# The Equality Act

# Further and Higher Education Technical Guidance

# post-consultation report



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## The Equality Act 2010

The Equality Act 2010 (the Act) brings together discrimination law introduced over four decades through legislation and regulations. It replaces most of the previous discrimination legislation, which is now repealed, and applies to England, Scotland and Wales. The Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

An important purpose of the Act is to create a single approach to discrimination against people with different protected characteristics, where this is appropriate. However, there are some important differences in the way that discrimination is defined, particularly for disability.

The Act has also brought in provisions to strengthen the law by making discrimination unlawful in circumstances not covered under previous discrimination law. Broadly speaking, discrimination in most areas of activity against people with protected characteristics, as described in the Act, is now unlawful. These areas of activity include, for example, employment, education, housing, and the provision of services and the exercise of public functions. An organisation may have duties under more than one area of the Act, for example if it employs people and provides services to customers.

## Codes of Practice and Technical Guidance

The Commission has produced Codes of Practice on Employment, Equal Pay, and Services, Public Functions and Associations (tranche 1 Codes), and these Codes came into force on 6 April 2011.

The Commission is continuing to develop a range of guidance based on the Equality Act 2010 to support our stakeholders, and make it easier for them to make informed decisions about the Act. A key element of this guidance is the suite of statutory Codes of Practice, which explain the statutory provisions of the Equality Act 2010.

We had originally planned to produce statutory Codes of Practice on the Public Sector Equality Duty (PSED), which came into force on 5 April 2011, and for statutory Codes of Practice for Schools and the Further and Higher Education (FEHE) sector. In the light of the Government's position not to lay Codes before Parliament, the Commission has decided for now to produce the original text of these Codes as Technical Guidance.

Technical Guidance is a non-statutory version of a Code, however it will still provide a formal, authoritative, and comprehensive legal interpretation of the PSED and education sections of the Act. It will also clarify the requirements of the legislation.

Our Technical Guidance will complement our existing suite of Codes of Practice and non-statutory guidance.

The Further and Higher Education Code underwent a full consultation in 2011 with a view to its coming into force in September 2011. Our intention now is to publish the post-consultation version as Technical Guidance. As with the Act, the Technical Guidance applies to England, Scotland and Wales.

The Commission has already produced practical guidance for FE/HE providers which is available on our website: <http://www.equalityhumanrights.com/advice-and-guidance/further-and-higher-education-providers-guidance/>

The Technical Guidance is a crucial component of the preventative framework and, together with the practical guidance for providers and users produced by the Commission, will:

* help those who have duties under the Equality Act to understand their responsibilities and how to avoid disputes
* help parents, students and prospective students to understand the law and what they can do if they believe they have been discriminated against because of a protected characteristic
* help lawyers and other advisers to advise their clients
* ensure that anyone who is considering bringing legal proceedings under the Equality Act 2010 understands the legislation and is aware of good practice in further and higher education.

### What is the status of Technical Guidance?

The Commission is issuing non-statutory Further and Higher Education Technical Guidance o the basis of its powers under the Equality Act 2006. The Technical Guidance does not impose legal obligations, and is not an authoritative statement of the law; only the tribunals and the courts can provide such authority. The Guidance may be used, however, as evidence in legal proceedings. Although there would be no obligation for courts or tribunals to take the Technical Guidance into account, the previous experience with courts using the Commission’s ‘Making Fair Financial Decisions’ guidance, suggests that the legal profession will look to the Commission as an authoritative source of guidance. In addition, if those who have duties under the Act's provisions follow the Technical Guidance, it may help to avoid an adverse decision by a tribunal or court in such proceedings.

## Consultation methodology

Where the Commission decides to exercise its powers and to issue a Code of Practice in respect of specified areas of discrimination legislation, the Equality Act 2006 requires that we publish and consult on our proposals. As the decision to publish this document as Technical Guidance was taken after the consultation process on the Further and Higher Education Code had been completed, we have followed and completed the required consultation procedure for Codes of Practice.

We have also adhered to consultation criteria included in the Government's Code of Practice on Consultation.[[1]](#footnote-1)

To meet our responsibilities under the Equality Act 2006 and Code of Practice on Consultation, our methodology incorporated the following elements:

* Incorporation into the consultation draft of feedback on Tranche 1 Codes from stakeholders.
* Engagement with government departments at pre-consultation stage on content, including core concepts, from Tranche 1 Codes.
* Publication of the draft Code for consultation, and notification sent to stakeholders via a range of media.
* Allowed 12 weeks for participants to respond, ensuring that they had scope to influence the final drafts.
* Provided a questionnaire to minimise the burden on consultees.
* Advertised the consultation on our website, e-bulletins and at stakeholder events and via their membership networks.
* Encouraged participants to engage informally throughout the consultation period, assisting them with queries and concerns as they drafted their submissions.
* Facilitated access of specialist stakeholders to the consultation process through expert roundtables.
* Analysed responses carefully, taking submissions into account in the redrafting phase.

