

# Protected Characteristics Member Guidance

October 2024 (V2.0)

## Document History

Document version	Date of Issue	Revision description
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.
2.0	11.10.2024	<p>This guidance has been updated to include:</p> <ul style="list-style-type: none"> <li>• Additional information about panel considerations, examples of good practice, approaching decision making and risk assessment, and aiding participation of the prisoner for the protected characteristic of disability.</li> <li>• Information about the protected characteristic of marriage and civil partnership.</li> <li>• Information about the protected characteristic of pregnancy and maternity.</li> <li>• Information about the Welsh Language Act.</li> <li>• Additional information about the criteria for philosophical beliefs.</li> <li>• More up-to-date resources for further reading.</li> </ul>

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# Executive Summary

## Protected Characteristics

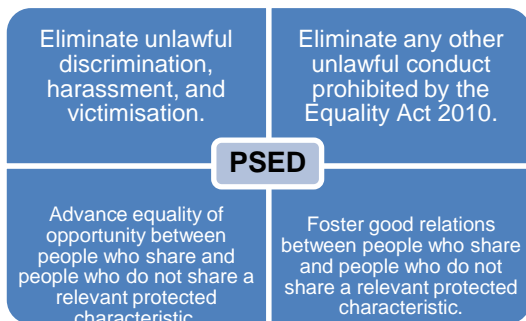
The full guidance can be read here.

### Definition

*It is illegal for a person to be discriminated against because of a protected characteristic. There are **nine** protected characteristics under the **Equality Act 2010**: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.*

The Parole Board is bound by the **Public Sector Equality Duty (PSED)**, which applies across Great Britain to the public bodies listed in Schedule 19 of the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (as amended) and to any other organisation when it is carrying out a public function.

As a result, the Board, when exercising its functions, has a **legal duty** to have due regard to the need to:



The Parole Board is committed to protecting and promoting equality and diversity and eliminating discrimination in compliance with its statutory duties.

**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.

## Key Points

### Prohibited Conduct (2.1 – 2.15)

- **Direct discrimination:** treating someone less favourably than others because of a protected characteristic.
- **Indirect discrimination:** applying a provision, criterion or practice to someone which is discriminatory in relation to a relevant protected characteristic. For example, 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.
- **Discrimination by perception:** treating someone unfairly because it is believed that they have a certain protected characteristic, whether it is true or not.
- **Discrimination by association:** treating someone unfairly because either someone they know or someone they are associated with has a certain protected characteristic.
- **Harassment:** unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating another person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- **Victimisation:** subjecting someone to a detriment because they have done or are believed to have done/be going to do a 'protected act', such as making a complaint of discrimination or helping another person to do so.

### Age (3.1 – 3.3)

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

### Disability (3.4 – 3.31)

- 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.

- 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.
- The Parole Board has a legal duty to make **reasonable adjustments** that will allow individuals with disabilities to access the same opportunities and services as those without disabilities.
- When deciding whether an adaptation request is reasonable, it may be considered how disruptive, expensive, practicable and effective taking such a step would be.
- Panels should seek relevant information, weigh likely causal or associated influences, and form a balanced view as to the relevance of a disability when assessing risks, progress, and plans (including release plans).

### **Gender Reassignment (3.32 – 3.33)**

- Applies to any person who is undergoing, proposing to undergo, or has undergone a personal process (or part of a process) of reassigning their sex/gender.

### **Marriage & Civil Partnership (3.34 – 3.37)**

- The Equality Act protects against discrimination at work because a person is married or is a civil partner.
- A marriage or civil partnership can be between any two adults.

### **Pregnancy & Maternity (3.38 – 3.42)**

- Mother and Baby Units are designated separate living accommodation within a Women’s Prison, which enables mothers to care for their children in prison up to the age of approximately 18 months.
- Panels will need to make adjustments for those who are pregnant or breastfeeding, particularly in the provision of additional breaks.

