

# Protected Characteristics

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## Document History

<b>Document version</b>	<b>Date of Issue</b>	<b>Revision description</b>
1.0	14.02.2020	This guidance was created as part of the Parole Board's project to launch fully revised and updated member guidance.
1.1	02.06.2020	References to combined discrimination were removed from the guidance.

**Contents****Page Number**

Introduction	4
The Board and the 2010 Act	4 - 6
The protected characteristics	6 - 11
Further implications for practice	11 - 12
Further reading	12

## **Introduction**

- 1.1 The Parole Board ('the Board') is committed to protecting and promoting equality and diversity. Fairness and inclusion are fundamental principles of the Board and work must be conducted in a way which reflects the diverse communities and respects individual differences. The Board is committed to eliminating discrimination and complying with its statutory duties, including those under the Equality Act 2010 ('the 2010 Act').
- 1.2 The following guidance is not exhaustive; panels must always consider the needs of those that they encounter within their work (such as prisoners, witnesses, solicitors, victims, co-panellists and members of the secretariat).

## **The Board and the 2010 Act**

- 2.1 The Parole Board is bound by the Public Sector Equality Duty, which applies across Great Britain to the public bodies listed in Schedule 19 of the 2010 Act (Specific Duties and Public Authorities) Regulations 2017, (as amended) and to any other organisation when it is carrying out a public function.
- 2.2 As a result of the 2010 Act, the Board, when exercising its functions, has a continuing legal duty to:
  - Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act.
  - Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not.
  - Foster good relations between persons who share a relevant protected characteristic and persons who do not.
- 2.3 The main types of prohibited conduct under the 2010 Act are:
  - Direct discrimination
  - Discrimination arising from disability
  - Indirect discrimination
  - Failure to make reasonable adjustments
  - Harassment
  - Victimisation

## Discrimination

- 2.4 There are different types of discrimination (detailed at paragraphs 2.5 and 2.6 below). Discrimination does not require intent and a person may be discriminating against another without realising it.
- 2.5 Direct discrimination: Section 13 (1) of the 2010 Act defines direct discrimination as, "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

- 2.6 Indirect discrimination: Section 19 (1) of the 2010 Act defines indirect discrimination as, "A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's." An example is where an organisation puts a particular policy into place which applies to everyone but puts people with one or more protected characteristics at a disadvantage.

### Reasonable adjustments

- 2.7 The Parole Board has a duty to make reasonable adjustments, including when making arrangements for oral hearings.
- 2.8 The protected characteristic to which this duty applies is that of disability.
- 2.9 A reasonable adjustment is an adaptation to change a provision, criterion or practice, or to change a physical feature, or to provide auxiliary aids or services to avoid placing a protected person at a substantial disadvantage. There is no universal criterion of 'reasonableness'. When deciding whether an adaptation request is reasonable, it may be considered how disruptive, expensive, practicable and effective taking such a step would be.
- 2.10 Where the prison is notified in advance that the Parole Board members, witnesses and/or prisoners have particular needs, including mobility issues (e.g. requirements for wheelchair access or adapted toilets), prison staff will make every effort to implement reasonable adjustments where practicable, in accordance with the 2010 Act, such as providing ramps for wheelchair access. PSI 32/2011 provides guidance on reasonable adjustments that should be made.

### Harassment

- 2.11 Section 26 (1) of the 2010 Act states:

"A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

The unwanted behaviour could include offensive emails, physical gestures or facial expressions.

## Victimisation

2.12 Section 27 (1) of the 2010 Act defines victimisation as:

“A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.”

Section 27 (2) of the 2010 Act sets out the protected acts, namely:

“(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.”

### **The protected characteristics**

3.1 As a result of the 2010 Act, it is unlawful to discriminate against someone on the grounds of any of these characteristics: age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion/belief, sex (gender) and sexual orientation. These are often referred to as protected characteristics.

3.2 The protected characteristics most relevant to the work of the Parole Board are:

3.3 Age (section 5, the 2010 Act)

3.3.1 Under the 2010 Act persons must not be discriminated against because:

- They are (or are not) a certain age or in a certain age group.
- Someone thinks they are (or are not) a specific age or age group, this is known as discrimination by perception.
- They are connected to someone of a specific age or age group, this is known as discrimination by association.

