

### Using The Theatre Casting Toolkit - Understanding The Legal Framework Around Discrimination (Version 4)

The following FAQs are for theatre producers, owners and managers using the Theatre Casting Toolkit created by Tonic Theatre and commissioned by UK Theatre and SOLT. These are designed to provide general legal guidance on obtaining and using information about performers' personal characteristics within the law on discrimination. This is based on the law applicable in England, Wales and Scotland.

This guidance note is intended to provide general information, not legal advice. As legal advice must be tailored to the specific circumstances of each case, its contents are not intended to be a substitute for taking advice in person from a qualified lawyer. SOLT and UK Theatre members requiring advice about a particular legal issue are invited to contact the SOLT/UK Theatre Legal Team.

#### Q1 We want to increase diversity amongst our performers. How do we know which particular groups to target?

You could look at:

- + internal information on the personal characteristics of those who have been cast by your organisation in the past;
- + data/information from relevant industry, Government or national research projects/reports/articles on the personal characteristics of performers within the theatre industry; and/or
- + information from comparable organisations within your area or from contacts within the theatre industry on the make-up of performers within the theatre industry.

This should provide an indication of which groups are under-represented in performance roles.

#### Q2 We do not have any/complete information on the personal characteristics of those previously cast. Can we ask performers on our current show/s for this information?

Yes, you can ask those already in performance roles to provide information about their personal characteristics to monitor and improve the diversity of your performers. Equality monitoring is encouraged by the Equality and Human Rights Commission (EHRC).

The best method of obtaining this information is to ask performers to complete an anonymised, equal opportunities monitoring form.

Certain characteristics are protected under the Equality Act 2010 (see below) but you can still ask for information about these to monitor and improve the diversity of your performers.

If an unfavourable decision is made in relation to a performer during their employment, eg they are disciplined or dismissed, and you have asked them for information about their characteristics, it is possible that they may claim that the information collected on their protected characteristic/s influenced that decision. To reduce the risk of a discrimination claim being made on this basis:

- + it should be made clear when collecting the information about their characteristics that it is being sought for the sole purpose of monitoring the diversity of performers and this should be what you then use it for;
- + the information should (where possible) be anonymised and separated from any personnel information relating to them by someone who does not make decisions in relation to their employment;
- + you should only collect information which you could potentially use for increasing diversity; and
- + if an unfavourable decision is made in relation to a performer, it is best to document the lawful business reason/s for that decision.

The protected characteristics under the Equality Act, referred to above, are:

- + age;
- + disability;
- + race (including colour, nationality, ethnic or national origins);
- + sex;
- + religion or belief;
- + sexual orientation;
- + pregnancy and maternity;
- + marriage and civil partnership; and
- + gender reassignment.

If you manage the discrimination risk as set out above, you should be able to conduct effective equality monitoring.

#### Q3 Going forward, can we ask performers for information on their protected characteristics during the casting process?

There is a prohibition on asking health-related questions prior to making an offer of employment. However, an exception is made where it is for the purpose of monitoring the diversity of applicants.

You can, therefore, seek information on protected characteristics during the casting process to monitor the diversity of applicants. Equality monitoring during the recruitment stage is also encouraged by the EHRC. As referred to above, using an equal opportunities monitoring form, is the best method of obtaining this information.

When seeking this type of personal information prior to making an offer, there is a risk that, if someone is not auditioned or cast, they could claim that this was due to the information they provided, ie for a discriminatory reason. However, if you follow the points set out in Q2 this will reduce the risk of a discrimination claim. For example, if you make a note of why that person has not been auditioned or cast, where that is the case, it should assist to defend a discrimination claim on this basis.

### Q4 Is there guidance on how we should ask about protected characteristics?

#### Ethnic groups, religion and national identity

The Office for National Statistics (ONS) [website](#) contains useful guidance on how to ask questions on ethnic groups, religion and national identity, including which categories to use. The questions were developed in consultation with stakeholders, including the EHRC, the Scottish and Welsh Governments and the Northern Ireland Statistics and Research Agency.

#### Sexual orientation

The EHRC statutory code of practice states that the recommended way to ask about sexual orientation is as follows:

What is your sexual orientation?

