



Equality Act guidance for charities

Restricting who can benefit from charities

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What is this guidance about?

This guidance explains the rule in the Equality Act 2010 that allows a charity to discriminate by limiting the group of people it helps.

We call this the **charities' exception**.

This guidance also summarises (at section F) a number of **other exceptions** in the Act which allow a charity to limit the group of people it helps or to target benefits to particular groups.

How has this guidance changed?

This guidance is an expanded version of the summary we produced in September 2010.

It includes more:

- information about how the charities' exception applies in different circumstances
- illustrative examples
- information about how other Act exceptions apply to some charities

We have retained our focus on the charities' exception and on the main issues it raises for charities. This is because detailed guidance about the charities' exception is not available from other sources.

Charities with complex queries about how Act exceptions apply to them may need specialist advice

A. About the Equality Act 2010 (the Act)

A1. What is the overall effect of the Act?

The Act makes it unlawful to discriminate against anyone because of a **protected characteristic** in a wide range of areas including employment and the provision of services. There are some exceptions to this, including the charities' exception.

A2. What are protected characteristics?

The following are protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

You can find more information about the meaning of protected characteristics on the Equality and Human Rights Commission website.

In this guidance, where we refer to **people who share a protected characteristic**, we include groups of people that share one **or more** protected characteristics.

A3. Have all parts of the Act been implemented?

No. Most of the Act took effect on 1 October 2010 and the provisions relevant to the charities' exception came into force then. Some parts (such as those to do with age discrimination in service provision) are not yet effective.

A4. Where can I find further guidance?

The Government Equalities Office (GEO) and the Equality and Human Rights Commission (EHRC) have published a range of practical guides to the Act. Links to the guides are listed at section G.

B. About the charities' exception

B1. What is the charities' exception?

The charities' exception allows a charity to limit its benefits to people who share a protected characteristic. Although this may exclude (and therefore discriminates against) people with other protected characteristics, it is allowed if:

- the charity's governing document only allows people who share a protected characteristic to benefit, **and**
- the restriction can be justified using either of the tests described below

The tests that apply are:

Test A Tackling disadvantage. This test is met if a charity's aim is to tackle a particular disadvantage faced by people who share a protected characteristic.

Test B Achievement of a legitimate aim. Test B applies where a charity is not tackling a particular disadvantage but is seeking to achieve some other legitimate aim in a fair, balanced and reasonable ('proportionate') way.

Section C below explains how the tests apply.

B2. Which charities does the charities' exception affect?

The charities' exception affects organisations applying to register as charities as well as existing charities in the following ways:

- **Organisations seeking to register as charities** which wish to limit benefits to people who share a protected characteristic. We can only register these organisations as charities if the restriction is specifically authorised by the governing document and is justified by either of the tests described above. If these criteria are not met the Commission may not be able to register the organisation as it is unlikely to be able to show that it is for the public benefit.

- **Existing charities** will also need to check any such restrictions in their governing document. They will need to check whether either of the tests described above applies. If not, the trustees will need to change the charity's purposes.

To check whether the charities' exception applies, follow the steps at section D.

There are other exceptions in the Act which allow a charity to target benefits or services to particular groups. Section F summarises the other key exceptions in the Act relevant to charities.

B3. Which charities are not affected by the charities' exception?

Charities are not affected by the charities' exception in the following circumstances.

1. There is no restriction on who may benefit

Example: no restriction on who can benefit

A housing charity has no restriction in its governing document on who it can help. It is not affected by the charities' exception because the exception only applies where benefits are restricted.

2. There is a restriction on who may benefit, but it does not relate to a protected characteristic

Example: restriction not based on a protected characteristic

A housing charity provides services for people living in a particular town. Only local residents can use the charity's services. The charity is not affected by the charities' exception because place of residence is not a protected characteristic.

Where there is a restriction on who may benefit which does **not** relate to a protected characteristic, this could lead to what is called **indirect discrimination**. Section E5 provides more information about how to avoid indirect discrimination in these circumstances.

3. A restriction can be justified using other provisions in the Act

There are other provisions in the Act which allow organisations, including charities, to restrict or target the provision of their services or benefits without relying on the charities' exception.

