Good Practice in Action 108
Legal Resource

Equality, diversity and inclusion (EDI) in the counselling professions

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Context

This resource is one of a suite prepared by BACP to enable members to engage with the current BACP *Ethical Framework for the Counselling Professions* and the Equality Act 2010 in respect of equality, diversity and inclusion.

Using the Legal Resources

BACP's *Ethical Framework* (BACP 2018) requires members to '...take the law concerning equality, diversity and inclusion into careful consideration and strive for a higher standard than the legal minimum' (Good Practice, point 23).

The membership agreement with BACP establishes a contractual commitment by members to abide by the *Ethical Framework* for the Counselling Professions, which includes a responsibility for members to keep the skills and knowledge relevant to their work up to date.

The Legal Resources cannot constitute legal advice or guidance in specific cases, nor are they sufficient on their own to resolve legal issues arising in practice. The Legal Resources do not give a full statement of the law. They are solely intended to support good practice by offering general information on legal principles and policy applicable at the time of writing. The Legal Resources are intended for information purposes only and are not a substitute for professional advice. BACP and the author accept no responsibility for and accept no liability as a result of any person acting or refraining from acting on the basis of the Legal Resources.

Practice issues and dilemmas are often complex, and may vary depending on clients, particular models of working, the context of the work and the therapeutic interventions provided. We therefore strongly recommend consulting your supervisor, and also, wherever necessary, a suitably qualified practitioner or lawyer. Some professional insurers will provide legal advice as part of their service.

BACP and the author make no representation or warranty as to the completeness or accuracy of the information contained in the Legal Resources. References in this resource were up to date at the time of writing but there may be changes in particular to the law, government departments, government policies and guidance, websites and web addresses. Organisations and agencies may also change their practice or policies, so please be alert for any changes that may affect your therapy practice.

In this resource, the terms 'practitioner' and 'counselling related services' are used generically in a wider sense, to include the practice of counselling, psychotherapy, coaching and pastoral care.

1 Introduction

In our society everyone has the right to be treated fairly, with dignity and respect. The moral case for striving for a fairer and more inclusive society is clear; we all deserve the opportunity to make the most of our lives regardless of our identity or background. There is also a strong business case to be made for promoting equality, diversity and inclusion as being vital for the sustainability of our profession and practice. By embracing diversity of thoughts, ideas, experiences and identities, BACP members can improve decision-making, enable people to reach their full potential and better meet the needs of a diverse client base.

The importance of appreciating diversity and challenging intolerance within the counselling professions is recognised in BACP's *Ethical Framework*. BACP members must endeavour to demonstrate equality, value diversity and ensure inclusion, and must avoid unfairly discriminating against clients or colleagues.

In the UK, there is a long tradition of upholding people's rights to equal treatment through legislation, making it unlawful to discriminate against someone on the grounds of a particular characteristic such as their sex or race. In England, Scotland and Wales, these protections are now primarily contained in one piece of legislation – the Equality Act 2010. The Equality Act includes sections preventing unlawful discrimination: in the provision of goods and services; in relation to premises; in the employment and education contexts; and in relation to public functions and associations. There are also specific duties and provisions relating to public authorities.

This resource gives an overview of the Equality Act in the employment context and in relation to the provision of services. It focuses on how the law is likely to apply to BACP members, from practitioners at all levels of training and modality to organisational members and members providing training or accredited courses. It also goes beyond the legislation to provide good practice recommendations and tips for implementing a successful diversity and inclusion strategy throughout all aspects of your practice.

Information and guidance on other aspects of the Equality Act not covered in this resource can be found on the website of the Equality and Human Rights Commission (see over).

The Equality Act 2010 does not apply in Northern Ireland. Instead Northern Ireland has its own equality and anti-discrimination law, which is contained in several pieces of legislation. Northern Ireland also has its own laws on flexible working and family leave and pay. This resource does not cover the law of Northern Ireland. If you work in Northern Ireland and want to find out more about local equality law, the website of the Equality Commission for Northern Ireland (www.equalityni.org) offers guidance and training for employers. You may still find it useful to read section 8 of this resource 'Practical steps and good practice recommendations'.

2 The Equality and Human Rights Commission

The Equality and Human Rights Commission (EHRC) is the national equality body for England, Scotland and Wales. The EHRC does not cover Northern Ireland, where the Equality Commission for Northern Ireland performs a similar function (www.equalityni.org/WhatWeDo).

The EHRC is a statutory non-departmental public body, independent from Government, which was established by the Equality Act 2006. The EHRC replaced the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission, taking over their functions in respect of sex, race and disability discrimination.

The EHRC's statutory duties include: promoting understanding of the importance of equality and diversity; encouraging good practice in relation to equality and diversity; enforcing the Equality Act; and promoting awareness and understanding of rights under the Equality Act. It has the power to conduct inquiries and it can carry out investigations into specific allegations of unlawful discrimination or harassment. The EHRC has a number of enforcement powers including the ability to: serve a notice specifying an action plan to address issues uncovered in an investigation; enter into a binding agreement with an organisation not to commit an unlawful act; apply to a county court for an injunction to stop someone committing an unlawful act; and assist and intervene in legal proceedings which relate to the Equality Act.

The EHRC publishes advice and guidance for individuals, private organisations and the public sector. These are available on the EHRC's website (www.equalityhumanrights.com/en/advice-and-guidance) and include detailed advice notes for service providers and employers. As well as guidance, the EHRC has the power to issue codes of practice to ensure compliance with the Equality Act and to promote equality of opportunity more generally (Codes of Practice | EHRC).

The Codes of Practice are important as courts and tribunals must take them into account when deciding claims under the Equality Act. You should familiarise yourself with the Code(s) of Practice that is (are) relevant to the work that you carry out.

3 The Equality Act

3.1 The protected characteristics

The Equality Act protects against discrimination or harassment on grounds of any of the so-called 'protected characteristics'. The protected characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

People can be subject to discriminatory treatment because of a combination of protected characteristics, for example, a black woman who is treated less favourably than a white man. When the Equality Act was introduced, it contained a new type of claim known as combined (or dual) discrimination, but this section of the Equality Act has never been brought into force and there are no plans to do so in the near future. This does not mean that someone cannot bring a discrimination claim concerning two or more protected characteristics; it just means that a court or tribunal will consider each allegation as separate types of discrimination claims.

It is worth considering each of the protected characteristics in a little more detail, as the definitions in the Equality Act may differ from the way in which these terms are used in everyday life.

The protected characteristic of 'age' includes reference to a particular age or an age group. For example, a protected age group could be expressed as '18-year-olds' or 'over-60s'.

To fall within the definition of 'disability' in the Equality Act, a person must have a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. There is no need to prove that there is a medically diagnosed cause for the impairment – it is the effect that the impairment has on them that is important for these purposes.

The Equality Act says that an adverse effect will be substantial if it is 'more than minor or trivial' and will be long term if it has lasted (or is likely to last) for at least 12 months. You should be aware that certain conditions are deemed to be disabilities under the Equality Act, meaning there is no need to satisfy this test. These include: cancer, HIV, multiple sclerosis, blindness and sight impairment, and severe disfigurements (with the exception of tattoos and piercings).

