

# Diversity and the law: Back to basics



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# Improving diversity – within the law

## Are you seeking to improve diversity within your organisation?

Navigating the law around diversity and discrimination can feel like a minefield. Here we set out some of the fundamental principles you need to be aware of.

## Is discrimination ever lawful?

Sometimes. The Equality Act 2010 (EA) consolidated existing anti-discrimination legislation and improved some of the protections for individuals. Under the EA, it is unlawful to discriminate against someone on the basis of a protected characteristic in certain circumstances.

## Protected characteristics and the law

Under the EA, protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (including colour and nationality), religion or belief, sex and sexual orientation. The law around protected characteristics is constantly evolving – for example, in January 2020 the Employment Tribunal decided that ethical veganism amounts to a philosophical belief that is protected under the EA.

## Equality Act 2010

Protected characteristics under the Equality Act 2010 (EA) are:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race (including colour and nationality)
- religion or belief
- sex
- sexual orientation

Areas in which these protections apply include:

- employment and other areas of work
- membership of associations
- provision of goods and services
- education
- housing
- exercise of public functions

### **Is discrimination under the EA always unlawful?**

No. The EA only applies to discrimination in certain circumstances (or areas of activity) and this includes employment and other areas of work, membership of associations, provision of goods and services, education, housing and the exercise of public functions.

### **What about trustee recruitment?**

That's a good question. The EA often doesn't apply to trustees, as a volunteer trustee doesn't meet the definition of a 'worker'. But if the trustee is paid for their services as a trustee or you are working with a membership organisation, the EA may apply. Our article on page 9 looks at membership organisations and discrimination.

Even if the EA doesn't strictly apply, you may wish to consider applying its principles as a matter of good practice. You should also consider questions of optics and reputation and think carefully to avoid unintended consequences and risk of legal challenge. For example, if you are thinking of taking positive action to improve representation by a certain group, consider how best to manage this process to avoid doing more harm than good.

### **Isn't positive action discriminatory?**

The EA distinguishes between positive action, which can be lawful, and positive discrimination, which is unlawful. We explore this in more detail in our article on page 15.

### **We are a charity that supports women only – is that allowed?**

The EA allows a charity to restrict beneficiaries to those who share a protected characteristic if

1. it is doing so in accordance with its governing document (do your charitable objects allow it?) and
2. if it is 'a proportionate means of achieving a legitimate aim' or is for the purpose of 'preventing or compensating for a disadvantage linked to the protected characteristic'.

There's an article on page 12 about a recent Supreme Court case on this issue.

### **What next?**

We hope that this Guide will give you some food for thought. If you have any questions about how your organisation can tackle diversity lawfully please get in touch.