “detriment”, something that causes disadvantage, damage, harm or loss because of one or more of the following:

- Making an allegation of discrimination.
- Supporting a complaint of discrimination.
- Giving evidence relating to a complaint about discrimination.
- Raising a grievance concerning equality or discrimination.
- Doing anything else for the purposes of (or in connection with) the Equality Act 2010.

1.37. Victimisation may also occur because an employee is suspected of doing one or more of these things.

1.38. A member of staff is protected under the Act if they make, or support, an allegation victimisation in good faith – even if the information of evidence they give proves to be inaccurate. However, an employee is not protected if they give, or support, information or evidence in bad faith – in other words maliciously.

## 2. The Comparative Approach

- 2.1. In general, direct and indirect discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker who does not share the same protected characteristic.
- 2.2. This other person is referred to as a 'comparator'.
- 2.3. In the case of direct discrimination, no comparator is needed in cases of racial segregation, or pregnancy and maternity discrimination.
- 2.4. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances.
- 2.5. It is important to be clear which protected characteristic is relevant. In relation to disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent level of visual impairment. For race, it could be all Africans or only Somalis, for example. For age, it is important to identify the age group that is disadvantaged by the provision, criterion or practice.

## 3. Exemptions and Exceptions: Objective Justification

- 3.1. Objective justification provides a defence for applying a policy that would otherwise be unlawful indirect discrimination. It also provides a defence for using an age-based rule or practice that would otherwise be direct age discrimination.
- 3.2. To rely on the "objective justification" defence, the employer or service provider must show that its policy (or age-based rule) was for a good reason – that is, "a proportionate means of achieving a legitimate aim".
- 3.3. Direct discrimination because of age is the only form of direct discrimination which may be objectively justified.
- 3.4. Indirect discrimination is potentially justifiable for all relevant protected characteristics.

- 3.5. In attempting to demonstrate “a proportionate means of achieving a legitimate aim”, an employer or service provider must show:
- There is a legitimate aim, such as a good business reason, but employers should note that cost alone is unlikely to be considered sufficient, and;
  - The actions are proportionate, appropriate and necessary.
- 3.6. Both points apply in justifying “a proportionate means of achieving a legitimate aim”, not just one of them.
- 3.7. The aim must be a real, objective consideration, and not in itself discriminatory. For example, ensuring the health and safety of others would be a legitimate aim.
- 3.8. If the aim is simply to reduce costs because it is cheaper to discriminate, this will not be legitimate.
- 3.9. Working out whether the means is “proportionate” is a balancing exercise. There must be no alternative measures available that would meet the aim without too much difficulty and would avoid such a discriminatory effect. If proportionate alternative steps could have been taken, the policy (or age-based rule) is unlikely to be justified.
- 3.10. An employer or service provider should consider if there is another way to achieve the same aim which would be less discriminatory. Also, it should be able to show it was fair and reasonable, and looked for a less discriminatory alternative.
- 3.11. The process of determining whether discrimination is justified involves weighing up the employer’s or service provider’s need against the discriminatory effect on the staff with the protected characteristic.
- 3.12. Employers and service providers should scrutinise closely whether any discriminatory act, policy, procedure or rule can really be justified and determine whether there is another way of achieving the same aim which would be less discriminatory.

- 3.13. As such, employers should carefully monitor their policies and practices, otherwise they may inadvertently indirectly discriminate. For example, policies and practices which were not discriminatory when they were first introduced may become discriminatory over time, perhaps because of a change in the composition of the workforce.

#### **4. Exemptions and Exceptions: Occupational Requirements**

- 4.1. In certain and rare circumstances, it may be lawful for an employer to specify that applicants for a job must have a particular protected characteristic under the Equality Act. In law, this approach is known as an “occupational requirement”.
- 4.2. Examples might include specifying a practising Catholic to work as a chaplain in a Catholic chaplaincy, or specifying an actor for a film role needs to be a young woman.
- 4.3. However, it is not enough for an employer to simply decide they would prefer to employ someone who has a particular protected characteristic. The requirement must:
- Be crucial to the post, and not just one of several important factors, and;
  - Relate to the nature of the job, and;
  - Be “a proportionate means of achieving a legitimate aim”. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely that the employer could claim an occupational requirement.
- 4.4. To be a genuine occupational requirement, all three conditions must be met.
- 4.5. An occupational requirement must be reassessed each time the job is advertised, even though it may have been valid for the same post in the past. Circumstances may have changed, meaning the occupational requirement may no longer be applicable.
- 4.6. An employer should think very carefully, and consider seeking specialist legal advice, before claiming an “occupational requirement”, as it can be difficult to justify and will be rare.