Example: positive action provisions

A grantmaking charity has no restriction on who it can help. The trustees are asked to make a grant to an organisation which supports homeless women with complex needs. They would not be able to rely on the charities' exception to justify a grant for women only. This is because the charities' exception only applies where there is a governing document restriction and this charity's governing document does not limit who may benefit. But the trustees may be able to rely on the positive action provisions (see Section F).

Section F summarises the positive action provisions and other key exceptions relevant to charities.

4. The charity is for the benefit of disabled people generally

Examples: charities with restrictions relating to disability

Example 1: Benefits restricted to disabled people generally

A charity is set up to provide an advice service for disabled people. The trustees would not need to rely on the charities' exception to justify the restriction to this group. This is because it is lawful to treat disabled people more favorably than non-disabled people. This has not changed under the Act.

Example 2: Benefits restricted to people with the same disability

By contrast, a charity is set up to provide an advice service for people with a hearing impairment. The charity's governing document restricts benefits to people with this particular disability. The charities' exception applies because the services are restricted to people with a particular disability (hearing impairment), and other disabled people are not able to benefit. The trustees would need to justify the restriction using Test A or Test B.

B4. How is this different from what went before?

The key difference is that the new Act explicitly requires charities to justify any restriction, based on a protected characteristic, on who can benefit from the charity. The restriction must be justified using either of the two tests outlined above, or another exception permitted by the Act.

B5. The charities' exception refers to a charitable instrument. What does this mean?

This means a legal document setting out the charity's purposes and, usually, how it is to be administered. It may be a trust deed, constitution, articles of association, will, conveyance, Royal Charter, Scheme of the Commission, or other formal document which determines the purposes for which funds have to be applied. This guidance refers to this document as the **governing document**.

C. How the charities' exception works

For a charity (or proposed charity) whose governing document restricts its benefits to people with a shared protected characteristic, there are two possible tests that can be used to show that this is allowed by the charities' exception. Only one of these tests has to apply. We describe below how each one might apply.

C1. Test A - Tackling disadvantage

Test A can be met if:

- the governing document restricts benefits to people with a shared protected characteristic; and
- the benefits are provided in order to tackle a particular disadvantage or need linked to that protected characteristic.

Example 1: tackling disadvantage

A charity set up for people with visual impairment provides software adapted to the needs of this group. This would be within the charities' exception because the charity's governing document restricts benefits to people with the same disability. The software compensates for any disadvantages visually impaired people may experience when using computers.

Example 2: tackling disadvantage

A charity is set up to help unemployed people of a particular national or ethnic origin. (The protected characteristic of race includes a group of people defined by their race, colour, nationality (including citizenship) ethnic or national origins). The charity can only follow the restriction to people of a particular national or ethnic origin if unemployment is particularly high for this group. To meet the disadvantage element of the charities' exception, the trustees must be satisfied that unemployment is higher for the group it is working with than for the general population.

C2. Can the disadvantage test (A) be used by charities with general purposes?

No. In our view test A could not be met where the charity

- has the freedom to choose any charitable purpose; and
- limits its benefits to a group of people with a shared protected characteristic.

This is because it is unlikely to be clear which particular disadvantage is being tackled.

Example: inappropriate restriction

It would not be possible to set up an organisation with general charitable purposes for the benefit of women or visually impaired people only. It would be difficult to use Test A to justify setting up a charity with these purposes because women or visually impaired people are unlikely to face more disadvantage in relation to every possible charitable purpose.

Whilst a charity with general charitable purposes will find it difficult to use Test A to justify this type of restriction in its governing document, it can as a matter of policy target some of its benefits or services on a group of people with a shared protected characteristic if it is within the positive action exception or another exception permitted by the Act.

C3. Test B - Achievement of a legitimate aim

Where Test A cannot be used, Test B provides an alternative justification for a charity to discriminate. Test B can be met if:

- the governing document restricts benefits to people with a shared protected characteristic; and
- the restriction can be justified as being a fair, balanced and reasonably necessary way of carrying out a legitimate aim, taking into account the discrimination involved.

We explain below how this test might be applied.

C4. What is meant by 'legitimate aim'?

