

# Diversity in action: A guide for charities

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# Welcome



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# Welcome

Welcome to Diversity in action: A guide for charities, for clients looking to develop and instil best practice in diversity and inclusivity. In this guide, we've included a range of specialist advice and practical guidance designed to help you negotiate the law in this area and to incorporate good practices into your organisation's culture.

Jess Neville and Mindy Jhittay give a brief introduction to the legislation on diversity - the Equality Act 2010 - in their article on diversity and the law (page 6). We explore the practical impact of the Act, looking at the complexities of encouraging diversity in membership charities (Danielle Mawer and Laura Soley, page 9) and a recent Supreme Court judgment about when charities can restrict services to particular groups (Mindy Jhittay and Sophie Cass, page 12).

Danielle Mawer explains how you can take positive action to improve diversity, but make sure that you don't fall foul of equality law (page 15). Employer clients need to be aware of the rules around reasonable adjustments for disabled applicants and employees (Victoria Cook, page 18). And the principles of equality, diversity and inclusion should be embedded within your charity's governance (Sung-Hyui Park and Tesse Akpeki, page 21).

Finally, the work of our client, Blueprint for All (formerly the Stephen Lawrence Charitable Trust) is an example of how diversity in action can change lives (page 24).

## **Diversity at Bates Wells**

At Bates Wells, we look to 'walk the walk' – and nowhere is this more important than in equality, diversity and inclusivity. Aside from working with a range of particularly inspiring clients, including the recently formed community benefit society spearheading the Black Lives Matter movement in the UK, we are striving to develop and improve our own practices in this area.

Acknowledging complicity with systemic issues and addressing them is a work in progress for everyone – we need to be willing to dig deep and face them.

Bates Wells aims to be a leader – good leadership is not only knowing when you need to do better but doing the work to fix it. We are continuing to develop firm-wide programmes to focus on ourselves and how we can positively impact our communities.

One of our goals is to provide our clients with quality advice that supports you to identify and improve inequities – to create diverse and inclusive spaces that make everyone feel welcome and supported. That's what this guide is for.

Thank you for taking this step with us in meeting our firm's values of 'walking the walk' and 'facing forward'.

Time to get to work!

*Cover image by Keegan Simon, an artist based in Trinidad and Tobago. Keegan deconstructed the sets and colours of the circles on the cover to show how fluid inclusion and diversity could be. [Individual.com](http://Individual.com) Instagram and Twitter: @Individual*

# Bates Wells Diversity and Inclusion Forum

Our Diversity and Inclusion Forum is made up of volunteers across the firm and spans a range of characteristics – Race, Ethnicity and Cultural Heritage (REACH), with a sub-group focusing on Black representation (RISE); LGBTQIA+ (QSP – Queen Street Pride); disability (ImPERFECT); social mobility; gender and Bates Wellness.

The forum aims to create a workplace enriched by diverse talent, views and thinking. We strive to be leaders for change in the legal profession – and wider society – in equality, diversity and inclusion issues. We want to make sure that as an organisation, as a professional services firm, and as representatives of the legal profession, we challenge ourselves and others to improve our practices and create an inclusive and equal society.

Our employee-led groups work together to develop policies, programmes, events and education in their focus areas. Our RISE group focuses on improving Black representation and creating a welcoming environment. It develops long-term programmes to address inequities and create a diverse and inclusive workspace and recently hosted an informative month of events and information to mark Black History Month. As well as other actions

we are taking to address inequality, Bates Wells is a signatory and adopter of the Race at Work Charter and we use the Rare contextual recruitment tool.

Our gender group collaborates with our HR team on gender pay gap reporting and has been very active in the Law Society's Women in Leadership in Law campaign. They host internal events, attend Law Society roundtables and present proposals to the firm on how to confront the challenges to women leaders within the profession.



# 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.



# Diversity in practice: Membership charities



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“Be alert for membership criteria that may discriminate – such as higher fees related to gender”



Most people know that the Equality Act 2010's (EA) rules apply to employment and provision of goods and services, but may not be aware of its relevance to membership charities. When you want to make positive changes to promote greater diversity within your membership or trustee body, you need to know when the EA may apply.