- 4.7. Also, a job applicant might challenge an “occupational requirement” which appears unjustified at an employment tribunal.
- 4.8. An occupational requirement can only be used in a defence against claims of direct discrimination (but not for by association or by perception).
- 4.9. An occupational requirement cannot be used in a defence against claims of indirect discrimination, harassment or victimisation.

## **5. Exemptions and Exceptions: Positive Action**

- 5.1. Under the Equality Act, an employer can adopt “positive action” measures to help staff and job applicants it reasonably thinks:
  - Are at a disadvantage because of a protected characteristic, and/or;
  - Have specific needs connected to a protected characteristic, and/or;
  - Are under-represented in the organisation, or whose participation in the organisation is disproportionately low, because of a protected characteristic.
- 5.2. An employer must be able to show evidence that any positive action is reasonably considered and will not discriminate against others. If it can, it may legally:
  - Take proportionate steps to remove any barriers or disadvantages, and/or;
  - Provide support, training and encouragement to increase the participation of people with a particular protected characteristic.
- 5.3. There is no legal requirement for an employer to take - or consider taking - positive action if it does not wish to do so.
- 5.4. In certain circumstances, an employer could use a protected characteristic as a ‘tie-breaker’ when deciding who to recruit or promote. These situations arise where the employer needs evidence to show that staff and/or job applicants with that protected characteristic:
  - Experience disadvantage related to that characteristic in the workplace, or;

- Are disproportionately under-represented in the workforce or the particular job where there is a vacancy.
- 5.5. This does not mean the tying candidates need to have exactly the same qualifications as each other – but it does mean that the employer’s selection assessment on a range of criteria rates them as equally qualified and/or capable of doing the job.
- 5.6. The ‘tie-breaker’ must only be used in considering an individual vacancy and means that in these circumstances it may not be unlawful to select the candidate with the protected characteristic.
- 5.7. However, automatically treating all job applicants who share a protected characteristic more favourably (or guaranteeing them a promotion because of that characteristic) would be discriminatory.
- 5.8. Employers should also be mindful that there can be circumstances where ‘positive action’ can unintentionally unsettle all staff.
- 5.9. It remains good practice - and is sound - to distinguish between candidates based entirely on their qualifications, attributes and ability to do the job, rather than a protected characteristic.

## 6. Bullying

### Definition

- 6.1. Bullying is not specifically defined in law. However, in the “[Bullying and Harassment at Work](#)” guide, ACAS defines bullying as “offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient.”
- 6.2. In this sense, bullying is more open and less specific than harassment as it is not explicitly grounded on protected characteristics.
- 6.3. Bullying incidents may not seem significant when taken in isolation. However, it is important to recognise that there may be a cumulative effect and each incident is in effect building on the last.

## Features of Bullying

6.4. The focus of bullying can take many forms. Although not intended to be exhaustive, bullying can relate to:

- **Clothing and appearance.**
- **Voice and mannerisms.**
- **Behaviours and other mental characteristics.**

6.5. In summary, bullying relates to behaviours which have the intention of hurting another person, or causing distress.

6.6. General bullying can take many forms. Although not intended to be exhaustive, these include:

- **Emotional** - being unfriendly, excluding and tormenting, including hiding possessions, or threatening gestures.
- **Physical** - pushing, kicking, hitting, punching or any use of violence.
- **Cyber** - misuse of email, internet chat rooms, text messaging, telephone calls or associated technologies, including cameras.

6.7. Bullying of subordinates by managers can take many forms. Although not intended to be exhaustive, these include:

- Deliberately imposing grossly excessive or unachievable workloads or impossible deadlines in order to make life difficult for a particular employee.
- Repeated unfair criticism or destructive and negative criticism that focuses on blame rather than future improvement.
- Criticising the individual in front of colleagues.
- Unfairly blocking promotion and/or development opportunities.
- Excessive monitoring of a particular employee's work without good reason.
- Ordering a particular employee to work below his or her level of ability, or to perform mundane or demeaning tasks, for no proper reason.

- Removing an employee's responsibility without consultation and for no proper reason.
- Threatening an employee with dismissal.