- + Bisexual
- + Gay man
- + Gay woman/lesbian
- + Heterosexual/straight
- + Other
- + Prefer not to say

An alternative is to use “gay/lesbian” instead of the second and third options above. This acknowledges that some women identify themselves as gay.

#### Transsexual status

Please note that the term “transsexual” is used in the Equality Act to refer to a person who has the protected characteristic of gender reassignment. This is used here as this is the specific category of persons protected from

discrimination by the law under the gender reassignment provisions.

We are aware that the term “trans” may be more commonly used to cover a wider group of people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. [www.stonewall.org.uk/help-advice/glossary-terms#t](http://www.stonewall.org.uk/help-advice/glossary-terms#t)

The EHRC states in its code of practice that transsexual or transgender status should not fall within the section on sexual orientation on a monitoring form. It should instead have a section on its own. If you are monitoring the wider “trans” category, our view is that the same principle should apply.

The EHRC code of practice also states that it is important to recognise that transsexual people will usually identify as men or women, as well as transsexual people so it is not appropriate to offer a choice between identifying as male, female or transsexual. Our view is that multiple choice options, including the options “other” and “prefer not to say”, are also appropriate if monitoring the wider “trans” category.

If seeking data on transsexual status, or data relating to the wider “trans” category, due to the particularly sensitive nature of this information, privacy, confidentiality and anonymity should be paramount.

If an individual has a gender recognition certification it may be a criminal offence to disclose any information relating to their gender history without permission, so you would need to be extremely careful about who knows this information and what is done with it.

### Q5 Is there any guidance on questions we should not ask during the casting process?

You should generally avoid asking any questions in relation to a protected characteristic which are unrelated to the purpose of monitoring and improving diversity amongst performers. You can ask a health-related question which is for the purposes of making reasonable adjustments, establishing whether they can do tasks which are intrinsic to the role, taking positive action (see Q8), judging whether the person can complete an assessment or where someone needs to have a disability to perform the role. There may be circumstances where it would be appropriate to ask other questions related to protected characteristics, but these will be limited.

Where you have sought information but then chosen not to focus on the particular personal characteristics disclosed, it is even more important to document the reasons for any unfavourable decisions taken in relation to that person. This is particularly relevant if data is not anonymised. Otherwise, it may make it easier for the person to allege that the information collected influenced, or was the reason for, the unfavourable treatment and make a discrimination claim. It would also be good practice to make a note of your reasons for choosing the target groups you have decided to focus on.

### Q6 Do we have to anonymise the data?

No. However, anonymising and separating the data is recommended as it has the advantage of reducing the risk of a discrimination claim. This is because it makes it more difficult to argue that the person taking decisions in relation to the performer knew about the particular performer's protected characteristics and was influenced by that knowledge.

Anonymising the data is likely to encourage more performers to provide the information as, because the information is personal and potentially sensitive, they may be uncomfortable providing the information otherwise.

If, however, you wish to do more detailed analysis for the purposes of increasing diversity, eg assessing whether people with particular characteristics are being typecast or whether they are being cast in minor rather than leading roles, then you will need to link the information on characteristics with the roles they are auditioning for, or have been cast in. It would also be necessary to do this if you wish to rely on the positive action recruitment and promotion exception (see Q8 below).

If anonymised data does not provide the level of information you require and you, therefore, need to link the information to the person, it is even more important that you communicate the purpose for which the information is sought and that you ensure that you do not use it for other purposes. It is also more important that you document the reasons for any future unfavourable treatment of the performer, eg if they are not auditioned or cast, or if they are disciplined or dismissed.

If you do not anonymise the data collected, your monitoring form should inform performers of this.

Where you need to link the information to the person, another option is to do this for most of the information but collect the more sensitive information on an anonymised basis. For example, if you were monitoring transsexual status, or any information relation to the wider category of "trans" status, it is likely to be more appropriate, due to the particularly sensitive nature of this information, to collect this data on an anonymised basis.

### Q7 We have not been able to get the required information in the past. Can we require them to provide this information?

Performers should not be required to provide this information for this purpose. It should be provided on a voluntary basis. You should instead:

- + focus on explaining clearly why the information is being sought, eg because the organisation values diversity and is committed to improving diversity amongst performers;
- + persuade them of the importance of providing this information for the organisation and/or the theatre industry;
- + explain how the data will be used;
- + explain how it will be kept secure and confidential; and
- + keep the request as concise as possible.

