



Equality and
Diversity Forum



Refugees, migrants and the Equality Act 2010

A briefing for refugee and migrant
community organisations

June 2011

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Who should read this briefing

This briefing provides an introduction to the Equality Act 2010 for migrant and refugee community organisations (MRCOs). Its purpose is to help MRCOs ensure that public authorities and others understand and meet their responsibilities to refugees and migrants under the Equality Act 2010.¹ The briefing:

- Explains how the Equality Act 2010 applies to refugee and migrant communities.
- Gives examples of when public authorities could be in breach of the Act.
- Explains how MRCOs can use the Act to support service users.

Migrant and refugee community organisations (MRCOs) provide valuable support and services to asylum seekers, refugees and migrants. It is important that MRCOs understand the Equality Act 2010 because they can use it to provide effective and ongoing support to asylum seekers, refugees and migrants who are often particularly marginalised, vulnerable to discrimination and harassment, and are also often unaware that there are equality and human rights laws that protect them. The Equality Act 2010 can help MRCOs ensure that public authorities² show 'due regard' to the needs of the populations they serve – including asylum seekers, refugees and migrants.

The Equality and Diversity Forum (EDF) commissioned Refugees in Effective and Active Partnership (REAP) to produce this briefing paper for MRCOs on how to use the Equality Act 2010 in their work of supporting refugees and migrants. This briefing draws on EDF's Refugees and Migrants Equality Project publications 'Who's Still Missing? Refugees, migrants and the equality agenda' and 'Refugees, migrants and the Equality Act 2010 – A briefing for public authorities'. It should be read in conjunction with those publications. (See 'Sources of further information or advice' below for full details.) This briefing does not provide a detailed explanation of the measures in the Equality Act 2010, nor does it constitute legal advice. MRCOs are encouraged to consult some of the 'Sources of further information and advice' listed at the end of the briefing, in particular Equality and Human Rights Commission guidance.

Who are asylum seekers, refugees and migrants?

Refugees and asylum seekers are people who have been forced to flee their country of origin due to persecution or risk of persecution and seek refuge in the UK. They are

¹ MRCOs should also ensure that they comply with equality legislation in their capacity as employers and service providers.

² Public authorities include local authorities or councils, schools, hospitals and police authorities as well as central government departments.

particularly vulnerable to discrimination as they do not have the choice to leave the UK and go back to their countries of origin. Other categories of migrants include those who came to the UK out of choice to work, to study, or to join a spouse or family. Most refugees and migrants face language barriers and are unfamiliar with British structures and systems. Undocumented migrants are additionally vulnerable to discrimination, e.g. vulnerability to abuse within the work place, due to lack of rights.

The Equality Act 2010 protects everyone in the UK and imposes duties on public authorities that apply to refugees and migrants.

Protected characteristics – who is protected?

The Equality Act 2010 protects people with the following characteristics:

- (i) Sex;
- (ii) Disability;
- (iii) Sexual Orientation;
- (iv) Age;
- (v) Gender Reassignment;
- (vi) Race & Ethnicity (includes colour, nationality, ethnic and national origins);
- (vii) Religion or Belief;
- (viii) Pregnancy & Maternity;
- (ix) Marriage & Civil Partnership.

Like all British residents, people who are refugees and migrants are protected on the basis of all the characteristics included in the Equality Act 2010. Asylum seekers, refugees and migrants can be affected by all forms of inequality. Each individual has a sex, an age, a sexual orientation, and a race or ethnicity. They may have a religion or strong beliefs and they may have a disability. Refugees and migrants are likely to experience discrimination based on race (including colour, nationality, ethnic and national origins). But refugee populations also have high levels of physical and mental disabilities, including elevated levels of mental illness often related to earlier traumas or as a result of war.

It is important to remember that refugees may have sought refuge in this country to escape persecution in their own country because of their sex, race/ethnicity, sexual orientation or religion or belief. Having fled persecution on those grounds, they often face new forms of discrimination in the UK for the same reasons and are unaware that they are protected under British law from such discrimination.

‘Prohibited conduct’ – what are they be protected from?

Prohibited conduct means acts that the law says other people cannot do to us and we cannot do to other people. The Equality Act prohibits:

(i) Direct discrimination

Direct discrimination is when a person is treated less favourable than another in a similar situation.