The Equality Act also lists other conditions, which are expressly excluded from being a disability for these purposes including: substance addiction or dependency, tendency to set fires, tendency to steal, tendency to physical or sexual abuse of other persons, exhibitionism and voyeurism. You should note, however, that impairments caused by these excluded conditions might still amount to protected disabilities in their own right. For example, liver disease will still count as a disability even if it was brought on by alcohol dependency.

The Equality Act says that the protected characteristic of 'sex' refers to a 'man' or a 'woman'. In 2025, a Supreme Court decision (For Women Scotland Ltd v Scottish Ministers [2025] UKSC 16) confirmed that the words 'sex', 'man' and 'woman' in the Equality Act refer to 'biological sex'. Although the Supreme Court did not define what is meant by 'biological sex', the judgment suggests that it refers to the sex a person was assigned on their original birth certificate. If a person subsequently obtains a Gender Recognition Certificate (GRC) in order to be legally recognised in their affirmed gender, this does not change their 'sex' for the purposes of the Equality Act. It is important to recognise that, in this context, sex does not include sexual orientation or gender reassignment, which are protected under different sections of the Equality Act.

'Sexual orientation' refers to a person's sexual orientation towards persons of the same sex, opposite sex or either sex. This means that the protected characteristic covers gay men, lesbians, bisexuals and heterosexuals but does not include sexual practices or preferences for particular types of sexual activity (for example, sadomasochism or bestiality), and would not appear to cover celibacy.

A person has the protected characteristic of 'gender reassignment' under the Equality Act if they are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex. The Equality Act requires them to have at least proposed to undergo gender reassignment but does not require the proposal to be irrevocable. This means that someone who starts the process but then decides to stop will still have the protected characteristic.

Under the previous law (the Sex Discrimination Act 1975), a person had to be under medical supervision in order to be protected under the gender reassignment provisions. This is no longer the case as the Equality Act defines gender reassignment as a personal rather than a medical process. Therefore, someone who was born physically female and chooses to spend his life as a man without seeking medical advice will have the protected characteristic of gender reassignment under the Equality Act. In a 2020 case, an Employment Tribunal held that someone who is gender fluid or non-binary will be covered by the gender reassignment provisions in the Equality Act (Taylor v Jaguar Land Rover Ltd, ET/1304471/18). As can be seen, the 'gender reassignment' protected characteristic extends to a wider class of persons than those who have undergone medical gender reassignment or who have been granted a GRC. For this reason, it is generally felt that 'trans' is the preferred umbrella term (see the Women and Equalities Select Committee report into Transgender Equality published in January 2016, https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf).

The Gender Recognition Act 2004 gives trans people who are 18 years or over the right to apply for a GRC. A person who holds a GRC is treated according to their acquired gender for certain legal purposes such as on birth, marriage and adoption certificates. It is not possible to obtain a GRC which recognises a gender status other than male or female. In the 2025 case of R (Castellucci) v Gender Recognition Panel [2025] EWCA Civ 167, the Court of Appeal confirmed that an individual's non-binary gender status could not be recognised in an application for a GRC, even though it had been legally recognised abroad.

It is important to recognise that the Gender Recognition Act is separate from the Equality Act and there is no requirement for a person to hold a GRC in order to be protected from discrimination, harassment and victimisation under the Equality Act.

BACP's *Ethical Framework* requires members to challenge assumptions that any sexual orientation or gender identity is inherently preferable to any other and, when providing counselling services, members should respect clients as people and must not attempt to bring about a change of sexual orientation or gender identity or seek to suppress an individual's expression of sexual orientation or gender identity. (See *Ethical Framework*, Good Practice, point 22e for more information.)

'Marriage and civil partnership' covers any formal union which is legally recognised in the UK. People in relationships outside of marriage or civil partnerships do not have this protected characteristic (even if they are cohabiting), nor do divorcees or people whose civil partnerships have been dissolved.

The position in relation to people who are engaged is less clear. The explanatory notes to the Equality Act say that a person who is engaged or who intends to marry does not have the protected characteristic of marriage. The EHRC Employment Statutory Code of Practice also states that people who intend to marry or form a civil partnership are not protected. However, an employment tribunal upheld a claim of discrimination on grounds of marriage in a case involving an employee who was dismissed because of her impending marriage to her boss's son (Turner v Turner, ET/ 2401702/04). In that case, the tribunal felt that it was necessary to interpret the statutory provisions in order to uphold the claimant's right to marry under Article 12 of the European Convention on Human Rights. The fact that the claimant in this case had a very short engagement and that a definite date had been fixed for the marriage were both significant and a court or tribunal could arrive at a different result in another case involving different circumstances.

In employment cases, 'pregnancy and maternity' discrimination occurs where an employer treats a woman unfavourably during the so-called 'protected period' because of her pregnancy or because of an illness she suffers as a result of her pregnancy.

The protected period starts when her pregnancy begins and ends at the end of their maternity leave period (or, if they do not have the right to maternity leave, at the end of the period two weeks after the end of their pregnancy). This means that the protected period will be different for different employees as the duration depends on the person's maternity leave entitlements. Since 6 April 2024, an additional protected period of 18 months from the first day after the birth, or the first day of the expected week of childbirth, will apply if a redundancy situation arises – see section 5.2 below (Maternity leave and pay).

An employer will also commit pregnancy and maternity discrimination if they treat an employee unfavourably because they are on maternity leave.

In goods and services cases, pregnancy and maternity discrimination occur if an employee is treated unfavourably because: they are pregnant (or because of a previous pregnancy); they have given birth; or they are breastfeeding. Treating an employee unfavourably means placing a hurdle in front of them, creating a particular difficulty for them, or disadvantaging them.

The definition of 'race' in the Equality Act includes colour, nationality and ethnic or national origins.

A person may fall into more than one racial group, for example, 'Black Britons' encompasses people who are both black and who are British citizens and 'South Asians' could include Indians, Pakistanis, Bangladeshis and Sri Lankans. Racial groups can also be defined by exclusion, for example, people of 'non-British' nationality could be considered a single racial group for the purposes of the Equality Act.

A 'religion' is any religion and includes a reference to a lack of religion. This is a broad definition, in keeping with Article 9 of the European Convention on Human Rights (the right to freedom of thought, conscience and religion). The main limitation on what constitutes a religion is that it must have a clear structure and belief system. A 'belief' means any religious or philosophical belief and, as above, includes a reference to a lack of belief. In order for a belief to be protected under the Equality Act, the belief in question must: be genuinely held; be a belief in 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, not be incompatible with human dignity and not conflict with the fundamental rights of others. Beliefs which have been found to meet these criteria include a belief in climate change, a belief in the sanctity of life extending to a fervent anti-fox hunting and anti-hare coursing belief, gender critical beliefs (including a belief that sex is immutable and should not be conflated with gender identity), a belief in ethical veganism, and a belief that it is wrong to lie under any circumstances.

