

STIÙIREADH AIR GÀIDHLIG MAR SGIL OBRACH GUIDANCE ON GAELIC AS EMPLOYMENT SKILL

**DÙBHLACHD 2018
DECEMBER 2018**



1 Adhbhar

1.1 'S e as adhbhar don stiùireadh seo a bhith a' dèanamh soilleir dè tha Bòrd na Gàidhlig (am 'Bòrd') a' moladh a thaobh a bhith comharrachadh Gàidhlig mar sgil a tha na 'buannachd' no 'riatanach' ann an tuairisgeulan obrach.

1.2 Beachdaichidh an stiùireadh seo air a' bhuaidh a dh'fhaodadh a bhith aig Achd na Co-ionannachd 2010 ('EqA 2010') air modhan-fastaidh. Cuideachd, gabhaidh an stiùireadh seo ealla ri cùl-fhiosrachadh, comhairle laghail neo-eisimeileach agus comhairle bho Choimisean na Co-ionannachd is nan Còraichean Daonna (EHRC).

1.3 Bha am fiosrachadh san stiùireadh seo ceart aig an àm a chaidh a sgriobhadh agus cha bu chòir gabhail ris ach mar fhiosrachadh a-mhàin. Cha bu chòir gabhail ris mar chomhairle laghail air dholghe sam bith. Bu chòir do bhuidheann / neach sam bith a tha toirt an aire don stiùireadh seo comhairle laghail fa leth a shireadh dhaibh fhèin, thoradh faodaidh gach sudheachadh fa leth a bhith eadar-dhealaichte.

2 Cùl-fhiosrachadh

2.1 Tha a' Ghàidhlig na cànan oifigeil ann an Alba fo chumhachan Achd na Gàidhlig (Alba) 2005 (An 'Achd').

2.2 Chaidh am Bòrd a stèidheachadh fon Achd gus a' Ghàidhlig adhartachadh. Feumaidh am Bòrd Plana Càinain Nàiseanta Gàidhlig ullachadh a h-uile 5 bliadhna anns am feum molaidhean a bhith a tha ag innse mar a thèid a chuid dhleastanasan fon Achd a choileanadh.

2.3 'S e aon de na h-amasan a th' aig a' Phlana Càinain Nàiseanta Ghàidhlig, gum bi barrachd chothroman cosnaidh ann far a bheil feum air sgilean Gàidhlig gus seirbheisean a thoirt seachad sa chànan.

Purpose

The purpose of this guidance is to clarify the position of Bòrd na Gàidhlig (the 'Bòrd') on the inclusion of Scottish Gaelic as a 'desirable' or 'essential' skill within job requirements.

This guidance will consider the effect that the Equality Act 2010 (the 'EqA 2010') may have on recruitment processes. This guidance will also consider background information, independent legal advice and advice from the Equality and Human Rights Commission (EHRC).

The information contained in this guidance note is correct as at the time of writing for information purposes only. It should not be construed in any way as providing legal advice. Any party who is following the guidance should take their own independent legal advice as their own particular circumstances may be different.

Background

The Scottish Gaelic Language is an official language of Scotland, under the terms of the Gaelic Language (Scotland) Act 2005 (the 'Act').

The Bòrd was established under the Act to promote the Gaelic language. The Bòrd must prepare a National Gaelic Language Plan every 5 years which must include proposals as to the exercise of its functions under the Act.

One of the aims of the National Gaelic Language Plan is to effect an increase in the number of employment opportunities where Gaelic skills are required in order to enable service delivery in the language.

2.4 Fon Achd, nuair a dh'iaras am Bòrd air ùghdarras poblach plana Gàidhlig reachdail ullachadh, feumaidh iad sin a dhéanamh mur an do shoirbhich leotha le ath-thagradh a rinn iad ri Riaghaltas na h-Alba. Mar phàirt den phlana Ghàidhlig agus a rèir nan toraidhean a thathar a' sùileachadh sa Phlana Càinain Nàiseanta Ghàidhlig, feumaidh an t-ùghdarras poblach beachdachadh air mar a tha e a' dol a chuideachadh le bhith toirt leudachadh air cleachdadadh na Gàidhlig. Bidh sin a' gabhail a-steach a bhith cruthachadh chothroman cosnайдh far a bheil sgilean Gàidhlig a dhith, nuair a tha sin freagarrach agus a rèir na th' ann de dhaoine le Gàidhlig air a bheil an t-ùghdarras a' frithealadh, agus bidh Gàidhlig mar sgil a tha na 'buannachd' no 'riatanach' sna tuairisgeulan obrach sin agus e na amas don ùghdarras seirbheisean a libhrigeadh tron Ghàidhlig.