Let us give you some background.

The Equality Act 2010 (EA) applies to 'associations'. This includes any organisation that has at least 25 members, where admission to membership is regulated by the rules of the organisation and involves a process of selection – for example, new members must be approved by the trustees. This applies to many membership charities.

It also applies where your charity has associate members who have certain membership rights as a result of being a member of another association. For example, charities that support the members of a particular profession by reference to membership of a separate professional body.

The EA prohibits charities with members from discriminating against their members and associate members on the basis of most of the protected characteristics listed

on page 7. This includes discrimination in membership criteria, in the terms of membership, access to member services and benefits, changing terms of membership or refusing membership. The EA also prohibits harassing and victimising members and associate members, including by refusing or removing membership. However, there is some scope for associations to restrict their membership to people who share a protected characteristic, in certain circumstances.

We recommend that charities keep their membership criteria and processes under review to make sure there is nothing discriminatory, such as charging higher membership fees by reference to gender. Be particularly alert for indirect discrimination, however unintended - for example, could there be something in your membership criteria that puts off people with certain protected characteristics from applying?

Membership charities also need to be mindful of the EA when trying to diversify your board. As Mindy and Jess explain in their article on page 6, while the EA doesn't usually apply to recruitment and appointment of a charity's trustees, the position can be different if trustees are drawn from the membership or members

elect the trustees. This is because - depending on your constitution - eligibility for members to stand as a candidate for election and members' power to elect trustees will usually be membership rights. This can limit your charity's ability to reserve a spot on the board for members from diverse ethnic backgrounds, for example.

It is possible, subject to your charity's constitution, to achieve a more diverse board using the positive action test under the EA: see our article on page 15. Practical steps you can take include encouraging members with a particular protected characteristic to put themselves forward for election in membership communications. Where your charity has trustee selection criteria, you need to make sure these don't contain barriers to diverse applicants putting themselves forward. You may also need to look at ways to diversify your membership base.

It can be hard to navigate the complexities in this area - if you would like to have a chat about these issues, please do get in touch.

# Diversity in practice: Diversity and beneficiaries



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## When is it lawful to restrict who can benefit from your charity's services?

A recent Supreme Court judgment clarifies when you can restrict your services in line with the Equality Act 2010 (EA).

The case of *R v Hackney London Borough Council and Agudas Israel Housing Association [2020]* concerns the provision of social housing in the London borough of Hackney, home to one of the largest Orthodox Jewish communities outside of New York and Israel. Agudas Israel Housing Association (AIHA) is a charitable housing association established to provide social housing primarily for members of the Orthodox Jewish community (the Community). AIHA works with Hackney London Borough Council, with its properties making up around 1% of the council's total social housing stock.

The council has a right to nominate tenants to AIHA properties, but AIHA has its own selection criteria in line with its charitable objects – to primarily house members of the Community. As the demand for social housing in Hackney far outstrips supply, this meant that, in practice, AIHA exclusively allocated its properties to members of the Community.

A single mother with four children had been on the council's waiting list for social

“Charities that support a restricted class of beneficiaries in line with their governing document can take comfort”

housing. As she wasn't a member of the Community, the council didn't nominate her for any of the available AIHA properties, meaning that she had to wait longer to be allocated to a property. She brought a claim against the council and AIHA under the EA, complaining that there had been unlawful direct discrimination against her on the grounds of both religion and race.

Fortunately, suitable housing has now been found for the family, but the points of law involved were ultimately considered by the Supreme Court in autumn 2020.

### **Exceptions under the EA**

The EA allows a charity to confine its services to a particular group if one of the exceptions set out in the EA apply.

The Supreme Court considered three possible exceptions:

- AIHA's actions were proportionate to compensate for the disadvantages/ needs of the Community;
- AIHA restricted benefits to the Community as a 'proportionate means of achieving a legitimate aim';
- AIHA restricted benefits to the Community to prevent or compensate for a disadvantage linked to being a member of the Community.