3.3.2 There isn't a specific definition of age groups in the 2010 Act. The definition could be narrow, (ages 18-20) or wide, (under 40s or over 18) or relative, (younger than me), or any attempt to describe an age group as having characteristics specific to that group.

3.4 Disability (section 6(10(a) and (b), the 2010 Act)

For the purposes of the 2010 Act, a person has a disability if they have a physical or mental impairment which has a substantial, long-term adverse effect on their ability to carry out normal day-to-day activities.

#### 3.4.1 Members should be aware of the following:

- Physical or mental impairment includes sensory impairments and severe and enduring mental conditions such as bi-polar affective disorder, schizoaffective disorder, paranoid schizophrenia and depression.
- A substantial effect need only be more than minor or trivial.
- Long-term means that it has lasted, or is likely to last, at least 12 months, or for the rest of the person's life.
- There is no exhaustive list of day-to-day activities, but normal work-related activities are included, although highly specialised work activities are not.
- The effects of measures to treat or correct the disability are disregarded, including medical treatment and the use of a prosthesis or other aids.
- Progressive conditions are protected from the moment it is diagnosed, even if the person is currently able to carry out normal day to day activities.
- Certain conditions such as HIV, cancer and multiple sclerosis are expressly included even if there are no adverse effects on day-to-day activities.
- A severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person to carry out day-to-day activities.
- A person certified by an ophthalmologist as blind, severely sight-impaired, sight-impaired or partially sighted has a deemed disability.
- A person is covered by the 2010 Act if they had a disability in the past.
- Certain conditions are expressly excluded such as hay fever (except where it aggravates another condition), a tendency to physical or sexual abuse of others, a tendency to steal or set fires, voyeurism, addiction to alcohol (although health conditions arising from an addiction to alcohol could amount to a disability) and exhibitionism.

#### 3.4.2 A person must not be discriminated against because:

- They have a disability.
- Someone thinks they have a disability (discrimination by perception).
- They are connected to someone with a disability (discrimination by association).

3.4.3 The 2010 Act protects a person from being discriminated against because of something connected to their disability (this does not apply unless the person accused of discrimination knew of the disability or ought to have known).

3.4.4 Members should always display patience and sensitivity. Chairs will often be constrained in the adaptations they can make by the facilities at the prison or secure establishment. Prisoners with a disability will be at a substantial disadvantage (as well as any witnesses with a disability), if reasonable adjustments are not in place. Prisons are under a legal obligation to ensure that efforts are made to identify whether a prisoner has a mental or physical impairment of any form. Prison establishments must be proactive in identifying the specific needs of all prisoners and what reasonable adjustments will be necessary to ensure a suitable environment for an oral hearing to take place and the Parole Board, through PPCS, will be informed of this prior to a hearing.

3.4.5 The following are some examples of good practice that can be transferred to any environment:

- Check that the person is able to sit comfortably in the chair provided.
- Allow for shorter sitting times and or the opportunity to take regular comfort breaks.
- Give permission for the person to get up and walk around if this reduces the discomfort, as some medication or sitting for long periods can cause restlessness.
- Check if the person requires regular medication and factor this into the hearing.
- Always face the person if they are deaf or hearing impaired and check that auditory enhancement systems are working. Enforce the 'one speaker' principle and frequently check that they have understood what has been said. Be patient and don't talk too slowly as this affects sound rhythms for those with a hearing impairment or too quickly if they are lip reading or an interpreter is present. Ensure there is no distracting or background noise. Those who use sign language will usually require a British sign language interpreter.
- Hearing rooms should be well lit if the person is visually or hearing impaired.
- Identifying at MCA stage possible support needs so that appropriate measures can be put into place for the hearing.