This approach should encourage more people to respond. Anonymising the information (where possible) should also lead to an increase in the information collected.

### Q8 Once we know which groups are under-represented and have decided which groups we are going to focus on, what steps can we take to increase diversity in casting?

You could take action to benefit people with a particular protected characteristic which does not involve treating those without the characteristic less favourably, eg making an agency with a high proportion of BAME talent aware of a new role in addition to making other agencies aware of that role.

#### General positive action

If you reasonably think that:

- + people who share a protected characteristic suffer a disadvantage connected to that characteristic, eg lack of opportunity, lack of choice; barriers to accessing employment, or have needs which are different from people without the characteristic; and/or
- + participation in an activity, eg performance work, by people who share a protected characteristic is disproportionately low;

you can take positive action. This is any action which aims to enable or encourage people with the protected characteristic:

- + to overcome or minimise the relevant disadvantage or meet the relevant needs; or
- + to participate in the particular activity.

This could include using the Theatre Casting Toolkit [Tracker](#) to set targets for increasing participation by the target group, providing training and mentoring opportunities for the target group, using wording in marketing or communications about roles to encourage those from the target group to audition, or advertising

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roles in media outlets which are likely to be accessed by the target group.

The action taken must be a proportionate means of achieving the aims referred to above. Assessing whether action is proportionate, involves balancing the seriousness of the disadvantage, the extremity of need or under-representation and nature of action being taken against the impact the action will have on others and considering whether there are other means of achieving your aim which will not disadvantage others.

### Positive action in recruitment and promotion

It is possible to cast a person because they have a protected characteristic instead of someone without the characteristic but **only** where the points set out below apply. This exception effectively allows favourable treatment based on a protected characteristic in a "tie-breaker" recruitment situation where two people are equally qualified. This particular type of positive action should be treated with caution as there are potential difficulties satisfying the "equal merit" test.

- + You reasonably think that participation in performance work by people who share that characteristic is disproportionately low or that they suffer a disadvantage connected to the characteristic.
- + The person is as qualified as the others applying for the role. This is not limited to formal qualifications, so it could include judgment based on the criteria you use to establish who is best for the role, eg suitability, competence, professional performance.
- + There is no policy of treating people with this characteristic more favourably than others, in connection with recruitment or promotion,

so no blanket policy of favouring a particular group or use of quotas. Each case should instead be considered on its merits.

- + Casting them is a proportionate means of enabling or encouraging people from that group to participate in performance work, or overcome or minimise the disadvantage they suffer. Please see the section on general positive action above in relation to proportionality.

Positive action is optional, not a requirement, but public-sector employers should consider whether it is necessary to comply with their public-sector equality duty.

### Positive discrimination

It is important to understand that the above does not mean that positive discrimination is permitted. This is where a target group is simply given preferential treatment because they have a particular protected characteristic, eg if an employer chooses to recruit a woman who is less qualified than a man because women are under-represented in its organisation. Positive discrimination is not lawful.

It is, however, possible to treat people with disabilities more favourably than a non-disabled person.

### Occupational requirement

It is possible to engage a performer on the basis that they have a protected characteristic (or in some cases do not have a protected characteristic) where this is an occupational requirement, eg one which relates to the nature and context of the work and is crucial to the role, but only if the application of the requirement is a proportionate means of achieving a legitimate aim, eg due to the need for authenticity or realism.

You should monitor the impact of any measures you take and only continue to take measures whilst the action is needed.

### **Q9** What do we need to show to use the positive action exceptions referred to in Q8?

As referred to above, to take action you must "reasonably think" that participation by the target group in performance roles is disproportionately low or that they suffer a disadvantage or have different needs, which means that some indication or evidence is required. However, this does not have to be sophisticated statistical data or research. It could involve looking at your internal monitoring information and/or speaking to other comparable employers in the industry. It could also involve looking at research data for a national or local picture of the work situation for particular groups who share a protected characteristic.

### **Additional point**

When obtaining and using information on performers' characteristics, you will need to take into account your obligations under the Data Protection Act 2018 (which implemented the GDPR into UK law). See the ICO [guidance](#) on data protection for more details. There is also information regarding data protection on the [SOLT](#) and [UK Theatre](#) websites.

### **SOLT and UK Theatre**

5 September 2019