A legitimate aim is one that is likely to include the following features:

- It has a reasonable social policy objective – examples include health improvement or the protection of children.
- It is consistent with the lawful carrying out of the charity's stated purpose for the public benefit. This will not necessarily be identical with the charitable purpose. For example, a charity may have a purpose of relieving poverty and sickness. This could be a legitimate aim. If the charity had a subsidiary aim of helping children out of poverty this could also be a legitimate aim.
- It is not itself discriminatory.

C5. When is it lawful to discriminate in order to achieve a legitimate aim?

Limiting benefits to those with a shared protected characteristic is only lawful under Test B if there is a strong justification that shows that the restriction is appropriate and necessary in order to achieve the aim. To justify discrimination based on Test B, the trustees must be able to show that applying the restriction:

- Is justified although it excludes people with other shared protected characteristics. Where the charity restricts its benefits to a group that shares a protected characteristics such as race, sexual orientation, or gender and the restriction is not justified on the basis of disadvantage or need (see Test A), this can only be justified by particularly convincing and weighty reasons. Charities seeking to use Test B will need to take advice about whether the discrimination they propose is in the category requiring a convincing and weighty justification.
- Is not justified by reference to funding considerations alone. Cost cannot be the only justification for applying Test B. For example, a charity could not justify restricting benefits to a particular group as a means of obtaining funding from a source who will only provide it on a discriminatory basis.
- Is the only effective way of carrying out the aim. The trustees must be able to show that they have considered if the aim can be achieved by other less discriminatory means and, if so, why these cannot be pursued instead.

Example 1: Discrimination based on Test B

A charity is set up to provide housing for men who have worked in the police force and who are in financial need. By restricting the beneficiaries to men, the charity is helping only people with a shared protected characteristic (sex) and the trustees must consider if the charity exception applies.

It is unlikely that Test A can be used to justify the restriction unless there is evidence that, for example, men who have worked in the police force are likely to face poverty or homelessness to a greater extent than women who have worked in the police force. To justify the restriction using Test B, therefore, the trustees would have to identify the legitimate aim that they seek to achieve and show that benefiting only men was a fair, balanced and reasonable ('proportionate') way of achieving it.

Example 2: Discrimination based on Test B

A new charity is set up to tackle poverty in a part of the world affected by food shortages and hunger. The governing document restricts benefits to women farmers. The charity would be helping people with a shared protected characteristic (sex) and so the trustees must consider if the charities' exception applies.

The trustees can use Test A to justify the restriction if there is evidence that women in the community where the charity works are more likely to face poverty or hunger.

If there is no evidence of greater disadvantage, the trustees could consider a test B justification. They might have evidence that, whilst people of both sexes are affected by hunger, focusing benefits such as funding for start up businesses on women reduces poverty for their families and the wider community. The trustees would have to identify the legitimate aim that they were seeking to achieve and show that only providing the funding to women was a fair, balanced and reasonable ('proportionate') way of achieving it.

D. Complying with the Act

D1. What must existing charities do to comply with the Act?

Charities have a legal duty to comply with the Act. It is likely that many charities which restrict or target their benefits will be able to rely on the charities' exception, or another exception permitted by the Act. We recommend that all charities check that they do comply with the Act. This can be done as part of any routine review of the charity's operations and we would recommend the following approach:

1. Review the charity's governing document. Does it restrict who may benefit on the grounds of a protected characteristic?
2. If the answer to this question is 'yes', consider whether the restriction can be justified using either
 - Test A or Test B in the charities' exception, or
 - another exception permitted by the Act.

If it can, then no further action is needed.

3. If it is difficult to apply either Test A or Test B, and no other exception applies, the charity's purposes may no longer be capable of being carried out for the public benefit. In these circumstances, a charity must change its purposes. We explain when and how this can be done in *Changing your Charity's Governing Document* (CC36)

D2. What if a charity's circumstances change?

Sometimes the link between a charity's aim and the group it is set up to help changes.

Example: new circumstances

A charity's governing document sets out an aim to relieve poverty by improving employment prospects for people of a particular national or ethnic origin. (Protected characteristic-race). The trustees can only continue to restrict their work to this group if unemployment remains higher for that group, or where disadvantages related to unemployment remain more acute for that group. If circumstances change so that disadvantage no longer exists, the trustees must consider changing the charity's purposes.

The charity's purposes would need to be changed if the charities' exception, or other Act exceptions, no longer apply.

D3. What if a charity is operating in a way prohibited by the Act?