3.2 Types of discrimination

The Equality Act sets out various types of discrimination and other unlawful conduct including: direct discrimination, indirect discrimination, harassment, and victimisation. Some of these only apply in relation to certain of the protected characteristics (see below).

In the following sections, 'A' refers to the party that is subject to the duties and obligations under the Equality Act (i.e. the employer or the service provider) and 'B' refers to the other party (i.e. the worker or service user).

3.3 Direct discrimination

Direct discrimination occurs where A treats B less favourably than A treats (or would treat) others because of a protected characteristic. The protected characteristic does not need to be the sole or main reason for A's actions; it just needs to have had a significant influence on the outcome.

It is not sufficient to show that B has been treated differently because of a protected characteristic; the treatment in question must also be less favourable. If the treatment puts B at a clear disadvantage compared with others, then it is likely that the treatment will be less favourable. In the workplace, less favourable treatment could mean being deprived of a choice or excluded from opportunity. Less favourable treatment in connection with the provision of goods and services could relate to the quality of the service being offered or the comparatively poor manner in which it is offered, or the absence of provision e.g. no therapy for someone who chooses not to be vaccinated.

In most cases, B will also be protected if the less favourable treatment is because of B's association with someone who has a protected characteristic, as opposed to B's own protected characteristic. For example, an employee who is not disabled could bring a direct disability discrimination claim against their employer if they were treated less favourably because they have a child with a disability.

The only exception to this is marriage and civil partnership when the discrimination must be because B is married or a civil partner.

Someone who is wrongly perceived to have a protected characteristic (other than marriage or civil partnership) will also be protected against less favourable treatment based on that incorrect belief. For example, a person who is Asian could bring a direct religious discrimination claim if they are treated less favourably because of a mistaken belief that they are Muslim.

In most cases, B must identify someone else (real or hypothetical) to compare themselves against. There are two exceptions to this requirement: for claims of direct pregnancy or maternity discrimination and claims of racial segregation.

Except in the case of age discrimination, direct discrimination cannot be objectively justified (see 'objective justification').

3.4 Indirect discrimination

Indirect discrimination occurs where A applies a provision, criterion or practice (a 'PCP') which is not intended to treat anyone less favourably but which, in practice, has the effect of disadvantaging a group of people with a protected characteristic. Where a PCP disadvantages (or would disadvantage) someone with that protected characteristic, it will amount to indirect discrimination unless it can be objectively justified (see 'objective justification').

The concept of a PCP is broad and can cover a variety of things including recruitment criteria for a role, formal employment policies, informal practices or pre-requisites for a service. A common example of indirect discrimination in the employment context is a requirement for all employees to work full time. Since women often bear greater childcare responsibilities than men, a requirement to work full time may be indirectly discriminatory towards a female employee with childcare responsibilities unless the employer can objectively justify the need for a full-time worker to do the job.

Following changes to the Equality Act which came into effect on 1 January 2024, someone who does not have the protected characteristic can still bring an indirect discrimination claim if they are disadvantaged in substantively the same way as the disadvantaged group. For example, a man who is disadvantaged at work because of his childcare responsibilities could bring a sex discrimination claim if the disadvantage is substantively the same as a woman would suffer in the same situation.

3.5 Harassment

The Equality Act covers three types of harassment.

In this resource, we focus on the first type which is sometimes referred to as the 'general' definition of harassment.

It says that A harasses B if A engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of either violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Harassment on grounds of marriage and civil partnership or on the basis of pregnancy and maternity does not fall within the general definition of harassment. However, harassment because of these protected characteristics could still give rise to claims of harassment on grounds of sex and/or sexual orientation.

There are some further exceptions to the protection from harassment depending on which part of the Equality Act applies. For example, Part 3 of the Equality Act (which relates to the provision of services) excludes harassment on grounds of religion or belief, sexual orientation or age (where a claimant is under 18 years), which are discussed further in 'Discrimination in the provision of services'. It is outside the scope of this resource to list all of these exemptions.

As with direct discrimination, the Equality Act protects people from harassment based on someone else's protected characteristic or based on the perception that the person has a protected characteristic that they do not, in fact, possess.

A one-off incident can constitute harassment and there is no requirement for B to make A aware that the conduct is unwanted. The fact that someone has put up with harassing conduct for months, or even years, does not necessarily mean that it is not unwanted.

In one case, the Employment Appeal Tribunal found that waitresses who had been made to wear short skirts and had been subjected to talk of a sexual nature by their boss had been unlawfully harassed, even though they had put up with the behaviour for several years and notwithstanding the fact that some of the conversations had been initiated by the women (Munchkins Restaurant Ltd and another v Karmazyn and others UKEAT/0359/09).

The question of whether conduct has the required effect for a harassment claim is assessed subjectively so B's perception can be taken into account, as well as other circumstances of the case. However, conduct will only amount to harassment if, in all the circumstances, it is reasonable for the conduct to have that effect on B.

The court or employment tribunal will decide what was or was not reasonable in a particular case and conduct may still amount to harassment even if no offence was intended or if the conduct was part of a general culture of jibing and teasing.

Employers and service providers can be vicariously liable for harassment by their employees against colleagues or service users (see 'Who is liable for breaches of the Equality Act?').

As noted above, the Equality Act covers three types of harassment. As well as the general definition of harassment discussed above, the following types of harassment are also explicitly prohibited:

- sexual harassment; and
- less favourable treatment because an employee rejects or submits to unwanted conduct of a sexual nature or that is related to gender reassignment or sex.

Since 26 October 2024, employers have been under a duty to take reasonable steps to prevent sexual harassment of their employees in the course of their employment. If an employer fails in this duty, an employment tribunal can increase an award of compensation by up to 25% (see section 4.4 – Compensation and Remedies). The EHRC has published updated technical guidance on sexual harassment and harassment at work to reflect this duty (Sexual harassment and harassment at work: technical guidance | EHRC). The EHRC has also published an eight-step guide for employers, which sets out the practical steps that should be taken to prevent sexual harassment at work (Employer 8-step guide: Preventing sexual harassment at work | EHRC),

3.6 Victimisation

The Equality Act protects a person ('B') who makes allegations of discrimination, brings proceedings under the Equality Act, gives evidence in any such proceedings, seeks, makes or receives a disclosure that would be a relevant pay disclosure (see 'Gender Pay Gap' below) or who does anything else in connection with the Act (the 'protected acts').

A victimises B if A subjects B to a detriment because B has done, or might do, a protected act. For example, a gay man brings a claim against a bar manager for making persistent derogatory remarks to other customers about his sexuality and, because he has raised the claim, the manager excludes the man from the bar altogether.

3.7 Discrimination arising from disability

The Equality Act introduced the concept of discrimination arising from disability to replace old rules in the Disability Discrimination Act 1995 concerning disability-related discrimination. Discrimination arising from disability occurs where A treats B unfavourably because of something arising in consequence of B's disability and where A cannot show that the treatment was a proportionate means of achieving a legitimate aim.

Unfavourable treatment means that B has been put at a disadvantage such as being refused a job or being asked to leave premises because there is no room to accommodate a wheelchair. Even if A thinks they are acting in the best interests of B, A may still treat B unfavourably.