They also considered other factors. Members of the Community have particular needs due to their protected characteristic (their religion), such as larger families needing larger houses. They are disadvantaged by anti-Semitic prejudice in the private rental sector. And, notably, AIHA's policy wasn't a blanket exemption –

should there be surplus properties, these would be allocated outside the Community.

The court decided that AIHA could demonstrate that it met all three exceptions. Its policy promoted a legitimate aim (minimising disadvantages the Community faced in the private housing sector), was proportionate (the policy's blanket effect was due to scarcity of housing), and addressed needs linked to being a member of the Community.

Charities that support a restricted class of beneficiaries in line with their governing document can take comfort. It would be discriminatory to restrict a benefit at will, but it's possible for charities to justify such restrictions by demonstrating that they meet one of the exceptions of the EA.

# Diversity in practice: Positive action



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The Equality Act 2010 (EA) sets out broad principles to protect individuals against unfair discriminatory behaviour. But what if you want to do something proactive to improve diversity? Well, there is good news here. The EA also sets up a framework that permits organisations to take ‘positive action’. These are measures to improve equality for people who share a protected characteristic under the EA (see the list of protected characteristics in the article on page 7). This action is only lawful if it meets the tests under the EA.

### **What are the tests for general positive action under the EA?**

We’re focusing here on the tests for ‘general’ positive action, rather than those for positive action in paid ‘recruitment and promotion’.

To take general positive action, you must answer a threshold question:

#### **1. Does your organisation reasonably think that individuals who share a protected characteristic:**

- experience a disadvantage connected to that characteristic;
- have needs that are different from the needs of persons who do not share that characteristic; and/or

- have disproportionately low participation in an activity compared to others who do not share that protected characteristic?

You will need to be able to point to some indication or evidence to support your view.

If the answer is yes, you must then ask:

#### **2. Is the proposed action a proportionate means to achieve the aim of:**

- remedying the disadvantage;
- meeting those needs; and/or
- enabling or encouraging participation in the activity?

This will involve a balancing act. You will need to ask: is this action appropriate for this aim? Is it reasonably necessary? Would it be possible to achieve this aim in another way that would be less likely to result in unfavourable treatment for others?

If you can justify the action using these tests, then you will be protected under the EA. If not, you leave yourself open to being sued for positive discrimination, which is unlawful.

We suggest that you keep the tests front-of-mind and be prepared to justify your actions within this framework.



### What might qualify as positive action?

Measures that could qualify as positive action under these tests include:

- Setting participation targets
- Offering internships or open days
- Providing bursaries or scholarships
- Reserving places on training courses, for example, in management
- Organising targeted networking opportunities
- Providing mentoring.

These steps could help to boost participation by, or remedy a need or disadvantage suffered by, individuals who come into contact with your organisation. (Please remember that different tests apply in promotion or recruitment contexts.)

### Putting in place an action plan

There is no legal requirement to take positive action. But, if you do, we suggest you draw up an action plan that reflects the requirements of the EA and keep good records of your reasoning.

We would be delighted to help you in drawing up an action plan for positive action – [please get in touch](#).



# Diversity in practice: Employment – a focus on reasonable adjustments



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# Disability and reasonable adjustments

Recognised as a 'cornerstone' of the Equality Act 2010 (EA), the duty to make reasonable adjustments requires employers to take positive steps to ensure that those with disabilities can access and progress in employment. This duty arises where a disabled person is placed at a disadvantage compared to those without disabilities.

Many employers find navigating this area of law challenging. Here we have set out our top five tips for getting reasonable adjustments right.

## 1. Get the basics right

You may have physical features in your workplace, or certain provisions, criteria or practices that impact on disabled employees and trigger the duty to make reasonable adjustments. You need to understand what is impacting on the employee and how this can be adjusted to avoid any disadvantage.

It is essential to establish and maintain open lines of communication with the employee and accurately record your discussions. This will enable you to properly understand the problem the individual is facing and prevent incorrect assumptions.