## 7. Hate Crime Legislation

- 7.1. The [Scottish Government](#) defines Hate Crime as crime committed against a person or property that is motivated by "malice or ill-will towards an identifiable social group".
- 7.2. It is likely that a recipient experiences hate crime if they believed they have been targeted because of prejudice against an aspect of the recipient's identity.
- 7.3. In Scotland, hate crimes are crimes motivated by prejudice based on:
  - Disability.
  - Race.
  - Religion.
  - Sexual orientation.
  - Transgender identity.
- 7.4. The motivation of the perpetrator is the key factor in defining a hate crime.
- 7.5. Hate Crimes can take a number of forms. Although not intended to be exhaustive, these include:
  - Physical assault.
  - Damage to property, including graffiti, arson, vandalism.
  - Fly tipping or dumping rubbish at someone's door.
  - Putting dangerous materials through a letterbox.
  - Intimidating or threatening behaviour including obscene calls or gestures.
  - Deliberate dog fouling.
  - Offensive literature, including letters, leaflets, posters.



- Verbal abuse or insults including name-calling.
- Online bullying and abuse.
- Emotional, psychological and financial abuse including threats, blackmail and extortion.
- Murder.

## 8. Racially-Aggravated Harassment

8.1. [The Criminal Law \(Consolidation\) \(Scotland\) Act 1995](#) defines racially-aggravated harassment as being where a person pursues a racially-aggravated course of conduct which amounts to harassment of a person and:

- Is intended to amount to harassment of that person, or;
- Occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person, or;
- Acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.

8.2. A course of conduct or an action is racially aggravated if:

- Immediately before, during or immediately after carrying out the course of conduct or action the offender demonstrates malice, or ill-will towards the person affected based on that person's membership (or presumed membership, or association) of a racial group, or;
- The course of conduct or action is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.

8.3. On conviction the guilty person may be liable to a statutory fine, imprisonment for up to 6 months, or both.

## 9. Wider Harassment, including Stalking

- 9.1. In a wider sense, harassment is used to cover the “causing alarm or distress” offence, under section 2, and “putting people in fear of violence” offences, under section 4 of the [Protection from Harassment Act 1997](#) (PHA 1997).
- 9.2. Although harassment is not specifically defined in the PHA 1997, it can include repeated attempts to impose unwanted communications and contact upon an individual in a manner that could be expected to cause distress or fear in any reasonable person.
- 9.3. Harassment of an individual can also occur when a person is harassing others connected with the targeted individual, knowing that this behaviour will affect their target as well as the other people that the person is directing their actions towards. This is known as “stalking by proxy”. Family members, friends and employees of the recipient may be subjected to this.
- 9.4. The [Protection of Freedoms Act 2012](#) created two new offences of stalking by inserting new sections 2a and 4A into the PHA 1997. Whilst there is no strict legal definition of stalking, section 2A (3) of the PHA 1997 sets out examples of acts which, in particular circumstances, are associated with stalking. Examples include following a person, watching or spying on them or forcing contact with the individual through any means, including social media.
- 9.5. The effect of such behaviour is to curtail a target’s freedom, leaving them feeling that they constantly have to be careful.

## 10. Consequences

- 10.1. Regardless of the outcome of College investigations, civil or criminal action may be brought by members of staff.
- 10.2. Serious incidents could result in civil offences under the:
  - [Equality Act 2010](#).
  - [Health & Safety at Work Act 1974](#).
  - [Human Rights Act 1998](#).

- [Protection from Harassment Act 1997](#).

10.3. Serious incidents could result in criminal offences, including:

- Racially-aggravated harassment under [The Criminal Law \(Consolidation\) \(Scotland\) Act 1995](#).
- Offences under [Hate Crime Legislation](#).

10.4. People who are subjected to bullying, harassment, victimisation or discrimination may lose their confidence, their self-esteem and are at an increased risk of suffering stress.

10.5. The effects can take many forms and can, in serious cases result in self-harm or people attempting to take their own lives. Although not intended to be exhaustive, the effects include:

- **Physiological Problems**, including sleep loss, nausea, loss of appetite, skin disorders, headaches, or shaking.
- **Psychological Problems**, including anxiety, tearfulness, depression, or panic attacks. Serious incidents can result in self-harm, or people attempting to take their own lives.
- **Behavioural Problems**, including aggression, irritability, or becoming withdrawn.

10.6. Bullying, harassment, victimisation or discrimination also violate the College values and expected behaviours, having a significant impact on the organisation as a whole. Staff working in a climate of fear and resentment cannot perform to the best of their ability. The College could also be at risk from potential damage to its reputation, as an employer of choice and place of study.

## 11. Sources

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