There will be no discrimination arising from disability if A did not know, and could not reasonably have been expected to know, that B had the disability in question.

If A does know (or should have known) about the disability, there is no need for them to also be aware that the 'something' arises in consequence of B's disability in order to be liable.

Consider the scenario where A dismisses B because B has taken three months' sick leave. A is aware that B has multiple sclerosis and most of B's sick leave is disability related. A's decision to dismiss B does not amount to direct discrimination as the decision was not because of B's disability.

However, it may amount to discrimination arising from disability as B has been treated unfavourably because of something arising in consequence of B's disability (i.e. the need to take a period of disability-related sick leave). A would need to show that the decision to dismiss was objectively justified (see 'Objective justification' below).

3.8 Reasonable adjustments

BACP's *Ethical Framework* requires members to make adjustments to overcome barriers to accessibility, so far as is reasonably possible, for clients of any ability wishing to engage with a service.

Please refer to the Good Practice in Action 080 Fact Sheet: *Reasonable adjustment in the counselling professions* for more information.

3.9 Objective justification

There is a defence to some discrimination claims if A can show that they had an objective justification for their actions, i.e. A's actions were a proportionate means of achieving a legitimate aim. This can be used to defend claims of indirect discrimination and discrimination arising from disability.

Generally speaking, direct discrimination cannot be objectively justified with the exception of direct age discrimination, which can be objectively justified if the less favourable treatment accords with a social policy aim such as inter-generational fairness or dignity.

Many of the cases in this area have arisen in the employment context and promoting access to employment for younger people, facilitating the participation of older workers in the workplace, and rewarding experience have all been found to be capable of amounting to social policy aims.

The burden is on A to prove that their treatment of B was objectively justified, and a court or employment tribunal must undertake a fair and detailed analysis of A's working practices and the considerations involved before reaching a decision.

It is usually relatively easy for A to establish a legitimate aim as the only requirement is that it must correspond to a real business need. Examples of legitimate aims can include economic efficiency, preventing fraud, and ensuring health and safety. The more difficult element for A to establish in order to succeed with an objective justification defence is to show that their actions were proportionate. A does not need to show that they had no other option, but A must be able to demonstrate that the actions they took were reasonably necessary in order to achieve their legitimate aim. This involves an objective balance between the discriminatory effects of those actions on B and the reasonable business needs of A. This will always be fact-sensitive, and each case will turn on its own facts.

4 Discrimination in employment

Part 5 of the Equality Act covers discrimination in the workplace. In the sections below, we look at who is protected and who is liable for discriminatory acts in the workplace.

4.1 Who is protected?

The Equality Act definition of 'employment' includes employees, workers and self-employed people whose contracts oblige them to perform work personally. Agency workers are also protected from discrimination by an end-user (i.e. the business that contracts with the agency to provide workers), as are employees who are temporarily seconded to work for another group company, partners and office holders. People undertaking vocational training including work experience placements are protected against discrimination by their training provider but volunteers and unpaid interns who are not working under a contract are not.

The Equality Act extends protection to job applicants and prospective job applicants so an employer's recruitment arrangements (e.g. the content of a job advert, the format of an application form, interview arrangements) must not be discriminatory.

The Equality Act makes it unlawful to discriminate against or victimise existing employees as to their terms of employment, in the way that they are given access to opportunities for promotion, transfer or training, or any other benefit, facility or service, by dismissing them, or by subjecting them to any other detriment. Dismissal can include non-renewal of a fixed-term contract or any act that gives rise to a constructive dismissal (i.e. circumstances in which the employee is entitled to terminate their employment because of their employer's conduct).

Former employees will be protected by the Equality Act if they are subject to discrimination, harassment or victimisation, which arises out of and is closely connected to an employment relationship that used to exist.

For example, in one case a firm of solicitors was found liable for post-termination victimisation after it provided a poor reference concerning a past employee who had previously pursued a claim of sex discrimination against the firm (Bullimore v Pothecary Witham Weld Solicitors and another UKEAT/0189/10).

4.2 Who is liable for breaches?

If an employer discriminates against employees, former employees or job applicants, they will be liable for their actions (see 'Compensation and remedies').

Employers may also be vicariously liable for something done by one of their employees in the course of their employment, even if the employer did not have any knowledge of the employee's acts. Some acts or omissions will obviously be done 'in the course of employment', for example, a decision by a manager to promote a particular employee. In other situations, however, it may not be so clear whether the employee was acting 'in the course of their employment'. Consider an employee who makes derogatory comments to a colleague about their religion during a shift – is this something done in the course of employment? What about a worker who sexually harasses someone at the work summer party?

To decide whether or not an act was carried out by an employee in the course of their employment, a court or tribunal will consider the following factors: (1) whether the incident took place on the employer's premises; (2) whether the victim or discriminator was on duty at the time; (3) whether a social gathering included employees' partners, customers or unrelated third parties; (4) whether an event took place immediately after work. It is possible for work social events or even informal after-work drinks to be considered an extension of the workplace and it can be difficult to draw a clear line between work and private life for these purposes.

Employers will not be vicariously liable for acts of their employees if they can show that they took all reasonable steps to prevent the employee from committing the act or type of act.

Reasonable steps will include having an equal opportunities policy and anti-harassment and bullying policy, taking practical steps to implement those polices and reviewing them regularly, making all employees aware of the policies, training managers and supervisors in equal opportunities and harassment issues and having in place effective measures to deal with complaints of discrimination or harassment (see 'Practical steps'). The 'reasonable steps' defence can succeed even where the employer's efforts did not actually prevent the discriminatory act from happening; what is important is to show that the employer took all the reasonable steps they could have taken in the circumstances.

Returning to the example given above of an employee who makes derogatory comments to a colleague about their religion during a shift – if the employer had a policy which made clear that harassment of workers related to any protected characteristic was unacceptable and would lead to disciplinary action, managers received training in applying this policy, and disciplinary action was taken against the employee who made the anti-religious comments, the employer may well be able to avoid liability because they would be able to show that they took all reasonable steps to prevent the unlawful act.

In order to succeed with a 'reasonable steps' defence, employers need to do more than paying lip service to equality and diversity policies and training. In a 2021 judgment (Allay (UK) Ltd v Gehlen UKEAT/0031/20) an employer failed to establish that they had taken all reasonable steps to prevent an employee making racist comments to a colleague, even though the company had an Equal Opportunity Policy and an Anti-bullying and Harassment Procedure, and could show that the employees involved had received equality and diversity training. The Tribunal found that the training had become 'stale' and that a reasonable step would have been to refresh the training. As the company had not done this, their defence failed.

Employees can be personally liable for any acts of unlawful discrimination that they commit in the course of their employment.

Even if an employer escapes liability by demonstrating that they took all reasonable steps, an individual employee will not escape personal liability unless they can show that they relied on a statement by their employer that the act in question did not contravene the Equality Act.

For example, if a manager asks the company director if she needs to make reasonable adjustments for an employee and the director wrongly says, 'I don't think he's covered by the Equality Act because he isn't in a wheelchair, so don't bother', the line manager will not be liable, and the employer will be.