It is likely to be direct discrimination if in providing an early years nursery a local authority accepts children from Kurdish refugee families for only three days a week but accepts children of the same age born in the UK for five days a week.

An MRCO advising a client on such a case of possible direct discrimination should ask the following questions:

Q: Has someone been treated less favourably?

A: Yes, the children from Kurdish refugee families.

Q: Is it less favourable compared to others in a similar situation?

A: Yes, compared to children of the same age born in the UK.

Q: What is the less favourable treatment?

A: Kurdish refugee children are accepted into the early years service only 3 days a week compared to children of the same age born in the UK who are accepted 5 days a week.

Q: Was the treatment because the person has a protected characteristic?

A: Yes, due to race.

To segregate people because of race (colour, nationality, ethnic or national origins) is direct discrimination. The motive or intention of the person who discriminates directly is irrelevant. Other than for age, direct discrimination cannot be justified.

It could be direct discrimination if, in trying to avoid tensions, a youth club holds sessions on Tuesdays for young Polish migrants only and holds sessions for all other young people on Wednesdays and Fridays.

‘Direct discrimination’ also includes **discrimination ‘by association’**. This is when the less favourable treatment is because of the victim’s association with someone who has the protected characteristic.

An employer treats a white, female employee less favourably because she has a black boyfriend.

Discrimination ‘by perception’ is also a form of direct discrimination and therefore illegal. A person is treated less favourably because another person wrongly thinks that a person has a protected characteristic, for example that that person is disabled or Asian or a Muslim.

The employer treats Mohammed less favourably because he thinks Mohammed is gay. Mohammed is in fact not gay.

(ii) Indirect Discrimination

Indirect discrimination is when a formal or informal rule – a provision, criterion or practice – which is applied generally, disadvantages people who share a protected characteristic and the rule cannot be objectively justified. To be allowed, the rule would have to be shown to be a proportionate way of achieving a legitimate aim. If it cannot be shown to be proportionate, it would be indirect discrimination.

A housing association always runs its training for tenants on a Friday. This may disadvantage tenants who are Muslim. This is likely to be indirect discrimination unless the housing association can show why it is necessary to hold the training on a Friday rather than on another day which would not disadvantage Muslims or other groups of tenants.

(iii) Harassment

Harassment involves unwanted conduct related to a protected characteristic that has the purpose or effect of violating a person’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. The wording ‘related to’ does not require the person subjected to the unwanted conduct to have that characteristic.

A work colleague making abusive and insulting comments about people from Poland could amount to harassment of a British man who is married to a Polish woman.

(iv) Victimisation

If a person complains or takes legal action against discrimination or harassment and is victimised because of that, the person is protected under the Equality Act 2010.

An employee complains that his colleague is harassing him because he is HIV positive. The employer treats the employee badly because he complained. The employer’s act is victimisation.

Positive action

Any employers or service provider is allowed to take action with the aim of enabling members of an equality group to overcome disadvantage or to participate in an activity or to meet the different needs of members of that equality group, as long as that action is a 'proportionate' or reasonable way of meeting that aim. Positive action can involve treating one group more favourably than another; the action is unlikely to be 'proportionate' if there are less discriminatory ways of meeting that aim.

A health provider was concerned about higher rates of infant mortality amongst certain migrant groups and low attendance of pregnant migrant women at local ante-natal clinics. After consulting local MRCOs, the health provider arranged special introductory ante-natal classes led by a midwife with relevant language and cultural knowledge. The same midwife attends the further regular classes to assist the migrant women to understand the medical advice.

Exemptions – are there any differences in the way the Equality Act 2010 applies to certain categories of migrants?

Yes. The Act permits direct discrimination against certain categories of migrants because of their nationality, where this is required by immigration law.

Non-UK national students can be charged higher university fees in England compared to UK national students.³

NHS hospitals can charge failed asylum seekers and undocumented migrants for treatment.⁴

However, where not providing treatment violates a person's right to life under Article 2 of the Human Rights Act 1998 or is inhuman and degrading under Article 3 of that Act, then it violates a person's human rights, and the person will be protected by the Human Rights Act.⁵

A person's claim for asylum has failed, but he cannot be sent to his country of origin because it is unsafe to return. The person is suffering from cancer. To refuse him treatment would be 'inhuman and degrading' under Article 3 of the Human Rights Act 1998.