2.5 Tha ùghdarrasan poblach ann an Alba air stiùireadh iarraidh a thaobh mar a tha reachdas na Rìoghachd Aonaichte a tha co-cheangailte ri leth-bhreith a' toirt buaidh air a bhith comharrachadh Gàidhlig mar sgil a tha na 'buannachd' no 'riatanach' airson cuid a dhreuchdan, agus iad a' toirt iomradh sònraichte air EqA 2010.

Under the Act, a public authority, when requested by the Bòrd, must prepare a statutory Gaelic language plan, unless a successful appeal is lodged with the Scottish Government. As a part of the language plan and in accordance with the outcomes of the National Gaelic Language Plan, the public authority must consider how it will increase the use of the Gaelic language, including the creation of relevant and proportionate employment opportunities where Gaelic skills are required, by placing Gaelic as a 'desirable' or 'essential' skill within job descriptions, with the aim of delivering a service in Gaelic.

Public authorities in Scotland have requested guidance with respect to the compatibility with UK discrimination legislation on the designation of certain posts where Gaelic is a 'desirable' or 'essential' job skill, with specific reference to the EqA 2010.

3 Cùisean Laghail

3.1 Tha cumhachan EqA 2010 a' cur an cèill na diofar dhòighean anns nach bu chòir do dhiofar sheòrsaichean dhaoine a bhith fulang 'leth-bhreith'. Tha e mi-laghail a bhith fulang leth-bhreith. air neach sam bhith air sàillibh:

- aois
- gu bheil iad, no gu bheil iad gu bhith, nan neach tar-ghnèitheach
- gu bheil iad pòsta no ann an companas catharra
- gu bheil dùil aca ri leanabh no gu bheil iad air fòrladh màthaireil
- gu bheil iad ciorramach
- cinneadh a' ghabail a-steach dath, nàiseantachd, freumhan cinneachail no nàiseanta
- an creideamh aca, na tha iad a' creidsinn no cion creideimh/no nach eil iad a' creidsinn
- gnè
- taobh gnèitheasach

3.2 Canar 'feartan fo dhòn' ris na feartan seo.

3.3 Faodar leth-bhreith a dhèanamh sna dòighean a leanas:

3.3.1 leth-bhreith gu direach – a' dèiligeadh ri cuideigin ann an dòigh nach eil cho math an coimeas ris mar a thathar a' dèiligeadh ri càch air sàillibh aon de na feartan a tha fo dhòn

3.3.2 leth-bhreith gu neo-dhìreach – a' stèidheachadh riaghailtean no modhan- obrach a tha buntainn ris a h-uile duine, ach a tha fàgail gu bheil cuideigin le feart(an) fo dhòn a' fulang anacothrom

3.3.3 sàrachadh – dòigh-gjùlain nach eil a' còrdadh ri neach a bhuineas ri feart fo dhòn agus a tha dèanamh cron air urram cuideigin no a tha cruthachadh àrainneachd shàrachail dhaibh

Legal Considerations

The provisions of the EqA 2010 sets out various categories of person who should not suffer discrimination. It is unlawful to discriminate against anyone because of:

- age
- being or becoming a transsexual person
- being married or in a civil partnership
- being pregnant or on maternity leave
- disability
- race including colour, nationality, ethnic or national origin
- religion, belief or lack of religion/belief
- sex
- sexual orientation

These are called 'protected characteristics'.

Discrimination can come in one of the following forms:

direct discrimination – treating someone less favourably than others because of a protected characteristic

indirect discrimination – putting rules or arrangements in place that apply to everyone, but that put someone with a protected characteristic at an unfair disadvantage

harassment – unwanted behaviour linked to a protected characteristic that violates someone's dignity or creates an offensive environment for them

3.3.4 geur-leanmhainn – a' dèiligeadh ri cuideigin ann an dòigh neo-chothromach seach gun do rinn iad gearan mu leth-bhreith no sàrachadh

3.4 Ged nach eil leisgeul sam bith ann leis an gabh leth-bhreith gu direach a dhion (3.3.1), gabhaidh leth-bhreith gu neo-dhìreach (3.3.2) a dhion air sàillibh cinn-uidhe. Gus leth-bhreith neo-dhìreach a dhion air sàillibh cinn-uidhe, feumaidh am fastaiche sealltann:-

3.4.1 gu bheil an ceann-uidhe cudromach gu leòr gus dearbhadh gum bu chòir còir bhunaiteach a chuingealachadh, me, dion bho leth-bhreith

3.4.2 gu bheil an rian-obrach no moladh co-cheangailte gu reusanta ris an amas dhligheach (faicibh 3.5)