### **Race (3.43 – 3.54)**

- Race means being part of a group of people who are identified by their nationality, citizenship, colour, national or ethnic origins. It is considered **race discrimination** if someone is discriminated against because they belong to any one of these groups, or because someone thinks they are part of such a group.
- 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.

### **Religion & Belief (3.55 – 3.59)**

- ‘Religion or belief’ can mean any religion or philosophical belief, and includes discrimination based on the lack of religion or belief.
- A religion must have a clear structure and belief system. Denominations or sects within a religion can be considered a protected religion or religious belief.
- Minority religions are treated with the same consideration and respect as more prominent religions.
- A philosophical belief must satisfy the criteria established in *Grainger Plc & Ors v. Nicholson [2009]* to be protected.

### **Sex (3.60 – 3.64)**

- In the Equality Act, sex is understood as binary – being either male or female, or a group of people such as men or boys, or women or girls.
- A person’s legal sex is the sex recorded on their birth certificate or their Gender Recognition Certificate.
- A trans person can change their legal sex by obtaining a Gender Recognition Certificate.

### **Sexual Orientation (3.65 – 3.66)**

- Sexual orientation relates to a person’s attraction to others, rather than their actions.
- Panels should not make assumptions about a person’s sexual orientation.

## **1 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 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') and the Human Rights Act 1998, the latter of which enforces Article 14 of the European Convention on Human Rights (ECHR)<sup>1</sup>. Although the geographical scope of the 2010 Act does not apply to Northern Ireland, it is binding upon all matters which come before the Parole Board.
- 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 and their representatives, witnesses, victims, co-panellists, and members of the secretariat).

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

- 2.1 As a result of the 2010 Act, it is unlawful to discriminate against someone on the grounds of any of the following characteristics:
- Age
  - Disability
  - Gender reassignment
  - Marriage or civil partnership
  - Pregnancy and maternity
  - Race
  - Religion or belief
  - Sex
  - Sexual orientation
- 2.2 These are often referred to as '**protected characteristics**'. Protected characteristics will need to be considered when undertaking parole reviews.
- 2.3 The Parole Board is bound by the Public Sector Equality Duty (PSED), 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.
- 2.4 As a result of the 2010 Act, the Board, when exercising its functions, has a legal duty to have due regard to the need to:
- Eliminate unlawful discrimination, harassment, victimisation, and any other unlawful conduct prohibited by the 2010 Act.
  - Advance equality of opportunity between people who share and people who do not share a relevant protected characteristic.

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<sup>1</sup> *Article 14 of the ECHR states that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

- Foster good relations between people who share and people who do not share a relevant protected characteristic.

2.5 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

2.6 Discrimination does not require intent, and a person may be discriminating against another without realising it. There are different types of discrimination, including direct and indirect.

2.7 **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". An example would be where an employer chooses not to recruit someone on the assumption that they wouldn't be able to do the job as well due to a protected characteristic.

2.8 **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

2.9 The Parole Board has a duty to make reasonable adjustments that will allow people with a protected characteristic to access the same opportunities and services as people without a protected characteristic. This includes making arrangements for oral hearings.

2.10 A reasonable adjustment is an adaptation to avoid placing a protected person at a substantial disadvantage. This may include:

- Changing a provision, criterion, or practice – for example making changes to policies, procedures and staff training to ensure that services work equally well for people with learning disabilities.
- Changing a physical feature – for example making alterations to buildings by providing lifts, wide doors, ramps, and tactile signage.
- Providing auxiliary aids or services.

2.11 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.

- 2.12 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<sup>2</sup> provides guidance on reasonable adjustments that should be made.

Harassment related to a protected characteristic

- 2.13 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 (but is not limited to) offensive emails, physical gestures or facial expressions.

Victimisation

- 2.14 Victimisation is where a person (A) subjects another person (B) to a detriment because B has done a ‘protected act’, or because A believes B has done or is going to do a protected act. The reason for the treatment does not need to be linked to a protected characteristic.