³ Education (Fees and Awards) (England) Regulation 2007.

⁴ National Health Service (Charges to Overseas Visitors) Regulation 1989.

⁵ The text of the Human Rights Act 1998 is at <http://www.legislation.gov.uk/ukpga/1998/42/contents>
The Equality and Human Rights Commission is responsible for promoting and monitoring human rights.
See <http://www.equalityhumanrights.com/human-rights/what-are-human-rights/the-human-rights-act/>

The Nationality, Immigration and Asylum Act 2002 makes the following groups ineligible for a range of statutory adult social care services, and services safeguarding the welfare of children under the Children Act 1989:

- Nationals of the European Economic Area (other than the UK);
- People granted refugee status by another European Economic Area state;
- People unlawfully present in the UK (including those whose visas have expired);
- Failed asylum seekers who have refused to cooperate with removal directions.

Local authorities are permitted to provide such services to adults or to children within these four groups where this is required in a particular case to avoid a breach of human rights. MRCOs that support people who fall within the above categories should seek additional advice in such cases.

Most women who come to the UK to join their spouse or partner are subject to the 'no recourse to public funds' rule. This means they cannot claim most benefits, tax credits or housing assistance paid by the state. Without rights to welfare benefits or any form of housing support, they are particularly vulnerable if they are victims of domestic violence. Migrant women who are victims of domestic violence and who meet certain conditions can apply for indefinite leave to remain under the Domestic Violence Rule, but while their application is being processed they still have 'no recourse to public funds'. Please contact the pilot scheme, 'Sojourner Project', for further advice.⁶

It should be noted that all refugees and migrants are fully protected from harassment and victimisation. And where refugees and migrants experience discrimination or disadvantage and protection is not available under equality law, MRCOs should consider whether protection may be provided by the Human Rights Act.

The Public Sector Equality Duty (PSED) / 'The Equality Duty'

Under The Equality Act, public authorities must have 'due regard' to the need to:

1. eliminate discrimination, harassment, victimisation and other conduct that is prohibited by or under the Act;
2. advance equality of opportunity between people who share a protected characteristic and those who do not share that characteristic; and
3. foster good relations between people who share a relevant protected characteristic and those who do not share that characteristic.⁷

Having 'due regard' under the Equality Act does not just mean consider; it also involves taking proportionate measures.⁸

⁶ <http://www.eaves4women.co.uk/Sojourner/Sojourner.php>.

⁷ Equality Act, s.149(1).

⁸ For further information about how public authorities should comply with the Duty, see Equality and Diversity Forum (2011) 'Refugees, migrants and the Equality Act 2010 – A briefing for public authorities'.

To meet these three aims, public authorities must consider the different needs of the people they employ and for whom they provide services. Doing this will help public authorities to make better-informed decisions, to target their resources more effectively and to provide services that are more appropriate to the needs of service users. Within this process, authorities will need to be aware of possibly different capacities for instance, and of the needs of migrants as service users or employees.

The Equality Duty applies to all of the functions of a public authority, meaning relevant bodies must pay due regard to the three aims in all aspects of their work, for example, setting a budget, funding community and voluntary sector organisations, employing staff, providing and commissioning services.

Who is protected under the Equality Duty?

The duty applies to the following protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Under the Equality Duty, public authorities must have due regard to the equalities needs of their communities, and that includes migrants and refugees. For example, a local authority's population might include (protected characteristics in brackets):

- A Somali (race), female (sex), disabled (disability) refugee.
- A Polish (race), older (age), gay (sexual orientation) migrant.
- An Afghan (race), Muslim (religion), female (gender) refugee.

A borough has a large number of Tamils who have arrived as refugees. Many of them are suffering from mental illness caused by the trauma of war. As a result, they have particular difficulties in talking about their experiences to health service providers in order to obtain the help and treatment they need. The public authority has a duty to address these difficulties under the Equality Duty to 'advance equality of opportunity between people who share a protected characteristic and those who do not share that characteristic'. In this case the protected characteristics would be race or ethnicity (Tamil) and disability (mental illness).