We consider that as we have produced reports for the consultation on our existing Codes of Practice, it is entirely appropriate to produce this report, thereby honouring our commitment to provide feedback to participants following the consultation.

## Statutory consultation

The draft Code (now Technical Guidance) was published for a three month consultation period from October 2010 to January 2011.

Our Codes and Guidance have been drafted to reflect the needs, expectations and language of the people who are going to use them. In line with this, the FE/HE public consultation was regarded as an essential part of the drafting process; allowing us to take on board the comments, concerns and recommendations of a diverse group of expert and specialist stakeholders thereby ensuring that the final product is as useful and informative as possible.

The consultation documents were based on the version of the Equality Act which had received Royal Assent in April 2010, the bulk of which came into force in October 2010. Some aspects of the Act came into force after this date – such as the Public Sector Duty on FE/HE institutions – in April 2011.

## Stakeholder participation

We received 25 written responses from individuals, HEIs and sector organisations. See Appendix 1 for details of respondents.

We hosted a roundtable review meeting with key stakeholders including Department for Business, Innovation and Skills, Equality Challenge Unit, Higher Education Funding Council for England, Higher Education Equal Opportunities Network, Skills Funding Agency, Ofsted, Young People’s Learning Agency, Russell Group, and higher education practitioners.

A separate consultation event was held in Scotland in November 2010. See Appendix 2 for details of respondents.

## Post-consultation revisions to the Technical Guidance

## External stakeholder concerns – generic issues

In general, feedback was very positive with many of the respondents commenting positively on the detail and clarity.

### Content

A number of respondents called for employment matters as well as education provision to be covered.

**In planning delivery of Codes and Guidance, the decision had been taken at the outset, to cover Equality Act employment law within one separate Code and to signpost to it from others as appropriate*.***

### Structure

Almost all stakeholders were positive about the structure and only one suggested change based around the lifecycle of the student.

**This was rejected.**

### Clarity

Some picked up inconsistencies in the legal terminology used and a small number felt more work could be done on definitions and core concepts, providing suggested text for inclusion.

**Sections that respondents felt were unclear have been rewritten. Core concepts text had been aligned with agreed definitions as set out in tranche 1 Codes and therefore only limited changes were made to definitions and terminology and only if they provided contextual clarity for the Further and Higher Education Sector and ensured consistency.**

A number of respondents also wanted specific reference to case law, and particularly to seminal judgments.

**In the interests of brevity, (and reflecting the approach taken in relation to tranche 1 Codes) it was decided not to include express references to case law, although several of the examples have been based on seminal judgments.**

### Legal requirements and good practice

Almost all stakeholders welcomed the inclusion of good practice. Some respondents wanted a clearer distinction between what was a legal requirement and what was good practice. Government departments were clear that best practice was better placed in the accompanying non-statutory guidance.

**To deal with these different perspectives, we have added and extended a number of examples of discrimination to include what could have happened to meet the requirement. Where examples of good practice are used (eg in the positive action chapter to show the difference between legal positive action and good practice) this is clearly labelled to distinguish it from text that sets out required behaviour to ensure legal compliance.**

1. **Specific legal provisions.**

There were a number of requests for more clarity on specific legal requirements.

**Where possible this has been done, but some requests were for definitive interpretations where none exist and where we felt that it was up to the courts to decide**.

Specific issued raised included:

* Clarity on whether it is legitimate to charge overseas students higher fees.

**DfE helpfully advised on the HE legislation that underpins different fee arrangements for home and overseas students. HE providers are aware of who must be recorded as home and overseas students for HEFCE funding purposes. Nothing in the Equality Act changes the position and makes different fees unlawful. This advice has informed the changes made.**

* Clarity on duties faced by 6th form colleges and private training providers.

**These have been set out more clearly with signposting to the services Code in the case of private training providers.**

* Interface between religion and belief, freedom of speech on campus, and content of the curriculum.

**We recognise that these are very live issues for providers and have set out more clearly the Equality Act requirements on these matters.**

* Competence standards.
* Relationship between disability/reasonable adjustments requirements and competence standards.

**We have set out clearly that the duty of FE and HE institutions to make reasonable adjustments for disabled students does not apply to a provision, criterion or practice that constitutes a competence standard.**

* + For indirect discrimination, including in the list of potential legitimate aims for objective justification of provisions, criteria or practices,the setting or maintaining of academic standards.

 **This has been done.**

* Clarifying the legal position in relation to conferring qualifications on students with other protected characteristics where disabled students not at the institution are covered by EA provisions.