We expect trustees to run their charity in accordance with the legal obligations that are relevant in their circumstances. This includes taking immediate steps to prevent illegal discrimination from continuing.

E. Other questions about the charities' exception

E1. Can a charity limit the group of people it helps by reference to skin colour?

No. If the governing document includes a restriction to people of a particular colour such as 'black' or 'white', it will be read as if that restriction did not exist.

E2. How does the charities' exception fit with public benefit requirements?

All charities must have an aim for the public benefit (the public benefit requirement).

Our public benefit guidance explains what this means.

An organisation which:

- restricts its beneficiaries to people who share a protected characteristic, but
- cannot justify the restriction under either of the two tests in the charities' exception

will not be able to show that it is for the public benefit and cannot therefore be a charity.

E3. How does the charities' exception apply to restricted funds?

The charities' exception applies to restricted funds in the same way as it applies to other charities.

Restricted funds are funds managed by charities which have been given or raised for specific purposes.

These funds are usually managed by the trustees of the main charity and they often have their own governing document.

Example: what is a restricted fund?

Money is donated to a university or school charity. The money is given by the donor to set up a scholarship for specific purposes. The trustees can only spend the money in the specified way. This is a restricted fund. Similarly, money raised by an international charity for use only in a particular part of the world is a restricted fund.

Trustees can only use the charities' exception to follow the requirements of donors that benefits be restricted to people with a shared protected characteristic where:

- the restriction is included in the governing document; and
- applying the restriction can be justified using Test A or Test B.

Example: how the charities' exception applies to restricted funds

A scholarship charity has a governing document that restricts benefits to student engineers of a particular national or ethnic origin, or is for engineering students generally but includes a preference for engineers of a particular national or ethnic origin. (Protected characteristic-race.) To be able to apply the restriction, the trustees must be satisfied that either Test A or Test B in the charities' exception applies.

E4. Is grant making a service within the meaning of the Act?

Yes. In our view, making a grant in furtherance of a charity's aim counts as the provision of a service.

E5. How do charities with a residence or geographic restriction avoid indirect discrimination?

Indirect discrimination may arise if there is a restriction on who may benefit which does **not** relate to a protected characteristic and the effect of the restriction is that:

- people who share a protected characteristic are disadvantaged by the restriction compared to others who don't share that characteristic; and
- the restriction is not a proportionate means of achieving a legitimate aim

For example, many charities restrict their beneficiary groups to the local inhabitants of a particular area. To provide charitable benefits is likely to be a legitimate aim and to do so in a particular area may be a proportionate means of achieving it.

Example: avoiding indirect discrimination

A charity is set up to tackle poverty amongst the inhabitants of a borough. The borough happens to be one where people from minority ethnic backgrounds are under-represented. Only local residents can use the charity's services. The charity is not affected by the charities' exception because place of residence is not a protected characteristic. Indirect discrimination against people of minority ethnic backgrounds is unlikely to arise if the charity can show that:

- there is a rational link between the purpose of tackling poverty and the restriction to inhabitants of this area; and
- inhabitants with any ethnic background, or with any other protected characteristic, can benefit from the charity's services.

F. Other exceptions relevant to charities

The Act contains some other exceptions from its prohibitions on discrimination. More information about these is contained in the guides provided by Government Equality Office and Equality and Human Rights Commission. We recommend that charities affected by these other exceptions should read these guides. The following list briefly describes the main exceptions which can apply to charities.

F1. Membership of associations

Restricting membership of associations

An association is any group:

- with 25 or more members
- which has rules to control how someone becomes a member

Associations, including charitable associations, may restrict membership and benefits to people who share a protected characteristic provided membership is not based on someone's colour.

Example: restricting membership of an association

An association is set up to support women with breast cancer. Membership is open to women only. The association has 30 members. New members must be approved by the committee. This is an association covered by the Act. The Act allows associations to restrict their membership to people who share a protected characteristic. This association is allowed to restrict its membership to women.

Restricting who can benefit from associations

Although the Act allows associations to limit membership and benefits in the way outlined above, charitable associations must also meet the public benefit test. This means that whilst **membership** may be restricted in the way described above, any **restriction on who can benefit** from the charity must be for the public benefit. There needs to be a rational link between who can benefit and the charitable purpose.