Finally, a person who knowingly helps someone else to unlawfully discriminate against or harass another person can also be liable.

As above, the individual will have a defence if they can demonstrate that they reasonably relied on a statement from the person they were helping that the act did not contravene the Equality Act.

4.3 Exceptions

Some actions that would otherwise fall within the statutory definition of discrimination, harassment or victimisation will be permitted if they fall within one of the exemptions set out in the Equality Act. In this resource, we will focus on the exceptions that apply to several of the protected characteristics, however, there are also specific exemptions relating to particular protected characteristics or to specific sectors such as the armed forces or organised religions.

The first of the exemptions is known as the occupational requirement exemption. This can apply to direct discrimination claims relating to recruitment, promotion, transfer, access to training and dismissal. There is a general exemption where, because of the nature or context of the work being carried out, there is an occupational requirement for an employee to have (or not have, as the case may be) a particular protected characteristic.

The explanatory notes to the Equality Act give the example of a counsellor working with victims of rape who might have to be a woman in order to avoid causing clients further distress.

An employer is only entitled to apply an occupational requirement if it is a proportionate means of achieving a legitimate aim.

The second exemption concerns lawful positive action that can be taken towards people who suffer a disadvantage, have particular needs or are under-represented because of a protected characteristic.

There is no obligation to take action, but employers can take proportionate positive steps to meet needs, overcome or minimise disadvantage, or encourage participation from people who share a protected characteristic.

Examples of positive action could include providing prayer facilities at work to meet the needs of a religious minority, having targeted networking opportunities for women, or mentoring for black and minority ethnic employees.

The Equality Act contains a specific exemption for positive action in the context of recruitment and promotion. An employer can (although, again, is not obliged to) take proportionate action to recruit or promote someone if the aim is to enable or encourage people who share a protected characteristic to participate, or to overcome or minimise a disadvantage connected to a particular characteristic. In this context, positive action is only permitted if there is a tie-break situation and two employees are equally as qualified as one another for a job or promotion.

The EHRC's Employment Statutory Code of Practice gives the example of a counselling service for teenagers that has no Muslim employees but is in an area with a high Muslim population. If a vacancy arises, two candidates of equal merit are in a tie-breaker situation, and one candidate is Muslim, the service could choose to offer the job to the Muslim candidate under the positive action provisions and the non-Muslim candidate could not claim discrimination.

Logically, the Equality Act also contains an exemption if an employer is obliged to do something related to age, disability and religion or belief in order to comply with, or to avoid breaching, a statutory requirement. Examples of discriminatory acts permitted under this exemption include a decision by an employer to dismiss a disabled employee because health and safety regulations leave the employer no other choice, or a decision to refuse to employ someone to drive a large goods vehicle who is not old enough to hold an HGV licence.

4.4 Compensation and remedies

If an employee succeeds with a claim under the Equality Act, an award of financial compensation is almost always made. Compensation can be awarded for financial loss (for example, loss of earnings and benefits) and non-financial loss (including injury to feelings and personal injury) and interest on losses before the date of judgment.

Unlike most unfair dismissal claims, there is no upper limit on the amount of compensation that can be awarded for losses arising from a discriminatory dismissal.

Compensation is intended to put the claimant in the position they would have been in if the discrimination had not taken place. This means compensation for loss of earnings will not be capped at the salary which the employee was earning at the date of the discrimination and will be based on what they would have earned in the future, taking into account promotions and pay rises. On the other hand, future losses that would have occurred in any event will not be recoverable (for example, if there is evidence that the employee would have been dismissed anyway for some other non-discriminatory reason).

Claimants are under an obligation to take reasonable steps to mitigate their losses, for example, by looking for other work, accepting offers and/or claiming benefits, and any sums received since termination of their employment will reduce the amount of compensation.

Even so, awards for future loss of earnings can be very substantial, particularly if the person had been entitled to relatively generous pension benefits, which are unlikely to be matched by future employers.

Compensation for non-financial loss, including injury to feelings, is awarded separately and a claimant can recover this type of compensation even where they have suffered no financial loss. When assessing an award for injured feelings, a court or tribunal will take several factors into account, including any medical condition the claimant is suffering from, the nature of the claimant's job, and the effect that the discrimination has had on the individual (for example, panic attacks, stress, loss of confidence, impact on personal relationships).

Guidelines for assessing the amount of compensation for injured feelings were set out by the Court of Appeal in the case of *Vento v Chief Constable of West Yorkshire Police* (No 2) ([2003] IRLR 102).

There are three award bands: a lower band for less serious cases such as an isolated or one-off occurrence; a middle band for serious cases that do not merit an award in the highest band; and a top band for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.

For claims presented on or after 6 April 2025, lower-band awards range from £1,200 to £12,100, middle-band awards from £12,100 to £36,400, and upper-band awards from £36,400 to £60,700. In exceptional circumstances, awards can exceed £60,700.

Two types of damages for personal injury can also be awarded in discrimination cases: general damages (for pain, suffering, loss of amenity etc.) and special damages (for financial loss arising out of the injury, such as medical expenses). Claimants must not be compensated for the same loss twice so if an award for loss of earnings has already been made this should not be taken into account in any award of special damages for personal injury.

Although the Equality Act does not specifically provide for awards of aggravated damages, the courts and tribunals have taken the view that aggravated damages can be given in the most serious cases, where an employer's behaviour has aggravated the injury or loss suffered by the claimant. Examples might include attempting to cover up or trivialise wrong-doing, serious mismanagement of an internal investigation or grievance process, using the claimant as a scapegoat, or repeated failure to correct a problem which has led to discrimination.

All of the types of damages discussed so far are intended to compensate the claimant for losses they have actually suffered, rather than acting as a punishment for the employer. In very rare cases, a court or tribunal may make an award of exemplary (or punitive) damages.

In the private sector, exemplary damages will only be available if the employer's conduct was calculated to make a profit which would exceed the amount of compensation that would otherwise be payable to the claimant.

As well as awards of compensation, the Equality Act gives courts and tribunals the ability to make recommendations for an employer to take specified steps within a particular period of time for the purposes of removing or reducing the adverse effect of the discrimination, for example, requiring an employer to introduce an equal opportunities' policy or to re-train staff. If an employer fails to comply with a recommendation, the amount of compensation may be increased.

The Equality Act also gives courts and tribunals the power to make a declaration as to the rights of a claimant and an employer in relation to the matters.

For example, in a claim of indirect discrimination, the employment tribunal could declare that the employer did not intend the PCP to be discriminatory.

5 Family friendly rights and flexible working

In order to foster and promote equality, diversity, and inclusion within the workplace, it is essential for employers to be aware of the rights available to workers who have family or other care commitments. If you employ staff, you should ensure that you are familiar with these rights and that you have policies and procedures in place to allow your employees to exercise their rights.

This resource gives a brief overview of statutory rights relating to families and pregnancy, but it is always open to an employer to agree more favourable terms, and this could be a way to encourage and support equality and diversity within the workforce.