3.4.6 Parole Board members need to make their decisions free from assumptions or stereotypes and with a better understanding of the issues that are relevant to the individual. Therefore, a prisoner with a learning difficulty or mental health illness should have access to the same considerations in an oral hearing as any other prisoner. A learning difficulty or mental health illness may affect a prisoner's ability to communicate effectively. Effective questioning can only happen if prisoners feel confident and capable of giving their best evidence. A prisoner will not be competent to give evidence to a panel if they are not able to understand questions put to them and give answers to those questions which can be understood. The following are some examples which may be helpful in ensuring an effective hearing:

- Ask straight forward questions in a logical manner.
- Use plain language and avoid jargon and legal terminology.
- Allow plenty of time for responses, repeat if necessary and explain further if the prisoner is confused or distressed.
- Identify at MCA stage possible support needs so that appropriate measures can be put into place for the hearing.

3.4.7 Prisoners who lack mental capacity to make decisions will require different solutions to reasonable adjustments in response to the lack of capacity. However, reasonable adjustments may also be required, for example, for a physical disability.

### 3.5 Gender reassignment (section 7, the 2010 Act)

Gender reassignment relates to any person who is undergoing, proposing to undergo or has undergone a process (or part of a process) of reassigning their sex/gender. This definition has a broad scope under the 2010 Act, as it refers



to a personal process of moving from the birth sex to the preferred gender, rather than to a medical process.

3.5.1 A person must not be discriminated against because:

- Their gender reassignment as a transsexual<sup>1</sup>.
- Someone thinks they are a transsexual.
- They are connected to a transsexual person, or someone thought to be transsexual.

3.6 Race (section 9 of the 2010 Act)

The Act is clear in its definition of race. Race means being part of a group of people who are identified by their nationality, citizenship, colour, national or ethnic origins. If anyone belongs to any one of these groups and they experience discrimination on account of it, it would be counted as race discrimination. It also counts as discrimination if they are not part of any one of these groups but someone discriminates against them because they think they are part of such a group. This is known as perceived race discrimination.

3.6.1 Members should be aware of the following:

- Race can mean skin colour or nationality (including citizenship). It can also mean ethnic or national origins, which may not be the same as current nationality. For example, one may have Chinese national origins and be living in Britain with a British passport.
- Race also covers ethnic and racial groups. This means a group of people who all share the same protected characteristic of ethnicity or race.
- A racial group can be made up of two or more distinct racial groups, for example black Britons, British Asians, British Sikhs, British Jews, Romany Gypsies and Irish Travellers.
- The travelling community is a term used to describe people with a nomadic lifestyle, known usually as Gypsies and Travellers.

3.6.2 The travelling community includes: Romany Gypsies, Irish Travellers, Scottish Gypsies and Travellers, Welsh Gypsies and Travellers, New Travellers or New Age Travellers, bargees and other people living in boats and fairground and circus families, known as travelling showmen.

3.6.3 People may be discriminated against because of one or more aspects of their race, for example people born in Britain to Jamaican parents could be discriminated against because they are British citizens, or because of their Jamaican national origins.

3.6.4 It will sometimes be relevant to identify or describe a person's ethnicity. Where it is relevant some care needs to be taken to ensure that appropriate terms are used. Where a person's ethnicity is irrelevant, it should not be referred to at all.

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<sup>1</sup> A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment (Section 7 (2) of the 2010 Act).

- 3.6.5 Where members are unsure about how to identify or describe a person's ethnicity or how to address a person from a minority ethnic group, they should ask the person concerned how they would wish to be identified, described or addressed. Using acceptable terminology avoids offending the relevant party or witness and gives confidence that they will receive a fair hearing.
- 3.6.6 People generally express their views and needs better in their native language. Where a prisoner's native language is not English, and they express a need or preference to conduct the hearing in a foreign language, the Board must enable them to use their preferred language where reasonably practicable.
- 3.6.7 If it is clear from the dossier that an interpreter will be needed, one should be supplied by the prison. It may be necessary to adjourn or defer if a fair hearing cannot take place without an interpreter present.
- 3.6.8 The Parole Board has adopted the principle that in the conduct of public business and the administration of justice in Wales, it will treat the English and Welsh languages on a basis of equality, so far as is both appropriate in the circumstances and reasonably practicable. This means that where a prisoner requests it, a hearing must be translated into Welsh and where the prisoner has corresponded in writing with the Board in Welsh decision letters must be translated into Welsh.

### 3.7 Religion and belief (Section 10 of the 2010 Act)

In the 2010 Act, religion or belief can mean any religion or philosophical belief such as humanism and pacifism and encompasses discrimination based on the lack of religion or belief.