Example: Charitable associations

An association is set up to provide a place of worship in a particular area. The membership is limited to a particular ethnic group in reliance on the association exception. The association also wishes to limit use of the place of worship on the same basis. Whilst this is not unlawful under the Act, the association could not be a charity. This is because the Commission considers that such a restriction is not for the public benefit and that the place of worship should be available for those members of the local community who wish to worship there.

F2. Men only or women only fundraising

Participation in activities to support or promote charities can be restricted to one sex only. For example, Race for Life is a women only event which raises money for Cancer Research UK.

F3. Membership based on religious belief

Some charities, which are not set up for religious purposes, have membership requirements which are based on religious belief.

The Act allows these charities to continue to require members or prospective members to make a statement that asserts or implies membership or acceptance of a religion or belief.

This is only allowed if this type of membership requirement has been in place continuously from a date before 18 May 2005.

Charities can restrict access to benefits to those members who make such a statement.

F4. Positive action in service provision

What is positive action?

Positive action is a means by which service providers can help people who are disadvantaged or under represented to achieve the same chances as everyone else. The positive action must be proportionate.

Positive action can include providing additional or bespoke services, separate facilities, accelerated access to services, targeting resources or induction or training opportunities to benefit a particular disadvantaged group.

When can positive action be used?

Service providers, including charities, can take positive action when **all** of the following conditions 1-3 are met:

Condition 1. Service providers must reasonably think that a group of people who share a protected characteristic and who are, or could be, using the service:

- suffer a disadvantage linked to that characteristic; or
- have a disproportionately low level of participation in this type of service or activity; or
- need different things from this service from other groups.

Note: Reasonably think means that the provider can see the disadvantage, low level of participation or different needs, but the provider does not have to show any detailed statistical or other evidence. To establish whether there is a particular disadvantage a charity can refer to the population with whom it usually works.

Condition 2. The action the provider takes is intended to:

- enable or encourage the group to overcome or minimise that disadvantage; or
- enable or encourage the group to participate in that activity; or
- meet the group's different needs.

Condition 3. The action the provider takes is a proportionate way to increase participation, meet different needs or overcome disadvantage. This means that the action is appropriate to that aim and that other action would be less effective in achieving this aim or likely to cause greater disadvantage to other groups.

Permissible activity not classed as positive action

A service provider can take action to benefit those from one particular protected group **that does not involve less favourable treatment** of those from another protected group. Although this would not be classed as positive action, it would be allowed.

Example: permissible activity not classed as positive action

A youth centre charity, restricted to working in an area with a significant Chinese population, finds that few Chinese people are using its services. The trustees could take specific steps to target its advertisements and explanations of its service to Chinese people living in the area. The trustees could give more information to this group about the service. Since this approach would not involve giving less favourable treatment to others, it would not be classed as positive action.

Example: permissible positive action

In the example above, the youth centre could consider waiving or reducing its fee for a short period for Chinese people as a means of increasing their participation. The action involves some less favourable treatment of other people from different national or ethnic backgrounds. The less favourable treatment can be justified because it would be short term and unlikely to affect use of the service by people from non Chinese backgrounds. The less favourable treatment would be outweighed by the benefit of having a wider membership. This approach would be within the positive action provisions.

Example: disproportionate approach – not permissible within positive action provisions

In the example above, a decision to waive an annual fee for the under represented Chinese group may not be a legitimate positive action. This is because such action would involve less favourable treatment in the longer term of other users who might want to join the club but have to pay fees. This means that it may not be a proportionate way of addressing the lower participation and may therefore be unlawful.

It is unlawful to treat members of a disadvantaged or under-represented group more favourably than other groups if the three conditions above do not apply or are not met.

Disability - positive action justification not always required

As with other types of discrimination covered by the Act, it is important to note that it is lawful to treat a disabled person more favourably than a non disabled person.

Example: positive action for disabled people generally

In the example above, the youth centre provides discounted admission for disabled people. This is allowed because it is lawful to treat disabled people more favorably than non-disabled people. This approach doesn't require a positive action justification.

Example: positive action for people with the same disability

By contrast, if the youth centre wishes to take similar steps to increase the participation of people with a particular disability, such as a learning disability, a positive action justification would be required. This is because the benefit of discounted admission is to be targeted at people with a particular disability and other disabled people will not benefit from the targeting.