In carrying out their functions, public authorities must have due regard to the different needs of different groups in their areas. This applies to all the activities for which public authorities are responsible, including health, education and social care. When services paid for by public authorities are procured (bought) from the private or the voluntary sector, the public authority must still have due regard to the impact the service procured will have on all people with the protected characteristics, including refugees and migrants.

Refugees and migrants, community organisations and public authorities

Refugee and migrant populations are often unfamiliar with systems and procedures in the UK. Those who do not speak English are particularly marginalised, as language difficulties often lead to a lack of confidence and low self-esteem which prevents them from accessing education, training, employment, health care and all other services and opportunities available to everyone else.

MRCOs can play a crucial role in advancing equality of opportunity for the populations they serve. MRCOs often act as a bridge between their communities and mainstream support structures and services. It is difficult for public authorities to pay 'due regard' to the Equality Duty to prevent discrimination, advance equality of opportunity and foster good relations between marginalised migrant and refugee populations and the rest of the population without working with MRCOs.

Public authorities are obliged to demonstrate that they are exercising 'due regard' under the three aims of the Equality Duty. Therefore, MRCOs have a right to question public authorities about their equality work and request evidence on how they are exercising 'due regard'.

Freedom of Information Act 2000

Under the Freedom of Information Act, MRCOs may put in a written request to public authorities for information on how the general duties under the Equality Duty are being met. Unless they have good reason, public authorities must provide the information requested within 20 working days.⁹

The Primary Care Trust (PCT) decides to stop funding a Tamil community organisation providing mental health support to the Tamil population within a particular borough. The PCT decides to mainstream the service by commissioning a large mental health charity to provide mental health services to the Tamil population within that borough. The Tamil community organisation puts in a Freedom of Information Request asking the PCT to explain how the decision to stop funding was made and whether an equality impact assessment was carried out.

Some of the questions it would be useful for the MRCO to ask are:

- Has there been a needs assessment of the [Tamil] community carried out?
- Have [Tamil] community organisations and other MRCOs been consulted?
- Have adequate measures been taken to meet the need of the [Tamil] population?
- Is the mental health charity best placed to deliver that service?

⁹ Details at http://www.direct.gov.uk/en/governmentcitizensandrights/yourrightsandresponsibilities/dg_4003239.

If they are unable to show that the needs of members of the [Tamil] population with mental health disabilities have been taken into account and that an adequate service is being provided, the PCT will be open to legal challenge. In such situations, MRCOs should seek legal advice (see resources below).

Some voluntary organisations have seen local authority funding decisions successfully challenged through judicial review pursued by their own service users. For example, in 2008 two service users of Southall Black Sisters successfully overturned Ealing Council's decision to cut its funding. The judge in the case ruled that Ealing Council had not had proper regard to equality legislation or its equality duty.

In January 2011, Mr Justice Calvert-Smith allowed a judicial review challenge of London Councils' decision to cut £10 million of funding from voluntary sector organisations in London in a case brought by service users of the Roma Support Group.¹⁰

Next steps for MRCOs

Legal action or challenge should be a last resort. Legal challenges are time-consuming and costly. Moreover, even if MRCOs are successful in taking the PCT or Council to court and winning their case, they may still need to work with that authority in the future. A legal dispute is likely to make it difficult to develop cordial or trusting relationships with the public authority involved.

The following approaches are suggested:

- Start by trying to build a good relationship with the public authorities that you need to work with.
- Communicate and negotiate with the public authority to secure the best service possible for your community and its individual members.
- Where you have concerns and would like information, speak to the public authority and request the information you seek (be as specific as possible) before putting in a Freedom of Information Request.
- The best way of using the Equality Duty is often to ask officials and service providers politely if they are aware of the Equality Duty or 'PSED' as it relates to the particular issue. Often this will be enough to ensure that they listen to what you have to say. For example: 'Mr. Smith, I am sure you are aware of the duties public authorities have under the general PSED. We don't feel these duties are being fully met in the current practice of funding and commissioning services for the Afghan community'.

¹⁰ Details at <http://www.edf.org.uk/blog/?p=9241>.