5.1 Pregnancy

Employees are not required to tell their employer that they are pregnant until the 15th week before the due date. An employee may decide to inform their employer before this time if, for example, they need to adjust their working arrangements to accommodate the pregnancy or if they want to benefit from paid time off for antenatal appointments.

The employee should also say when they expect their maternity leave to start; this must be no earlier than the beginning of the 11th week before the due date.

Employers have specific health and safety duties in relation to pregnant employees, including a requirement to carry out a risk assessment of the workplace and to alter the employee's working conditions or hours to avoid any significant risks. The Health and Safety Executive website has useful guidance on protecting pregnant workers and new mothers (www.hse.gov.uk/mothers).

5.2 Maternity leave and pay

Employees are entitled to up to 52 weeks' maternity leave, regardless of their length of service with their employer.

Employers and employees can maintain reasonable contact during maternity leave (for example, to discuss arrangements for the employee's return to work or to keep the employee informed of important developments at work) but what amounts to 'reasonable contact' will depend on the circumstances. It is a good idea to have a discussion with an employee before they start their maternity leave to agree an appropriate level of contact during maternity leave.

An employee can work for up to 10 'keeping in touch' (or KIT) days during their maternity leave. The employee must be paid at their normal contractual rate of pay for KIT days and can undertake any work that is agreed with their employer. Many employers and employees find it helpful to use KIT days to enable the employee to attend important training sessions or meetings during their maternity leave.

An employee on maternity leave is given special protection if a redundancy situation arises in a period of 18 months starting with the first day after the birth (or the first day of the expected week of childbirth). In short, the law gives the employee priority over other employees who are also at risk of redundancy to be offered a suitable alternative role, if one exists. If an employer does not comply with this requirement, the employee will automatically have a claim for unfair dismissal.

On their return from ordinary maternity leave (i.e. the first 26 weeks of maternity leave), the employee has the right to return to the same job on the same terms and conditions as if they had not been away.

An employee who takes additional maternity leave (i.e. leave from week 27 onwards) will be entitled to return to a different job that is suitable for them if there is some reason, other than redundancy, why it is not reasonably practicable for them to return to the same job (e.g. because of a restructure).

An employee will be entitled to statutory maternity pay if: (1) they have been continuously employed for at least 26 weeks at the end of the 15th week before their due date; (2) their normal weekly earnings are not less than the Lower Earnings Limit for the purposes of National Insurance Contributions; (3) they are still pregnant or have already given birth 11 weeks before the due date; (4) they give their employer at least 28 days' notice of the date they intend statutory maternity pay to start or, where this is not reasonably practicable, as much notice as possible; (5) they supply an MAT B1 certificate; and (6) they have stopped working. If an employee does not qualify for statutory maternity pay, they may still qualify for maternity allowance, which is a social security benefit paid by the Jobcentre Plus at a flat rate for the 39-week pay period.

Statutory maternity pay is paid at 90% of the employee's normal weekly earnings for the first six weeks of maternity leave and is paid at a prescribed rate set by the Government each tax year for the following 33 weeks.

5.3 Paternity leave and pay

A spouse, civil partner or partner of a child's mother or adopter who has responsibility for the child's upbringing will be entitled to take either one week or two weeks' paternity leave within 56 days of the birth of a child or placement of a child in the case of adoption, provided they meet the eligibility criteria. In birth cases, the employee must have been continuously employed for at least 26 weeks ending with the week immediately prior to the 14th week before the due date. In adoption cases, the employee must have not less than 26 weeks' continuous service ending with the week in which the adopter is notified that they have been matched with a child. Following changes which came into force in April 2024, the two weeks' leave can be taken as one single period of leave or as two non-consecutive periods of leave of one week each.

An additional period of paternity leave used to be available, however, this was replaced with shared parental leave for any child expected or placed for adoption on or after 5 April 2015 (see 'Shared parental leave').

An employee will be entitled to statutory paternity pay if they: (1) satisfy the relationship requirements set out above; (2) have been continuously employed for a period of at least 26 weeks ending with the 15th week before the due date or, in the case of adoption, the week the adopter is notified of being matched with a child (the 'relevant week'); (3) continue to be employed on the day the child is born or placed in the case of adoption; (4) have received normal weekly earnings of not less than the Lower Earnings Limit for the purposes of National Insurance Contributions in the period of eight weeks ending with the relevant week; and (5) in the case of adoption, are the person who has elected to receive statutory paternity pay.

Statutory paternity pay is the lesser of the prescribed rate set by the Government each tax year or 90% of the employee's normal weekly earnings.

5.4 Adoption leave and pay

People who are matched for adoption with a child and those who adopt from overseas are entitled to adoption leave and pay. They are also entitled to time off for adoption appointments.

These rights were extended in April 2015 to include foster parents and parents of a child born to a surrogate mother. There is still no right to adoption leave or pay for stepparents who adopt stepchildren, for private adoptions or for special guardians or kinship carers who provide a home for children who cannot live with their parents.

Couples must decide who is going to be the 'adopter' (or 'Parent A' in the case of surrogacy). As long as they meet the qualifying requirements, that person will have similar rights to an employee on maternity leave, i.e. the right to up to 52 weeks' statutory adoption leave, statutory adoption pay for up to 39 weeks, the right to return to the same job (or, in certain circumstances, to return to a suitable and appropriate alternative job), priority to be offered suitable alternative employment if redundancy occurs during adoption leave, and protection from detriment or dismissal relating to adoption leave.

To qualify for statutory adoption pay an employee must: (1) have been in employment for a continuous period of 26 weeks ending with the week in which they are notified of having been matched with the child; and (2) their normal weekly earnings for the period of eight weeks ending with the week in which they are notified of having been matched with the child must not be less than the Lower Earnings Limit for the purposes of National Insurance Contributions.

5.5 Shared parental leave and pay

A new scheme of shared parental leave and pay was introduced for children due to be born or placed in the case of adoption on or after 5 April 2015. The scheme enables both parents to take leave in a more flexible way in the first year after birth or adoption.

Shared parental leave can be taken when an employee curtails their statutory maternity leave (in relation to births) or where a primary adopter curtails their statutory adoption leave in order to take shared parental leave. The first two weeks of maternity leave are compulsory and must be taken by the mother.

The remaining 50 weeks can be taken as shared parental leave with the other parent and can be taken consecutively or concurrently as long as the time taken does not exceed what the couple are jointly entitled to.

In general, anyone who is entitled to shared parental leave will also be entitled to receive shared parental pay as long as: (1) they have normal weekly earnings of not less than the Lower Earnings Limit for the purposes of National Insurance Contributions in the eight weeks prior to the 15th week before the due date in birth cases or date of placement in adoption cases; (2) they have been in employment for a period of at least 26 weeks ending with the 15th week before the due date or date of placement; and (3) they continue in employment between the due date or date of placement and the last week before shared parental pay starts.

The requirements for evidencing an entitlement to shared parental leave and pay, and for giving notice of an intention to take shared parental leave and pay, are more complex than for other types of family leave and detailed information can be found on the Government website (www.gov.uk/shared-parental-leave-and-pay).