- 2.15 A ‘protected act’ is:

- Making a claim or complaint of discrimination (under the 2010 Act)
- Helping someone else to make a claim by giving evidence or information
- Making an allegation (express or not) that someone has breached the 2010 Act
- Doing anything else in connection with the 2010 Act

### **3 The Protected Characteristics**

Age (section 5 of the 2010 Act)

- 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, known as *discrimination by perception*.
- They are connected to someone of a specific age or age group, known as *discrimination by association*.

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<sup>2</sup> [Ensuring equality: PSI 32/2011 - GOV.UK](#)



- 3.2 There isn't a specific definition of age groups in the 2010 Act. The definition could be narrow (ages 18-20), wide (under 40s or over 18), or relative (younger/older than me), or any attempt to describe an age group as having characteristics specific to that group.
- 3.3 Separate guidance is available on *Children* (prisoners under the age of 18 at the point of referral) and *Young Adults* (aged 18-21 at the point of referral).

*Disability (section 6 of the 2010 Act)*

- 3.4 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.
- 3.5 Panels should be aware of the following:
- 'Physical or mental impairment' includes sensory impairments and severe and enduring mental conditions, for example (but not limited to) bi-polar affective disorder, schizoaffective disorder, paranoid schizophrenia, depression, attention deficit hyperactivity disorder (ADHD), autism and post-traumatic stress disorder (PTSD).
  - 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.
  - Measures to treat or correct the disability, including medical treatment and the use of a prosthesis or other aids, are disregarded. The impairment should be treated as having the effect that it would have without the measures in question.
  - Progressive conditions are protected from the moment they are 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 they have 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 is deemed as having a 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 physically or sexually abuse others, a tendency to steal or set fires, voyeurism, addiction to alcohol and non-prescribed drugs, and exhibitionism.
  - It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, health conditions arising from an addiction to alcohol could amount to an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the 2010 Act.

3.6 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).

3.7 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).

3.8 Panels should always consider disability issues with sensitivity. Reasonable adjustments need to be in place to ensure that prisoners and witnesses with a disability will not be at a substantial disadvantage. 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, should be informed of this prior to a hearing. Patience and adaptability may be needed, as the panel could be constrained in achieving the preferred adaptations because of the facilities available at the prison or secure establishment.

3.9 Panels should bear in mind that prisoners with certain physical and mental disabilities may have difficulty presenting their case and giving evidence for a variety of reasons. Difficulties are likely to be exacerbated where the prisoner is representing themselves. Panels can suggest in the narrative of their directions that the Prison Offender Manager (POM) or other member of staff should support the prisoner in obtaining suitable representation. Further information can be found in the guidance on *Representation*.

3.10 The following are some examples of good practice that panels can adopt:

- Identify at Member Case Assessment (MCA) stage the need for further information about a reported disability. MCA panels must aim to ensure that any future panel has relevant information, that the review can proceed fairly, and that the prisoner is appropriately supported throughout the review where this is within the Parole Board's powers. The provision of a Social Care Assessment can be directed if it is likely to be of assistance to the panel. The potential need for support should be identified at the earliest opportunity so that the establishment can put appropriate measures into place.
- Panels should consider whether the prisoner (or a witness) has a disability that might prevent full engagement with a video or telephone hearing and whether a face-to-face or hybrid hearing would be more suitable.
- Where a prisoner applies for a family member, friend, or other individual (such as a pastoral advisor or guide) to attend as an observer to support them during their hearing, panels should consider whether support would be best provided if the observer is physically in the hearing room.
- Participants at the hearing should be addressed clearly and directly, checking understanding where necessary. It is possible that

participants may have hidden disabilities or neurodivergent conditions (known or unknown), which may impede their ability to be fully present during the hearing. A considerate approach should be adopted in all cases.

- Any assistance should be offered tactfully and without directly suggesting the person has a disability. For example, rather than assuming a hearing impairment, the panel chair could ask: "Would it help if we closed the window – it can get noisy during a hearing?"
- Check that the person can sit comfortably in the chair provided and that they have water or a drink.
- 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 discomfort, as some conditions, medication or sitting for long periods can cause restlessness.
- Clarify to participants that it is okay if they need to take medication during the hearing, and factor this into the hearing where required.