If you think that one of your service users may have experienced discrimination, or that a public authority may have breached the Equality Act 2010 in any of the ways identified above, we suggest you look at some of the sources of further information and advice below. A good place to start is the guidance on the Equality and Human Rights Commission website and the 'quick start' guides on the Government Equalities Office website. If you wish to seek legal advice, the Law Centres Federation website can help you find a law centre near you. The Public Law Project provides telephone advice to voluntary and community groups on public law matters, such as local authority funding decisions. Citizens Advice Bureaux provide advice on a wide range of subjects, and give advice over the telephone as well as having published and online resources.

Sources of further information or advice

Resources – organisations

Asylum Aid www.asylumaid.org.uk

Asylum Aid provides specialist legal representation and advice to people seeking asylum in the UK, and campaigns for a fairer and more efficient asylum system.

British Institute of Human Rights <http://www.bihhr.org.uk/>

The mission of the British Institute of Human Rights – BIHR – is to bring human rights to life – supporting and empowering people and organisations to use human rights to improve their own lives and the lives of others.

Employability Forum www.employabilityforum.co.uk

The Employability Forum is an independent organisation that promotes the employment of refugees and the integration of migrant workers in the UK.

Equality and Human Rights Commission www.equalityhumanrights.com

The Equality and Human Rights Commission has a statutory remit to promote and monitor human rights; and to protect, enforce and promote equality across the nine 'protected' grounds – age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment.

Equality and Diversity Forum www.edf.org.uk

EDF does not provide advice to individuals but publishes leaflets and research and the EDF website brings together a wide range of resources on equality and human rights.

Government Equalities Office www.equalities.gov.uk

The Government Equalities Office (GEO) takes the lead in government on issues relating to women and gender equality, sexual orientation and transgender equality matters and leads on the Equality Act 2010. The GEO website includes information and guidance on the Act.

Information Centre about Asylum and Refugees www.icar.org.uk

The Information Centre about Asylum and Refugees (ICAR) is an independent information and research organisation based at the Runnymede Trust.

Immigration Lawyers Practitioners Association www.ilpa.org.uk

The Immigration Law Practitioners' Association was established to: promote and improve the advising and representation of immigrants; provide information to members on domestic and European immigration, refugee and nationality law; secure a non-racist, non-sexist, just and equitable system of immigration, refugee and nationality law practice.

Law Centres Federation <http://www.lawcentres.org.uk/>

Law Centres are not-for-profit legal practices providing free legal advice and representation to disadvantaged people.

Local Government Improvement and Development www.idea.gov.uk

Local Government Improvement and Development works with local authorities and their partners to develop and share good practice. The website has a section on equality and cohesion.

Migrant & Refugees Communities Forum www.mrcf.org.uk

MRCF is a user-led, community forum working to promote the rights of migrants and refugees in London. It provides advice and support to individuals and community organisations, produces research and works in partnership to influence policy and facilitate better understanding and inclusion.

Migrant Resource Centre www.migrantsresourcecentre.org.uk

Migrant Resource Centre works with migrants and refugees and in partnership with other agencies, to effect social justice and change, enabling migrants and refugees to fully participate in this society.

Migrants' Rights Network www.migrantsrights.org.uk

The Migrants' Rights Network (MRN) works for a rights-based approach to migration, with migrants as full partners in the development and implementation of policies which affect them.

Migration Observatory www.migrationobservatory.ox.ac.uk/

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues.

Partnership Development Project

www.partnershipdevelopmentproject.org.uk/index.html

The Partnership Development Project is a project managed by MENTER, the regional network of Black and Minority Ethnic (BME) organisations and communities for the East of England. Its main aim is to assist with the integration of asylum seekers, refugees and migrant workers in the East of England and to improve local community cohesion through partnerships working. The website contains links to useful resources.

Praxis www.praxis.org.uk

Praxis provides a wealth of advice and support services to migrants and refugees from all over the world, as well as a welcoming meeting place for displaced communities.

Public Law Project <http://www.publiclawproject.org.uk/>

The Public Law Project provides telephone advice to voluntary and community groups on public law matters, such as local authority funding decisions.

Refugee Council www.refugeecouncil.org.uk

The Refugee Council is the largest organisation in the UK working with asylum seekers and refugees.

Refugees in Effective and Active Partnership www.reap.org.uk

Refugees in Effective and Active Partnership (REAP) is an independent, refugee-led organisation that aims to empower refugees and asylum seekers to live as valuable and valued members of British society.

