

Change 5.1: New example on sex discrimination - same disadvantage - Changes we are consulting on in chapter 5

Chapter 5 is about indirect discrimination and 'objective justification'. Objective justification applies to indirect discrimination, discrimination arising from disability, positive action and to some of the exceptions permitted by the Equality Act 2010 (the Act) (s.19).

We have included the changes to this chapter that we are consulting on in the following sections.

Change 5.1: New example on sex discrimination - same disadvantage

This example explains how indirect sex discrimination can occur when people experience the same disadvantage, even if they do not share the same protected characteristic. The example is in the context of sex and gender reassignment.

We have included additional information to provide context for this example. We are only looking for feedback on the example in paragraph 5.1.3.

Updated content - Indirect discrimination: same disadvantage

5.1.1 Indirect discrimination may also occur when an individual without the relevant protected characteristic experiences disadvantage alongside persons with the relevant protected characteristic. Provided that a discriminatory provision, criterion or practice puts, or would put, them at substantively the same disadvantage as people who share the relevant protected characteristic, such an individual may bring a claim for 'same disadvantage' indirect discrimination (s.19A). Objective justification applies to same disadvantage indirect discrimination.

5.1.2 Although this type of indirect discrimination is sometimes referred to as 'associative indirect discrimination', it is not necessary for there to be any relationship or association between the group with the relevant protected characteristic and the individual who does not share it. Rather, the individual without the relevant protected characteristic must be able to show that the disadvantage they experience is essentially the same as that experienced by the group sharing the protected characteristic and it arises from the same provision, criteria or practice.

Example - 5.1.3 A local council holds its public consultation meetings on a weekday evening in an area regarded as unsafe for women. It discovers that fewer women than men attend. A woman complains that this is because many women cannot come because of safety concerns, including herself. This kind of disadvantage is more likely to apply to women as a group and will amount to indirect discrimination against women, unless the council can justify its policy.

People who do not share the same protected characteristic but who may also feel unsafe for similar reasons could experience disadvantage that is essentially the same. For example, a trans woman who feels unsafe in the area where the consultation meetings are held because they present as a woman would also have a claim for indirect discrimination, if the council is unable to justify its policy.

Example - 5.1.4 A local authority uses an algorithm to help identify housing benefit fraud. The algorithm identifies a higher incidence of housing benefit fraud in a specific postcode area. Based on this, the council introduces extra checks and verification steps on applications received from residents living in that particular postcode area. This results in delays in those applications being processed.

The area has a large population of residents of Bangladeshi heritage who are put at a disadvantage by the additional, postcode-specific fraud detection checks when applying for housing benefit. Unless the local authority can justify the policy, members of that population may have a claim for indirect discrimination.

A person from an Irish background who has no Bangladeshi heritage lives in the same postcode area. They are subjected to the new fraud checks and their application also gets delayed. Unless the local authority can justify the policy, that person may also have a claim for indirect discrimination.

Public authorities and justification of indirect discrimination

5.1.5 Where a public authority is seeking to justify indirect discrimination, evidence of how they have had regard to the issues of potential discriminatory impact and justification under their public sector equality duty is likely to be relevant.

Example -5.1.6 In the previous example (paragraph 5.1.4), the local authority must, under its public sector equality duty, have due regard to the need to

eliminate unlawful discrimination and to promote equality of opportunity and good relations between protected characteristic groups. Evidence of how it has carried out this duty is likely be relevant when considering any justification of the policy.

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26. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new example on sex discrimination - same disadvantage is clear. - required

- ☐ Strongly Agree
- ☐ Agree
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

27. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

Example Response:

The example in paragraph 5.1.3 effectively illustrates how indirect sex discrimination can occur when a provision, criterion, or practice (PCP) disproportionately disadvantages women as a protected group under the Equality Act 2010 (s.19).

However, to strengthen the legal protection of females as a sex class and ensure clarity, I propose the following feedback and amendments: The example correctly identifies that women, as a group defined by their sex, are disproportionately disadvantaged by the council's decision to hold meetings in an area perceived as unsafe. This aligns with the Equality Act's protection of sex as a characteristic (s.11). However, the example could be enhanced by explicitly referencing the biological basis of sex to avoid ambiguity, especially given the inclusion of gender reassignment in the example. For instance, it could clarify that the disadvantage arises due to

societal patterns of violence or intimidation primarily affecting biological females, which data consistently shows (e.g., Home Office statistics on violence against women and girls).

Suggested Amendment: Revise the first part of the example to: "A local council holds its public consultation meetings on a weekday evening in an area regarded as unsafe, particularly for women due to higher risks of violence or harassment, as supported by crime statistics. A woman complains that this disproportionately prevents females from attending due to safety concerns. This amounts to indirect discrimination against women as a sex class unless the council can justify its policy."

The inclusion of a trans woman in the example risks conflating sex and gender reassignment, which could undermine the distinct protection of females as a sex class. The example should clarify that the trans woman's claim is based on experiencing the same disadvantage (perceived safety risks due to presenting as a woman) rather than sharing the protected characteristic of sex. This ensures the example respects the legal distinction between sex and gender reassignment under the Equality Act.

Objective Justification and Public Sector Equality Duty (PSED):

The example does not address how the council might justify the PCP or how the PSED (s.149) could be applied to mitigate discrimination. To protect females, the example could include a note on the council's duty to consider alternative venues or times to eliminate the discriminatory impact, especially given the PSED's requirement to advance equality of opportunity for women.

Suggested Addition: Add a sentence: "To justify the policy, the council must demonstrate that holding meetings in this area at this time is a proportionate means of achieving a legitimate aim and that it has considered alternatives, such as safer venues or virtual consultations, to comply with its public sector equality duty."

The phrase "an area regarded as unsafe for women" is vague and could be challenged for lack of evidence. To strengthen the example, it should reference objective data or reasonable perceptions of risk (e.g., local crime statistics or consultation with women's groups) to ground the claim of disadvantage.

Suggested Amendment: Replace "regarded as unsafe for women" with: "an area with documented high rates of violent crime, particularly affecting women, as evidenced by local police data."

These changes ensure that the example robustly protects females as a sex

class by grounding the disadvantage in evidence-based risks specific to biological females while maintaining clarity for claims under s.19A for those who do not share the protected characteristic. The amendments also reinforce the council's obligations under the PSED, ensuring that public authorities proactively address discriminatory impacts on women.