- 3.7.1 A religion must have a clear structure and belief system.
- 3.7.2 Denominations or sects within a religion can be considered a protected religion or religious belief. It is important to note that minority religions are treated with the same consideration and respect as more prominent religions. For example, it protects:
- Christians if they are discriminated against because of their Christian beliefs.
  - People of other religions and those with no religion if they are discriminated against because of their beliefs.
  - Those who are (or are not) of a particular religion.
  - Those who hold (or do not hold) a particular philosophical belief.
  - Someone thought to be a person of a particular religion or hold a particular belief (this is known as discrimination by perception).
  - A person who is connected to someone who has a religion or belief (this is known as discrimination by association.)
- 3.7.3 A philosophical belief must satisfy various criteria, including that it is a weighty and substantial aspect of human life and behaviour. The belief must be worthy of respect in a democratic society and not affect the fundamental rights of other people.

### 3.8 Sex (section 11 of the 2010 Act)

The Act protects both men and women from discrimination on grounds of sex.

#### 3.8.1 A person must not be discriminated against because:

- They are (or are not) a particular sex.
- Someone thinks a person is of a particular sex (this is known as discrimination by perception).
- They are connected to someone of a particular sex (this is known as discrimination by association).

#### 3.8.2 In the Act, sex can mean either male or female, or a group of people such as men or boys, or women or girls.

### 3.9 Sexual orientation (section 12 of the 2010 Act)

Sexual orientation covers a person's orientation towards people of the same sex, the opposite sex or persons of the same and opposite sex. People must not be discriminated against because:

- they are heterosexual, gay, lesbian or bisexual
- someone thinks they have a particular sexual orientation (this is known as discrimination by perception)
- they are connected to someone who has a particular sexual orientation (this is known as discrimination by association)

#### 3.9.1 It relates to feelings as well as actions, and manifestations such as appearance, dress, and social life. Sexual orientation does not cover gender reassignment which is a separate protected characteristic.

### **Further implications for practice**

4.1 Panels may have to address a prisoner's statement that they are being discriminated against if they consider this has a direct bearing on risk. In these circumstances, Members should seek advice from the Policy and Practice Advisor.

4.2 During the MCA process or preparing for an oral hearing, Parole Board members may need to consider whether there is a need for some action to avoid discrimination, e.g. where the hearing should be held (ground floor hearing room), the need for a hearing loop, rearrangement of seating, an interpreter or signer or a dossier with large print.

4.3 At the appropriate point during introductions, confirm how the prisoner wishes to be addressed in the hearing – what is the chosen name and gender and appropriate form of address? If needed, correct any colleague or other participant at the hearing as to the preferred appellation.

4.4 When drafting written directions or reasons, having been alerted to any aspect of the case which poses a possibility of discrimination, consider taking advice from the Policy and Practice Advisor.

- 4.5 Make sure you use appropriate terminology.
- 4.6 As per paragraph 3.1, pregnancy and maternity is a protected characteristic. Panels will need to make adjustments for those who are pregnant or breastfeeding, particularly in the provision of additional breaks.

### **Further reading**

- 5.1 If Members wish to undertake any further reading on this subject, they may find the following links helpful:
- Key Facts- Women in Prison  
<https://www.womeninprison.org.uk/research/key-facts>.
  - Disabilities:  
[www.prisonreformtrust.org.uk/.../Learningdisabilitiesanddifficulties](http://www.prisonreformtrust.org.uk/.../Learningdisabilitiesanddifficulties)
  - Autistic People in Prison | Network Autism  
<https://network.autism.org.uk/content/autistic-people-prison>
  - Mind Toolkit – Bar Council - Practice & Ethics: Support for people with Mental Health concerns in CJS  
<https://www.barcouncilethics.co.uk/documents/mind-toolkit>
  - Bromley Briefings - Prison factfile - Prison Reform Trust  
[www.prisonreformtrust.org.uk/Publications/Factfile](http://www.prisonreformtrust.org.uk/Publications/Factfile)
  - The Equality and Human Rights Commission  
<https://www.equalityhumanrights.com/en>