F5. Religious or belief organisations

1. What restrictions can religious or belief organisations impose?

In certain circumstances religious or belief organisations, including charities which fall into this category, can restrict, because of a person's **religion or belief** or their **sexual orientation**:

- membership; or
- participation in their activities; or
- the services they provide; or
- the use of their premises.

Example: restriction because of a person's religion or belief

A religious or belief organisation, as defined at point 4 below, is able to restrict membership to people who follow its beliefs.

Unlike other types of charity, religious and belief charities do not need a governing document restriction to be able to do this.

Organisations which meet the criteria of the religion and belief exception do not have to justify restricting benefits by reference to the criteria in the charities' exception.

2. What conditions must be met before the restriction is imposed?

A. Restrictions on the grounds of religion or belief

A restriction can only be made on the grounds of religion or belief:

- because of the organisation's purpose; or
- to avoid causing offence to followers of the religion or belief on which the organisation is founded.

B. Restrictions on the grounds of sexual orientation

Religious and belief organisations can only make restrictions because of sexual orientation if this is necessary to:

- comply with the organisation's doctrine; or
- avoid conflict with the religious or belief-based convictions of many followers of the religion or belief on which the organisation is founded.

3. Other restrictions on the use of the religion and belief exception

Even where these tests described above are satisfied, there are further restrictions:

- The exception for religious and belief organisations does not apply to organisations that are wholly or mainly commercial. Where charities may engage in some types of trading, they are not commercial in that they cannot have profit making as a primary aim. The exception for religious and belief organisations would not apply to companies owned by the charity to carry out non charitable trading.
- Religious and belief organisations cannot discriminate because of sexual orientation where they are providing a service on behalf of a public authority under a contract with that public authority.

4. What is a religious or belief organisation?

The Act defines a religious or belief organisation as one where the purpose is to:

- a) practice, advance or teach a religion or belief; or
- b) enable people of a religion or belief to receive any benefit, or engage in any activity, within the framework of that religion or belief; or
- c) foster or maintain good relations between people of different religions or beliefs.

The fact that an organisation meets the definition above, does not necessarily mean that it can limit its benefits to persons of that religion or belief. A restriction relating to religion or belief is only permitted for a charity if:

- the conditions in 2A and 3 above are met; and
- the purpose is for the public benefit.

There needs to be a rational link between who can benefit and the charitable purpose.

Example: restricting benefits to people of the same religion or belief

A charity has a purpose to provide a care home for the people of a particular religion, including the provision of facilities in an environment which adheres to the particular religious doctrines and practice. The Commission has accepted that a purpose to provide such services is capable of being for the public benefit. The care home qualifies as a religious organisation under b. above and the first condition in 2A above and in 3 are met. The trustees can restrict their service to people of that religion. Because their activity is within the conditions of this exception, the trustees do not need to rely on the charities' exception to justify restricting their service.

F6. Admission to education

Single sex institutions

Schools and further and higher education institutions are allowed to admit students based on gender where the school or institution is single sex.

Institutions with a religious character

Schools with a religious character can have admissions criteria which give preference to members of a particular religion. A maintained school with a religious character can only apply such criteria to decide who is admitted if it oversubscribed.

An higher or further education institution which has been designated as one with a religious ethos can, in certain circumstances, admit students that share its religion or belief over those that do not.

F7. Sport

In certain circumstances sporting organisations (including charities) can lawfully discriminate on gender or gender reassignment grounds.

G. Further information

The Government Equalities Office (GEO) have produced a series of quick start guides and the Equality and Human Rights Commission (EHRC) have produced a range of fuller guides which can be viewed at www.equalityhumanrights.com/ea2010. These give advice on what organisations must do to meet their obligations under the Act. These give a full account of those obligations and how they impact on different types of organisations and different activities. The guides clearly highlight what has been changed by the new law. The range of specialist guides includes:

EHRC

What equality law means for:

- your association, club or society
- your voluntary and community sector organisation (including charities and religion or belief organisations)
- you as an education provider - further and higher education
- you as an education provider - schools

GEO

A quick start guide:

- to positive action in service provision for voluntary and community organisations
- on religion and belief discrimination in service provision