

Consultation Response

Draft code of practice for
employers: Avoiding unlawful
discrimination while preventing
illegal working

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Equalities Law, Employment Law and Immigration and Asylum Law sub-committees welcome the opportunity to consider and respond to the UK Government consultation: Draft code of practice for employers: Avoiding unlawful discrimination while preventing illegal working.¹ The sub-committee has the following comments to put forward for consideration.

¹ [Draft code of practice for employers: Avoiding unlawful discrimination while preventing illegal working - GOV.UK](#)



General comments

The consultation refers to the "right to work checks" that employers are required to undertake, such as through the Home Office operated "Employers Checking Service". There have been longstanding concerns about the accuracies of these checks. In particular, these have included that the Home Office system often fails to recognise the right to work of migrants leave to remain conferred by Section 3C of the Immigration Act 1971.

As the Secretary of State is aware Such problems were noted by the High Court of England and Wales in the case of *RAMFEL & Anr v SSHD [2024] EWHC 1374 (Admin)*²

There is a clear risk that individuals who are denied employment or else whose employment is suspended / terminated as a result of these deficiencies will suffer discrimination. That is in addition to the many serious practical and financial problems such individuals and their dependent family members suffer as a result of such deficiencies. It should be noted that very many (perhaps most) migrants with "Section 3C leave to remain" are not permitted to claim benefits and therefore they rely solely on employment income to support themselves and their families. There is therefore no safety net in place to catch them when such employment is, rightly or wrongly, terminated.

Comments in relation to the draft Code

These comments are offered in support of the objectives of the draft Code. The suggested clarifications are intended to strengthen its practical application, particularly in light of digitalisation and the expanded scope of the Right to Work Scheme, and to reduce the risk of unintended discriminatory outcomes.

1. Section 1: Definitions

The draft code includes a wide definition of worker to catch any individual employed by an employer under any of the following working arrangements: a contract of employment (a contract of service or apprenticeship); under a worker's contract; as an individual sub-contractor; or an online matching service providing the details of an individual who is a service provider to potential clients or customers. We note that this wide definition is to reflect regulatory changes due to come into force under the Border Security, Asylum and Immigration Act 2025 section 48 which expands the duties on employers to conduct right to work checks for a much broader class of worker³.

² [RAMFEL & Anr v SSHD \[2024\] EWHC 1374 \(Admin\)](#)

³ [Border Security, Asylum and Immigration Act](#)



The Code states that there should be no unlawful discrimination by employers when carrying out the right to work checks on these workers, and states that workers can raise an Employment Tribunal complaint if there is discrimination.

The definitions relevant to who can bring a complaint in respect of a contravention of Part 5 (Work) of the Equality Act 2010 ought to be considered to ascertain whether all those classed as ‘workers’ for the purposes of the draft code will have the statutory right under the Equality Act 2010 to bring a complaint of unlawful discrimination. For example, a complaint of unlawful discrimination contrary to section 39 of the Equality Act 2010 (employees and applicants) can only be brought by an ‘employee’ or an applicant for ‘employment’. The terms ‘employee’ and ‘employment’ are defined in s83 of the Equality Act 2010 (and have been interpreted in key cases such as *Jivraj v Hashwani* [2011] UKSC 40⁴).

2. Section 1 – Application to employment and recruitment agencies

The Code correctly states that agencies may remain liable for discrimination even when acting on client instructions. Practical compliance guidance is limited so we suggest that examples illustrating how agencies can demonstrate reasonable steps to resist or address discriminatory instructions from clients should be added.

3. Section 2 – What is discrimination? (Indirect discrimination)

Indirect discrimination is defined accurately but limited right to work specific examples are provided. We suggest that additional examples linked to right to work practices should be included (e.g. digital only processes, rigid procedural rules) to assist employers in identifying risk.

4. Section 2 – Action against employers and cross references to “reasonable steps”

The Code identifies training and equality policies as reasonable steps but does not outline expected standards or scope. We suggest that the Code should include signposting to minimum expectations or recognised best practice in equality and right to work training, without creating new legal obligations. This is particularly important as employers newly brought within scope may face implementation challenges. Signposting to transitional or sector specific guidance where appropriate could also be considered.

5. Section 2 – What is discrimination? (race focus)

The Code focuses primarily on race discrimination, although right to work checks may intersect with other protected characteristics. We suggest that the examples given within the Code should be expanded to include

⁴ [Jivraj v Hashwani \[2011\] UKSC 40 \(27 July 2011\)](#)



intersectional discrimination (e.g. race and disability; religion and race) to reflect tribunal practice.

6. Section 2 – Action against employers

The Code accurately explains civil penalties and uncapped discrimination compensation but does not acknowledge the tension employers face between these risks. We suggest that the Code should explicitly recognise this competing risk context, reinforcing that compliance with immigration law must not undermine equality law protections

7. Section 3 – How to avoid discrimination and requirement for consistency by employers

The Code requires consistency in right to work checks for all workers, including British citizens, but does not define consistency in operational terms. We suggest that there should be clarification that consistency relates to *process and timing* of checks, rather than identical documentation requirements, to reduce over-cautious or intrusive practices.



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