3.11 In face-to-face hearings, the panel should consider the best seating arrangements for everyone. Always directly face a person who is D/deaf<sup>3</sup> or hearing impaired. Check that auditory enhancement systems are working. Enforce the 'one speaker' principle and frequently check that the person has understood what has been said. Be patient and don't talk too slowly as this affects sound rhythms for those with a hearing impairment. Don't talk 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 (BSL) interpreter, which is the responsibility of the prison to arrange.

3.12 Panel chairs should consider additional time needed for interpreting and signing. Time estimates for the hearing may need to be adjusted accordingly. As a rule of thumb, assisted evidence may take at least twice as long to elicit and probe. For a remote hearing, the panel may want to see whether a second remote room can be made available for the prisoner to meet with the interpreter or communication specialist in private.

3.13 Hearing rooms should be well lit if the person is visually or hearing impaired. For remote hearings, checks should be made that everyone can hear and see everyone else clearly.

3.14 During the hearing and in drafting communications, avoid words and phrases which may be perceived as being offensive or show prejudice. The Equal Treatment Bench Book<sup>4</sup> contains further information on acceptable terminology and which terminologies may be considered offensive for some disabilities.

3.15 In drafting documents likely to be seen by a prisoner with disabilities that

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<sup>3</sup> The 'uppercase D' Deaf is used to describe people who identify as culturally Deaf and are actively engaged with the Deaf community. The 'lowercase d' deaf refers to the physical condition of having hearing loss. People who identify as deaf with a lowercase 'd' don't always have a strong connection to the Deaf community and don't always use sign language. Further information on D/deaf prisoners can be found on SharePoint.

<sup>4</sup> [Equal Treatment Bench Book - Courts and Tribunals Judiciary](#)

could affect comprehension, try to use short sentences, simple punctuation, and uncomplicated language. This could be especially important for unrepresented prisoners. As far as possible, try to avoid jargon, use bullet points for key points, employ subheadings, and allow blank space between sections. In panel chair directions, the POM or another member of staff can be invited to go through the document with the prisoner to help ensure accurate interpretation and understanding.

- 3.16 If a hearing needs to be adjourned, it may be helpful to note in directions exactly what adjustments will be required on the next occasion. This is especially important if the case is deferred and likely to be heard by a different panel when the review resumes.
- 3.17 When writing decisions declining release, use the last section of the template to alert future panels to possible adjustments, facilities and arrangements which might be needed.
- 3.18 Request that the Parole Board case manager, when issuing documents, draws the attention of the establishment's Offender Management Unit to the need for additional support to be provided in relevant cases.

*Approach to decision making and risk assessment*

- 3.19 Risk assessment, decision making, and risk management planning should be fair, free from assumptions or stereotypes and consider the issues that are relevant to the individual.
- 3.20 In some cases, physical or mental disability is not linked directly to a person's risk of harm or risk of re-offending. The panel will need to make an assessment as to whether there is a link, taking into account all available evidence or ensuring that they have directed necessary evidence where there appear to be gaps.
- 3.21 On the other hand, a disability or impairment may provide a partial or central understanding of past behaviour or in assessing risk of future offending. Panels will need to explore as fully as possible any relevant connections and influences. For example, how a diagnosed mental health issue might contribute at certain points to lack of judgement, stability, arousal, use of violence, relationship difficulties, and/or general lifestyle. Influences may vary in their impact or frequency over different periods.
- 3.22 Panels should seek relevant information, weigh likely causal or associated influences, and form a balanced view as to the relevance of a disability when assessing risks, progress and plans (including release plans). Information about medication and treatments, and their effect may be relevant to the analysis.
- 3.23 To assist with risk assessment and risk management, at any stage of the parole process, panels can seek the expert input of specialist Parole Board members from within the specialist pool. This is available at MCA and oral hearing stage. If necessary, the panel chair can ask for a specialist member to be added to the panel. At any stage in the review the panel may also direct assessments and advice in reports or oral evidence from other

professionals who are expert in the field. Where this has happened, panels should refer to the guidance as to whether to adjourn or defer the review with specific directions, or conclude the case, noting any relevant information for the next panel.