5.6 Parental leave

Shared parental leave and pay should not be confused with parental leave, which is a statutory right that some working parents have to unpaid leave. To qualify for parental leave, employees must have been continuously employed for at least one year and must have, or expect to have, responsibility for a child. This includes birth parents, adoptive parents, parents under a surrogacy arrangement and guardians. If an employee meets these criteria, they will be entitled to a total of 18 weeks' leave for the purpose of caring for each child under 18. The entitlement is to 18 weeks' leave in total for each child so the idea is that an employee who has already taken 12 weeks' parental leave for a child with one employer should only be entitled to a further six week's leave in relation to that child if they move to work for a new employer. However, this may be difficult to enforce in practice as there is no requirement for employers to keep and share records of parental leave.

5.7 Flexible working

Any employee has the right to request flexible working. The law in this area changed significantly in June 2014 and is now far less prescriptive than it was in past.

It is important to appreciate that the right to request flexible working is no longer limited to employees who have at least 26 weeks' continuous service or employees with care responsibilities – any employee can make a request.

However, the right is still limited to employees (as defined in the Employment Rights Act 1996) and it does not apply to consultants, self-employed contractors or agency workers.

The employee starts the flexible working request process by asking for a change to their hours and/or place of work. You should assume that an employee is requesting a permanent change to their terms and conditions of employment unless they specifically say they are only looking for a temporary change. A request must be in writing and must include certain information, including the effect (if any) the employee thinks the change will have on the employer and how that effect could be dealt with.

Once an employer receives a flexible working request, they should deal with it in a reasonable manner; this is likely to include discussing the request with the employee and being open to suggestions and potential compromises. Employers must only refuse a request for one of the eight reasons set out in the legislation. These include the burden of additional costs, detrimental impact on quality or performance and an inability to recruit additional staff. The full grounds for refusal can be found on the Advisory, Conciliation and Arbitration Service (ACAS) website (www.acas.org.uk/flexible-working).

Before refusing a flexible working request, employers should think carefully about whether refusal could amount to unlawful discrimination under the Equality Act. For example, it has been common for women whose requests for flexible working are rejected to make a sex discrimination claim but a man could also bring a claim if an employer regularly allows women with childcare commitments to work flexibly but refuses a similar request from a male employee.

A flexible working request could also engage the duty on employers to make reasonable adjustments for employees with a disability or it could be made in order to accommodate someone's religious beliefs.

An employer must notify the employee of their decision within two months of the date the request was made (unless both parties agree a longer period). If the request is rejected, the employee does not have a statutory right to appeal but the ACAS Statutory Code of Practice on handling requests for flexible working says employees should be allowed to appeal. An employee can only make one statutory flexible working request in any 12-month period.

5.8 Time off for dependents

Employees have the right to take a reasonable amount of unpaid time off to deal with situations affecting their spouse, civil partner, child or parent (but not grandparent), or a person who lives in the same household as the employee (excluding tenants, lodgers, boarders or employees).

The legislation lists the situations when this right will apply: (1) to provide assistance if a dependant falls ill, gives birth, is injured or assaulted; (2) to make care arrangements for the provision of care for a dependant who is ill or injured; (3) in consequence of the death of a dependant; (4) to deal with the unexpected disruption, termination or breakdown of arrangements for the care of a dependant; or (5) To deal with an unexpected incident which involves the employee's child during school (or another educational establishment's) hours.

This right applies from day one and there is no requirement for the employee to have worked for a certain period in order to be eligible.

The employee must tell their employer that they are taking or intend to take time off as soon as reasonably practicable. They must also give information about the reason for their absence and how long they expect to be away from work, unless it is not practicable for the employee to tell their employer of the reason for their absence until they return to work.

5.9 Parental bereavement leave and pay

Employees have the right to take up to two weeks off work following the death of a child under 18 or a stillbirth.

The right applies to the child's parent (including an adoptive parent), prospective adopter, intended parent under a surrogacy arrangement, a parent 'in fact' (someone looking after the child in that person's own home for the last four weeks), or that person's partner.

The right to parental bereavement leave applies from day one of employment and no minimum length of service is required. The leave can be taken as two continuous weeks or as separate weeks, starting on any day of the week. Leave may be used anytime in first 56 weeks after the death or stillbirth of the child. During the first eight weeks, the employee only needs to give notice that they intend to take parental bereavement leave before they are due to start work on the first day of leave. From weeks nine to 56, at least a week's notice is required. Leave can be cancelled or rearranged with the same degree of notice.

Statutory parental bereavement pay is available if an employee or paid office holder has at least six months' continuous service and normal weekly earnings of at least the Lower Earnings Limit.

It is paid at the same rate as statutory paternity pay or shared parental pay. Parental bereavement pay is not payable during a week in which the employee does any work for the employer.

5.10 Neonatal care leave and pay

For children born on or after 6 April 2025, employees are entitled to up to 12 weeks' leave if their child spends a period of at least seven days without interruption in neonatal care (beginning with the day after the neonatal care starts). The neonatal care must begin within 28 days of the child's birth and leave must be taken in blocks of whole weeks.

The entitlement to neonatal leave is in addition to any other statutory rights to leave that an employee may have, such as maternity leave, paternity leave, adoption leave or parental bereavement leave.

Employees taking neonatal care leave may also be entitled to neonatal care pay for a period of up to 12 weeks if they meet certain requirements. As a general rule, an employee who meets the requirements to qualify for statutory maternity, adoption or paternity pay will also qualify for statutory neonatal care pay. Neonatal care pay is paid at the same rate as statutory paternity or shared parental pay.

6 Gender pay reporting

In April 2017 the Equality Act 2010 (Gender Pay Gap Information) Regulations (the 'Regulations') came into force, requiring large employers in the private sector to analyse the gender pay gap within their organisation, i.e. the gap between men and women's average pay.

Employers affected by the Regulations must calculate the mean and median average hourly pay and, if relevant, bonus pay for all of their employees. They must then split the results into four pay bands, which the Regulations refer to as 'quartiles', in order to show how the gender pay gap differs at levels of seniority across the organisation. Once the calculations have been carried out, the organisation must produce a written statement signed by a senior individual, confirming that the information is accurate. This must be published on the organisation's own website and retained online for three years and must also be published on the Government website (www.gov.uk/report-gender-pay-gap-data). If they wish, organisations can also publish a narrative along with their gender pay gap results. A narrative can be used to provide context as to why a certain result has arisen and/or to provide information about the organisation's action plan for narrowing its gender pay gap.

The Regulations only apply to employers with 250 or more employees on 5 April each year, which means that many of BACP's members will not be required to comply. Therefore, this resource will not consider the gender pay gap reporting regime in any further detail.

More information on the gender pay gap and how to report your own organisation's results can be found on Search and compare gender pay gap data - Gender pay gap service - GOV.UK.

6.1 Wider pay gap reporting

The Government has proposed wide-ranging changes to employment law in a new Employment Rights Bill.

If the Bill becomes law, employers with 250 or more employees will be required to: develop and publish equality action plans showing the steps they are taking in relation to gender equality; and publish gender pay gap information about any service providers they use for outsourced services. The Government also plans to introduce mandatory ethnicity and disability pay reporting for employers with 250 or more employees.