You need to keep records of your reasoning and how you arrived at a particular decision.

## 2. Prevention is better than cure

Employers need to have systems in place that will identify when you might need to make adjustments, such as return to work interviews, appraisals and surveys. Provide line managers with training and tools to identify any steps that can be taken at an early stage. We also advise you to regularly check that your policies are updated and well publicised to your employees.

## 3. A methodical approach

A systematic approach will help you to consider appropriate adjustments and identify the measures that you can reasonably implement. First, consider the nature of the employee's disability, then the feature, provision, criterion or practice that is in place. Next identify how this puts the employee at a disadvantage. Then consider the potential adjustment: does it actually address the disadvantage and is it reasonable?

## 4. Occupational Health Reports

Clinicians are well placed to provide a definitive diagnosis and prognosis. You

should not accept vague or unclear reports. Make sure you have complete records that provide a clear background and consider the information you need when setting out the questions for the expert. Once you have received the report, work through the suggested adjustments – either assigning them for action or explaining (and documenting) to the employee any that are not reasonable to implement.

### **5. Pre-employment health checks**

Employers are prohibited from asking potential recruits questions about their health, other than for prescribed reasons or to establish whether you need to make reasonable adjustments for the recruitment process. You should not ask questions about reasonable adjustments needed for the job itself until after you have made a job offer, unless they relate to a function that is intrinsic to the job.

Our employment team is here to assist with any queries you have about employment and diversity. Please feel free to [get in touch](#).



**READ MORE:** In this blog, Katie Exell, who co-leads a Bates Wells network dedicated to enhancing support for people with disabilities, neurodiversity, and/or caring responsibilities, highlights practical tips from the recent “Legally Disabled?” Covid-19 survey. [Read blog](#)

# Diversity in practice: Governance



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The articles in this Guide explore how the fundamental legal duties in the Equality Act 2010 (EA) apply to charities. The **Charity Governance Code** sets out guidance on key elements of charity governance – including on diversity.

The code is not legally binding but expresses ‘best practice’ core principles and governance goals for charity trustee boards. It has been widely adopted across the sector.

The code has seven core principles, including ‘equality, diversity and inclusion’ (EDI). EDI was introduced in early December 2020 – replacing the original ‘diversity’ principle – after a review and consultation process that revealed that diversity remains a key issue for charities.

The new EDI principle is framed around the potential journey that a charity board could make to meet its diversity challenges:

1. assessing understanding of systems and culture
2. setting context-specific and realistic plans and targets
3. taking action and monitoring EDI performance
4. publishing performance information and learning

There are many practical steps that you can take to embed the spirit of the code’s EDI principle within your charity’s governance structures. Some examples include:

### **Recruiting diverse trustees**

The code states that charity boards are more effective if they reflect ‘different perspectives, experiences and skills’.

As well as the protected characteristics under the EA – explored elsewhere in this Guide – diversity in this context includes different backgrounds, life experiences – especially those that are similar to the charity’s beneficiaries – career paths and diversity of thought.

You can use creative approaches in your trustee recruitment processes to reach a more diverse pool of candidates. For example, look at using relevant social media and/or key meeting places for different demographics and adjusting the tone of your recruitment materials to make the role attractive for different types of candidates.

### **Encouraging inclusive and accessible participation**

You will want to make sure that trustees from diverse backgrounds feel fully supported in their role. This includes full induction processes, logistical support

where needed (such as translators / braille or audio support / sufficient disabled access) and, potentially, ongoing mentoring.

Culturally, the nurturing of a 'safe space' where diverse trustees feel that they can share different views and challenge unacceptable behaviour – without being labelled as the 'aggressor' themselves – is crucial. You can encourage this by holding training for all trustees on having challenging and delicate conversations, as well as incorporating EDI awareness as part of your general trustee recruitment, induction, evaluation and exit interview processes.