- 3.24 Disabled prisoners may face prejudice, misunderstanding and limited resources for treatment and support in custody. Panels should appreciate that a physical or mental disability could affect an offender's capability to understand rules and expectations, limit opportunities to participate in the regime, and prevent them from being assessed as suitable for offence-focused work and other educational or rehabilitative activities.
- 3.25 When considering a prisoner's conduct and progress in prison, panels will wish to consider how far and in what ways the prison environment may be affecting behaviour, perhaps by aggravating an aspect of disability or by not treating it effectively. For example, a prisoner with adult ADHD – which may not have been formally diagnosed – may act in a challenging way on the wing, triggering negative entries and adjudications. One sanction is to be locked in their cell for longer periods, possibly without television or other stimulation. In turn, this may impact negatively on the prisoner's wellbeing and mental health.
- 3.26 There is scope for reports from inside and outside the establishment to include misinformed interpretations about custodial conduct, compliance, assimilation and interaction, completion of sentence plans, and progress in general. These reports and witnesses' oral evidence feed directly into a panel's risk assessment and decision making. Therefore, panels should be alert to and objective about possible bias concerning behaviour and misunderstandings about riskiness when they impartially weigh evidence. The panel should assess all evidence objectively and apply their knowledge and experience to weigh it. This might involve asking questions of the witness and prisoner to test whether the interpretations given are fair and reasonable and take account of any disability or other protected characteristic.
- 3.27 When considering release or progression to open conditions, panels should consider how the removal of the constraints of prison or closed custodial environment may affect behaviour and risk. The nature of a disability may affect a prisoner's conduct, understanding, compliance and ability to meet expectations. Panels should explore with witnesses and with the prisoner what may be significant changes in the environment, the levels and types of support available, and the various opportunities which will present on release. Release and risk management plans may need to build in additional or specific forms of support, treatment and monitoring to meet some risks and needs. The Community Offender Manager (COM) will be central to these assessments and planning considerations.

*Participation of the prisoner during a hearing*

- 3.28 Panels may find *Appendix B of the Equal Treatment Bench Book*<sup>5</sup> useful when considering which adjustments may be appropriate to allow effective participation of the prisoner during the hearing. It sets out a range of

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<sup>5</sup> [Equal Treatment Bench Book - Courts and Tribunals Judiciary](#)

impairments alongside their impact, and suggested adjustments that can be made before, during and after a hearing.

- 3.29 A developmental condition, learning difficulty or mental health illness may affect a prisoner's ability to communicate effectively. Effective questioning can only happen when prisoners have an opportunity to give their best evidence. A prisoner cannot give comprehensive evidence to a panel when they cannot understand questions or provide understandable answers. To ensure an effective hearing, panels may need to consider:
- **The Principles of Questioning Vulnerable Prisoners:** The mandatory Questioning Vulnerable Prisoners training provides invaluable advice and principles on how to approach questioning when undertaking an oral hearing with a young or vulnerable person.
  - **Whether an intermediary is required:** An intermediary is a communication specialist that assesses an individual's communication needs and recommends adaptations to the communication format/style and delivery. Their assessment can help to ensure the prisoner has a fair hearing where a physical, neurological, neurodevelopmental or mental health condition, a neurodivergent need, or speech, language and communication issue affects their ability to participate fully in an oral hearing. Separate *Guidance on Intermediaries* is available.
- 3.30 Prisoners who lack mental capacity to make decisions or instruct their representative will require different solutions to reasonable adjustments in response to the lack of capacity. However, reasonable adjustments may also be required.
- 3.31 The *Mental Capacity Assessments and Litigation Friends Guidance* is relevant for managing cases where the prisoner lacks capacity. Further information on vulnerable prisoners can be found on *SharePoint*.