**We have been clear that although the HE and FE provisions of the Act only refer to non-students with the protected characteristic of disability, educational institutions conferring qualifications on people who are not their students would be prohibited by the provisions relating to goods and services from discriminating in relation to any of the other protected characteristics. DfE has indicated that it will not be making an amendment to this provision because any proposed amendment would need to be either consequential, incidental, supplementary, transitional, transitory or saving in order for them to amend via regulations and they do not think such an amendment would fall into that category.**

* More clarity on charging for reasonable adjustments.

**The guidance is clear that providers cannot charge for reasonable adjustments.**

* Positive action – more clarity, and use of the terminology of ‘targets’ rather than quotas, as well as separating out the difference between good practice and specific positive action provisions.

**We have made some major revisions to this chapter to address these points.**

* Clarification of status of students unions and clubs run by them as Part 3 responsibilities falling directly on students unions as service providers and not Part 6 responsibilities of institutions, with examples amended to reflect this.

**This has been made clear and examples replaced where necessary.**

* Competitive sport provisions need inserting.

**The two types of exceptions that apply in relation to a competitive sport, game or other competitive activity have now been included.**

* More on justifiable direct discrimination because of age.

**An additional section and example has been added to cover this area of law and its application to further and higher education.**

* Several respondents requested more references to the public sector equality duty (PSED).

**We have included more references, but separate PSED Technical Guidance will be available early in 2013 and this is intended to be the main comprehensive source of legal guidance for education providers.**

1. **Examples**

The majority of respondents welcomed the inclusion of examples, requested more, and helpfully suggested revisions and additional examples across all protected characteristics.

Some examples were criticised as unrealistic and for portraying unlawful discriminatory acts and behaviours that would not occur because providers were already aware of their legal responsibilities to students.

A small number of examples based around stereotyping of protected characteristics were similarly criticised because of their use, albeit to exemplify discrimination, of unacceptable stereotypes.

A number of respondents identified the need for consistency of legal terminology across examples.

**A comprehensive review of all examples was conducted and a number were added, some amended or replaced and certain examples were deleted. Legal terminology has been aligned across all examples.**

1. **More recent changes**

Recent case law has addressed cost being used as a justification for discrimination (where it is permissible to justify ie indirect, discrimination arising).

**The text has been amended to clarify that while cost alone cannot be used as a justification, cost plus some other factor could be used.**

## Appendix 1 Respondents

|  |
| --- |
| Abertay University of Dundee |
| Association of Colleges |
| Association of School and College Leaders |
| Department for Business, Innovation and Skills |
| Cardiff University |
| Catholic Education Service |
| Close the Gap Scotland |
| Equality Challenge Unit |
| Edinburgh University |
| University of Glasgow |
| Harper Adams University College |
| Higher Education Funding Council for England |
| Katya Hosking of Cardiff University  |
| Jenny White |
| John Wheatley College |
| Motherwell College |
| NASUWT |
| NIACE |
| Scottish Council of Jewish Communities |
| Scotland’s Colleges |
| SKILL |
| Supporting Professionalism in Admissions |
| Weston College North Somerset |
| Young People’s Learning Agency |
| University of St Andrews |

**Appendix 2 Attendees at Scotland consultation roundtable**

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| Banff and Buchan College  |
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| Scottish Funding Council |
| Glasgow Caledonian University |
| University of Glasgow |
| Dundee University |
| West Lothian College |
| James Watt College |
|  |
| Scottish Funding Council |
| Edinburgh University |
| Skill Scotland: National Bureau for Students with Disabilities |
| Queen Margaret University  |
| Disability Service, University of Glasgow |
| Govan Law Centre |
| Adam Smith College |
| University of Edinburgh Disability Office |
| Disability Service, Glasgow Caledonian University |
| Queen Margaret University  |
| Disability Office, University of Edinburgh  |
| Scotland’s Colleges |
| Scottish Funding Council |
|  |
| Motherwell College |
| Stevenson College, Edinburgh |

## Contacts

**www.equalityhumanrights.com**

The Commission’s publications are available to download on our website: **www.equalityhumanrights.com**. If you are an organisation and would like to discuss the option of accessing a publication in an alternative format or language please contact engagementdesk@equalityhumanrights.com. If you are an individual please contact the Equality Advisory and Support Service (EASS) using the contact methods below.

**Equality Advisory and Support Service (EASS)**

The Equality Advisory Support Service has replaced the Equality and Human Rights Commission Helpline. It gives free advice, information and guidance to individuals on equality, discrimination and human rights issues.

Telephone: 0800 444 205
Textphone: 0800 444 206

**Opening hours:**

09:00 to 20:00 Monday to Friday
10:00 to 14:00 Saturday

**Website:** www.equalityadvisoryservice.com

**Post:** FREEPOST Equality Advisory Support Service FPN4431

1. HM Government Code of Practice on Consultation 2008 http://www.berr.gov.uk/files/file47158.pdf [↑](#footnote-ref-1)