Refugee Support www.refugeesupport.org.uk

Refugee Support is one of the UK's leading providers of housing and support for refugees and asylum seekers.

Scottish Refugee Council www.scottishrefugeecouncil.org.uk

The Scottish Refugee Council provides advice and information to people seeking asylum and refugees living in Scotland. It campaigns for fair treatment of refugees and people seeking asylum, raising awareness of refugee issues through the media, arts and local communities and working hard to influence policy in both Scotland and the UK.

The Sojourner Project <http://www.eaves4women.co.uk/Sojourner/Sojourner.php>

The Sojourner Project is for women with no recourse to public funds, who entered the UK on a spousal or partner visa and are eligible to apply for Indefinite Leave to Remain (ILR) under the Domestic Violence Rule.

Welsh Refugee Council www.welshrefugeecouncil.org

The Welsh Refugee Council empowers refugees to rebuild their lives in Wales. It provides advice, runs events, promotes fair policies and works in partnership to promote the inclusion of refugees and asylum seekers in Wales.

Resources – publications

British Institute of Human Rights (2008) The Human Rights Act – Changing Lives, Second Edition.

Equality and Diversity Forum (2011) Who's Still Missing? Refugees, migrants and the equality agenda. Available at www.edf.org.uk

Equality and Human Rights Commission (2010) The essential guide to the public sector equality duty. London: EHRC. Available at www.equalityhumanrights.com

Equality and Human Rights Commission (2010) Equality impact assessment quick-start guide: A step-by-step guide to integrating equality impact assessment into policymaking and review. London: EHRC. Available at www.equalityhumanrights.com

Equality and Human Rights Commission (2011) 'The Equality Act 2011 and its application to asylum-seekers and refugees'. Legal opinion. EHRC.

Government Equalities Office (2011) 'Equality Act 2010: What do I need to know?' guides for the voluntary and community sector. Available at www.equalities.gov.uk

Local Government Improvement and Development (2011) Including migrant populations in Joint Strategic Needs Assessment. A guide. Available at <http://www.idea.gov.uk/idk/aio/26070159>

Refugees in Effective and Active Partnership (2010) BME & Refugee Groups' Access to Local Authority and PCT Commissioning in West London. Available at http://www.reap.org.uk/community_advocates_network.php

Refugees in Effective and Active Partnership (2009) 'We Don't Do Refugees!' Refugees and Multiple Inequalities Report 2009. Available at www.reap.org.uk

Refugee Support (2008) Supporting disabled refugees and asylum seekers: opportunities for new approaches. Available at http://www.refugeesupport.org.uk/documents/MST_RCU_DisabilityFullReport_1108.pdf

Race on the Agenda (2011) Race Equality and the Equality Act 2010 Manual. Available at www.rota.org.uk

Women's Resource Centre and REAP (2009) One plus One. Supporting frontline organisations to work effectively with refugees. Available at http://www.reap.org.uk/community_advocates_network.php

About the Equality and Diversity Forum

The Equality and Diversity Forum (EDF) is a network of national organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination based on age, disability, gender and gender identity, race, religion or belief, and sexual orientation.

For details of EDF activities and membership, or to subscribe to EDF's free electronic newsletter, visit www.edf.org.uk.

About Refugees in Effective and Active Partnership (REAP)

REAP is an independent, refugee-led organisation in West London that aims to empower refugees and asylum seekers to live as valuable and valued members of British society. REAP works towards this aim through practical and policy-oriented activities in partnership with others: through communication and building capability of those individuals who have sought refuge in the UK, and their communities; by promoting equality for refugees in all their diversity; by working alongside organisations and individual activists and professionals that support refugees as they rebuild their own lives.

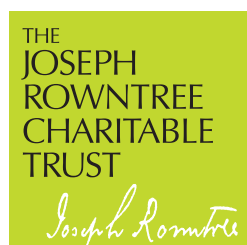
For details of REAP activities and resources visit www.reap.org.uk.

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Equality and Diversity Forum

Tavis House, 1-6 Tavistock Square, London WC1H 9NA

Tel: 44 (0) 20 303 31454, email: info@edf.org.uk, website: www.edf.org.uk

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