#### Gender reassignment (section 7 of the 2010 Act)

- 3.32 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 sex assigned at birth to the preferred gender, rather than to a medical process.
- 3.33 A person must not be discriminated against because:
- They have the protected characteristic of gender reassignment.<sup>6</sup>
  - Someone thinks they have the protected characteristic of gender reassignment, known as *discrimination by perception*.
  - They are connected to a person who has the protected characteristic of gender reassignment, or someone wrongly thought to have this protected characteristic. This is known as *discrimination by association*.

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<sup>6</sup> A wide range of people identify as transgender. However, they are not protected under the Equality Act unless they have proposed, started or completed a process to change their sex.

Separate guidance has been produced on *Prisoners who are Transgender*.

Marriage or civil partnership (section 8 of the 2010 Act)

- 3.34 A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner.
- 3.35 A marriage or civil partnership can be between any two adults.
- 3.36 The 2010 Act protects against discrimination at work because a person is married or is a civil partner.
- 3.37 Some prisoners who are over 18 can request to get married or enter a civil partnership whilst in prison. However, as of 2<sup>nd</sup> August 2024, prisoners subject to whole life orders are prohibited from marrying or entering civil partnerships unless they have permission from the Secretary of State (who may only give permission for a whole life prisoner to marry if satisfied that this is justified by exceptional circumstances)<sup>7</sup>

Pregnancy and maternity (section 17 of the 2010 Act)

- 3.38 Pregnancy and maternity discrimination is when a person is treated unfavourably because they are pregnant, breastfeeding or have given birth.
- 3.39 Under Prison Rule 12(2), 'a woman prisoner may be allowed to have her baby with her in prison and, if so, everything necessary for that baby's maintenance and care may be provided there.'<sup>8</sup>
- 3.40 Mother and Baby Units (MBUs) allow mothers to care for their children in prison up to the age of approximately 18 months.
- 3.41 MBUs are defined as: 'designated separate living accommodation within a Women's Prison, which enables mothers to have their children with them whilst in prison. It is a drug free unit where, in order to promote healthy child development, a calm and peaceful environment is required at all times.'<sup>9</sup>
- 3.42 Panels will need to make adjustments for those who are pregnant or breastfeeding, particularly in the provision of additional breaks.

Race (section 9 of the 2010 Act)

- 3.43 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 because of it, it would be considered race discrimination. It is also considered 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*

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<sup>7</sup> *The Victims and Prisoners Act 2024 (Commencement No. 2) Regulations 2024*

<sup>8</sup> *The Prison Rules 1999*

<sup>9</sup> *Prison Service Instruction (PSI) 49/2014*

*discrimination.*

3.44 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, a person 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.

3.45 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.

3.46 There may be discrimination against one or more aspects of a person's 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.

3.47 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 possible, the person themselves should be asked to identify or describe it. Where a person's ethnicity is irrelevant, it should not be referred to at all.

3.48 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 helps towards establishing a fair hearing.

3.49 People generally express their views and needs better in their first (native) language. Where a prisoner's first language is not English, and they express a need or preference for the hearing to be accessible to them in a different language, the Board should enable them to use their preferred language where reasonably practicable or make other adjustments to ensure a fair hearing.

3.50 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. Separate guidance has been produced on *Translations and Interpreters*.

3.51 The 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.

- 3.52 The Welsh Language Act 1993 contains the legal requirement that English and Welsh be treated on an equal basis when conducting public business, and in the administration of justice, in Wales.
- 3.53 For all other languages (including sign language), the relevant legislation is within the 2010 Act. The Act prohibits direct (section 13) and indirect (section 19) discrimination on the basis of a protected characteristic, such as race or religion. Section 129 of the Public Sector Equality Duty requires the Board to eliminate discrimination, advance equality of opportunity, and foster good relations between those persons with a protected characteristic and those without.
- 3.54 As such, provision of translated documents or an interpreter will assist in addressing the duty. **However, it should not be read as a legal requirement to arrange translations of documents or provide an interpreter for other languages, except where that language is Welsh.**

Separate guidance has been produced on *Welsh Speaking Prisoners and Duties Regarding the Welsh Language*.