### **Reporting and monitoring**

To ensure that your EDI measures are accountable, set out what your charity's specific diversity objectives are, and aim to monitor, assess, and publish your performance – and key learnings – on an ongoing basis. Do make sure that you keep within the law: see Jess and Mindy's article on page 6.

### **Sufficient allocation of resources**

As the 'lynchpin' to all other measures, meaningful progress on diversity and governance can only be made if charities actively allocate sufficient financial and time resources – and ideally create a specific budget – to meet your EDI goals.



The Charity Governance Code is recognised by the Charity Commission as the standard for effective charity governance and boards of larger charities are expected to review their own performance annually with an external evaluation every three years. If your board is looking to carry out such a review, we can help by carrying out a governance health check. For more information please see [here](#) or contact your usual advisor.

# Creating change: Blueprint for All

(formerly the Stephen Lawrence Charitable Trust)



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The Stephen Lawrence Charitable Trust was founded with the initial focus of providing bursaries for young people from ethnic minority heritage to succeed in the architecture profession, which was Stephen's dream.

In the 22 years since our founding, it still remains the fact that while talent is everywhere, opportunity is not. We are now renamed Blueprint for All, in honour of Stephen's family's wishes.

We are a small charity – currently less than 11 employees – that works in partnership with an incredible network of partners and supporters to create a fairer and more inclusive society in which everyone can succeed regardless of race, ethnicity or background.

**We are creating real change through our high impact programmes encompassing three pillars:**

- Individuals (particularly young people aged 13-30),
- Organisations (who need our support to embed inclusion in the workplace), and
- Communities (via the small but vital organisations who create the environment that is necessary for diverse communities to thrive).

Our work over the past 5 years has grown exponentially to provide the blueprint for others to follow, to ensure we live in a society where a 'seat at the table' is not a statistically impossible

## Blueprint for All

Blueprint for All is the new name for the Stephen Lawrence Charitable Trust.

We believe in a future where talent is respected and nurtured, where organisations recognise the benefits of a diverse workforce and where our communities can thrive. This is our blueprint to set the foundations for a more inclusive society.

We work with young people and communities, providing opportunities and support that enables them to thrive, while driving systemic change in organisations and society.

We are passionate about ensuring that everyone, irrespective of their race, ethnicity or background, has the opportunity to create their own blueprint for their life.

<https://www.blueprintforall.org>

ambition. We believe all young people should get the information and support they need to make informed decisions about their education and future careers.

**Our evidence is clear. Since 2019 we have:**

- Supported over 3,500 young people aged 13-30 from disadvantaged backgrounds
- Brokered three universities who have awarded full scholarships totalling around £150,000 to support students who would otherwise struggle to stay in education
- Provided 143 young people with bursaries to support their studies
- Supported 343 alumni from our Building Futures programme
- Supported 85 members of our BAME Network to work with community groups to build skills and capacity
- Established a Community Leadership Academy
- Established a Young Leaders Academy, an AQA-accredited programme for young people from disadvantaged backgrounds aged 15-24 enabling them to play a leadership role in their community.

The events of 2020 have challenged us all. Racism, discrimination, and under-representation are attitudes and behaviours we should all stand against. They cannot be resolved by short-term outrage or a quick fix.

It is an arduous journey, but unless we act, the challenges will outlive us, blighting more lives. Our hope is that, rising from the ashes of these immediate actions, people will continue to support charities like us, who are striving to create the systemic change we need so that everyone can live in a world where their lives are valued, their aspirations are encouraged, and they are seen and treated equally.

We are particularly proud that during Black History Month we launched our #Change Makers campaign: highlighting Luke AG, from [Eggtooth](#); Mwila Mulenshi, founder of [Success Looks Like You](#) and Joel Dunn, founder and CEO of [Paradigm Project](#). They are powerful examples of how grassroots community groups drive societal change – we are honoured to amplify their respective voices to serve as beacons for others to be inspired by.

We are grateful for the support that Bates Wells has offered us during this time.



If you would like to talk to Bates Wells about creating change, please contact [Samara Lawrence](#), Solicitor.



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