7 Discrimination in the provision of services

Part 3 of the Equality Act deals with discrimination, harassment and victimisation by providers of goods and services. It makes it unlawful for a service provider to discriminate in the way that it affords someone with a protected characteristic access to a service, the quality of service provided, and in the way it advertises services.

Many of the concepts such as direct and indirect discrimination, harassment and victimisation are similar to the employment provisions (see 'The Equality Act' above). If any act of discrimination is unlawful under both the employment and the service parts of the Equality Act, then the employment provisions take precedence.

The EHRC has published a Code of Practice on Services, Public Functions and Associations (*the EHRC Services Code*), which a court must take into account in any proceedings concerning discrimination in the provision of services, as well as a supplementary guidance which identified developments since the EHRC Services Code was approved. Both publications can be found on the EHRC's website: Services, public functions and associations: Code of Practice | EHRC.

7.1 Who is protected?

Any individual or business that provides services to the public or a section of the public will fall into the Equality Act definition of a service provider.

There is no need for payment, so voluntary organisations that provide services for no charge are treated as service providers, in the same way as consultants or companies that charge for their services.

The concept of services is given a wide interpretation by the courts and will include anything from shops, to websites, to bus companies. BACP's members will be considered to be providing services under the Equality Act when they advertise or deliver counselling and/or education services.

Any member of the public who obtains or seeks to obtain services will be protected from unlawful discrimination under the Equality Act. This means that someone who would like to access a service but cannot do so because of something discriminatory will be covered. People who have stopped using a service can also still bring a claim if the discrimination they complain of arises out of, and is closely connected to, a service relationship that they used to have with a service provider.

7.2 Who is not covered?

Part 3 of the Equality Act does not apply to the protected characteristics of marriage and civil partnership or to age if the person is under 18. Harassment on grounds of sexual orientation and religion and belief are also exempt from protection under this part of the Equality Act.

7.3 Exceptions

The Equality Act contains a number of exceptions to protection from discrimination by service providers. Some exceptions apply to all protected characteristics, including: the provision of certain single-sex services (e.g. dormitories in a hostel); services aimed at particular groups (e.g. a butcher who sells halal meat); and age-related concessions and discounts (e.g. reduced travel fares for the over-60s). Other exceptions have more limited scope and only relate to a particular protected characteristic or to certain sectors such as charities, transport providers or financial services.

7.4 Who is liable for breaches?

The service provider will be liable for a breach of the Equality Act provisions relating to goods and services. If a service is provided by more than one person or company, both providers may be fully liable for contravening the Equality Act. The EHRC Services Code gives the example of a training company that provides a conference at a hotel.

The training company will be responsible for duties in relation to the way the conference is run, treatment of the participants and accessibility of the venue, and the hotel will be responsible for services provided as part of the conference facilities such as toilets, or services ancillary to the conference such as accommodation the night before the conference.

As already noted, employers can be vicariously liable for acts of their employees (see 'Who is liable for breaches?' above). This applies equally to discrimination by employees towards service users as long as the act was done in the course of employment, and unless the service provider can show that it took reasonable steps to prevent the employee from committing the act or type of act.

8 Practical steps and good practice recommendations

8.1 Equality policies and training

There are many initiatives and measures that BACP members can put in place to promote equality, diversity and inclusion in the workplace and in the way they provide services to the public.

As a minimum, any organisation that engages staff or volunteers will be expected to have appropriate policies in place to promote diversity and inclusion. This should include an equalities policy and an anti-harassment and bullying policy, both of which must be regularly reviewed and updated. It is equally as important to ensure that the people who work with and for you are made aware of these policies and their implications. Training should be provided to managers and supervisors on policies and on equal opportunities, discrimination and harassment issues more generally as they will be the ones who can really influence how your organisation nurtures and encourages diversity.

If complaints of unlawful discrimination or harassment are received, whether from a member of staff, a volunteer or from a client or other member of the public, your organisation must be poised to deal with those complaints effectively. If appropriate, you may need to take action against an employee under your organisation's disciplinary policy, for example, suspending an employee who is accused of harassment from work while you undertake an investigation.

8.2 Unconscious bias

As well as having policies and procedures in place to address discriminatory acts or omissions, BACP members are also encouraged to think about how unconscious bias may affect your decisions and practices, and to put in place measures to limit the influence that our own personal predispositions have on our professional practice.

BACP's *Ethical Framework* recognises that we are all vulnerable to prejudice and BACP encourages its members to recognise the importance of self-inquiry, personal feedback and professional development. Although the majority of people do not intend to discriminate, we may sometimes find ourselves making judgments about others because of tendencies or inclinations related to our own background, our cultural environment and our personal experiences. This is often referred to as unconscious bias.

One type of unconscious bias – affinity bias – describes the feeling we have when we are drawn to people who are like us and who appear to share our values. For example, we might favour a job applicant who has a similar educational background to us or a member of staff who lives in the same area as us. When we favour someone who is like us, we may unintentionally subject someone else to less favourable treatment, for example, by rejecting a job application from someone who has a foreign-sounding name. As well as impacting negatively on workplace relationships, unconscious bias can have an adverse effect on the way that we respond to clients. This is again reflected in BACP's *Ethical Framework*, which requires members to be open-minded with clients who appear similar to us or possess familiar characteristics so that we do not suppress or neglect what is distinctive in their lives.

Another type of unconscious bias, known as 'the halo effect,' can mean that we attribute certain characteristics to a person without actually knowing much about them. For example, we might assume that someone who wears a suit every day is more academically capable than someone who dresses more casually.

It is challenging to overcome unconscious bias but there are steps that can be taken to recognise and control our reactions to others based on stereotypes and prejudices that we may not even realise we have. The first positive step is to be aware of the risks of unconscious bias affecting our behaviour and to raise awareness amongst colleagues who we work with.

We also know that unconscious biases are more likely to affect decisions if we are rushed, tired or stressed, so taking time to consider all of the issues before coming to a decision can be another way to overcome unintended bias. Other specific steps can be taken to reduce the potential impact of unconscious bias in particular scenarios, for example, in the recruitment process the names of job applicants can be removed for the purposes of reviewing applications and drawing up an initial shortlist. Taking these sorts of steps can combat specific instances of unconscious bias and they can also act as a learning tool for organisations to recognise where the risks of bias can creep in. Taking steps to reduce the impact of unconscious bias within our organisations is likely to result in an increase in underrepresented groups, which, in turn will help to encourage further diversity within the workplace and beyond.

About the author

Carla Whalen is a Partner in the charity and social business team at Russell-Cooke solicitors. Carla specialises in employment law and regularly advises employers on HR issues including flexible working and family rights; managing long-term sickness absence; and responding to complaints of discrimination, harassment and victimisation. Carla has represented clients in employment tribunal proceedings across England and in Scotland and has successfully defended claims of whistleblowing detriment, unfair dismissal and discrimination. She has spoken at sector conferences and events on equality and diversity issues, including: race discrimination in the workplace, gender pay gap reporting, and discrimination in the recruitment process.

References and further resources

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