Religion and belief (section 10 of the 2010 Act)

- 3.55 In the 2010 Act, religion or belief can mean any religion or philosophical belief, such as Humanism and Pacifism, and includes discrimination based on the lack of religion or belief.
- 3.56 A religion must have a clear structure and belief system.
- 3.57 Denominations or sects within a religion, such as Protestants and Catholics within Christianity, 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:
- People of a particular religion or people with no religion if they are discriminated against because of their beliefs.
  - 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*.
- 3.58 A philosophical belief must satisfy various criteria<sup>10</sup>, including that it must:
- be genuinely held;
  - be a belief as to a weighty and substantial aspect of human life and behaviour;

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<sup>10</sup> Established in *Grainger Plc & Ors v. Nicholson* [2009] UKEAT 0219\_09\_0311

- attain a certain level of cogency, seriousness, cohesion and importance;
- be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others.

3.59 For example, any cult involved in illegal activities would not satisfy these criteria.

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

3.60 The 2010 Act protects people from discrimination on grounds of sex.

3.61 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, known as *discrimination by perception*.
- They are connected to someone of a particular sex, known as *discrimination by association*.

3.62 In the 2010 Act, sex is understood as binary being either male or female, or a group of people such as men or boys, or women or girls.

3.63 Under the 2010 Act, a person's legal sex is the sex recorded on their birth certificate or their Gender Recognition Certificate. A trans person can change their legal sex by obtaining a Gender Recognition Certificate.

3.64 A research study exploring remote hearings for people in women's prisons, and how they could be facilitated in a more procedurally just and trauma-informed way, was approved by the Research Governance Group (RGG) and can be found on *SharePoint*.

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

3.65 Sexual orientation discrimination is when a person is treated differently on the basis of their sexual orientation. People must not be discriminated against because:

- They are heterosexual, gay, lesbian or bisexual.
- Someone thinks they have a particular sexual orientation, known as *discrimination by perception*.
- They are connected to someone who has a particular sexual orientation, known as *discrimination by association*.

3.66 Sexual orientation relates to a person's attraction to others, rather than their actions. For example, a man may identify as bisexual even if he has only had relationships with women. Panels should not make assumptions about a person's sexual orientation.

## **4 Further Implications for Practice**

4.1 Panels may have to address a prisoner's statement that they are being discriminated against, especially if they consider this has a direct bearing on

risk. In these circumstances, panels should seek advice from the Policy and Practice Advisor.

- 4.2 During the MCA process or when preparing for an oral hearing, panels will need to consider accessibility. Panels may need to take action to avoid discrimination, for example by ensuring the hearing is held in a suitable place (such as on the ground floor or in a building with a lift), the need for a hearing loop, rearrangement of seating, an interpreter, or a dossier with large print.
- 4.3 Prior to the hearing, panels should check the dossier to ensure they have the correct information about how to address the prisoner. If it is unclear or there are doubts about how the prisoner wishes to be addressed, the panel can ask for clarification prior to the hearing and/or obtain confirmation at the appropriate point during introductions.
- 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 appropriate terminology is used at all times. If in doubt, ask for advice from the Policy and Practice Advisor.

## **5 Further Reading**

If Members wish to undertake any further reading on this subject, they may find the following links helpful:

- [Criminal Justice - Together for Mental Wellbeing \(together-uk.org\)](https://together-uk.org/)
- [Equal Treatment Bench Book - Courts and Tribunals Judiciary](#)
- [Neurodiversity in the Criminal Justice System \(autism.org.uk\)](https://autism.org.uk/)
- [Positive Practice, Positive Outcomes: A handbook for professionals in the criminal justice system working with offenders with a learning disability \(GOV.UK\)](#)
- [Representing pregnant women and mothers in the criminal justice system: a legal toolkit](#)
- [The care and management of individuals who are transgender - GOV.UK](#)
- [The Equality and Human Rights Commission](#)