3.4.3 gur iad na modhan a chaidh a roghnachadh na modhan as lugh a ghabhadh cleachdadh gus an ceann-uidhe a choileanadh

3.5 Tha an EHRC den bheachd gur e amas dligheach a th' ann a bhith ag adhartachadh na Cuimris. Ri linn cho coltach 's a tha an ro-ràdh airson Achd na Cuimris 1993 agus an ro-ràdh airson Achd na Gàidhlig (Alba) 2005 ri chèile, tha e glè choltach gun deigheadh adhartachadh na Gàidhlig a mheasadh mar amas dligheach. Ge-tà, cha deach a' phuing sin a dhearbhadh sna cùirtean. Nuair a chuireas ùghdarris poblach roimhe seirbheis a thoirt seachad tron Ghàidhlig sa phlana Ghàidhlig reachdail aca (faicibh 2.4), tha e buailteach gum bi na geallaidean a nì iad a rèir suidheachadh àraid an ùghdarris phoblaich sin.

victimisation – treating someone unfairly because they've complained about discrimination or harassment

Whereas there is no justification possible for direct discrimination (3.3.1) it is possible to objectively justify indirect discrimination (3.3.2). In order to objectively justify indirect discrimination, the employer must be able to show:

that the objective is sufficiently important to justify limiting a fundamental right, i.e. protection from discrimination

whether the measure is rationally connected to the legitimate aim (cf. 3.5)

whether the means chosen are no more than is necessary to accomplish the objective

The EHRC considers the promotion of the Welsh language to be a legitimate aim. Owing to the similarity between the preambles of the Welsh Language Act 1993 and the Gaelic Language (Scotland) Act 2005, the promotion of the Gaelic language is very likely to be considered a legitimate aim. However this point has not been tested in the courts. Where a public authority makes a commitment to provide a service through the medium of Gaelic in their statutory Gaelic language plan (cf 2.4), it is likely these commitments will be proportionate to the specific circumstances of that public authority.

3.6 A bharrachd air dion air dòighean-giùlain no modhan-obrach ri linn cinn-uidhe, tha EqA 2010 a' ceadachadh corra shuidheachadh far am biodh e laghail a bhith ag iarraidh gum biodh feart sònraichte a tha fo dhòn aig neach. Ann an sudheachaidhean mar sin, gabhaidh dion a dhèanamh air dòighean-giùlain no modhan- obrach a dh'fhaodadh leth-bhreith a dhèanamh. Cha bhi an leithid riatanasan laghail ach a-mhàin:

3.6.1 nuair a thèid cuid a chumhachan sònraichte a choileanadh, agus

3.6.2 nuair a buineas iad ri seòrsaichean ghniomhan sònraichte

3.7 Feumaidh an neach a stèidhicheas na riatanasan trì cumhachan a choileanadh le bhith sealltainn (agus iad a' gabhail ealla ri seòrsa no co-theacsa na h-obrach dom buin an riatanas):

3.7.1 gur e 'riatanas dreuchdail' a th' ann (chan eil an abairt seo air a mìneachadh, mar sin bu chòir a tuigsinn a rèir a céill àbhaistich sa Bheurla), **agus**

3.7.2 gu bheil mar a tha an riatanas ga chur an sàs na mheadhan cothromach gus amas dligheach a choileanadh (faicibh 3.5), **agus**

3.7.3 nach eil an neach, a dh'fheumas an riatanas a choileanadh, a' coileanadh an riatanais sin (no gu bheil adhbharan reusanta aig an neach a tha a' stèidheachadh an riatanais a bhith den bheachd nach eil an neach, a dh'fheumas an riatanas a choileanadh, ga choileanadh)

3.8 Tha an dàrna cumha ('na mheadhan cothromach gus amas dligheach a choileanadh') an aon rud ris a' mheasadh a nithear nuair a thathar a' feuchainn ri leth-bhreith neo-dhireach a dhion is a mhineachadh.

In addition to objective justification, the EqA 2010 allows for limited circumstances where it will be lawful for a person to be required to possess a particular protected characteristic. In such circumstances it is possible to justify potentially discriminatory conduct. Such requirements will only be lawful:

provided certain conditions are satisfied, and

in relation to certain types of action

The person imposing the requirement must satisfy three conditions, by showing that, having regard to the nature or context of the work in relation to which the requirement is being applied:

the requirement is an 'occupational requirement' (this phrase is not defined, so it should be interpreted according to its natural English meaning), **and**

the application of the requirement is a proportionate means of achieving a legitimate aim (cf. 3.5), **and**

the person to whom the requirement is applied does not meet it (or the person imposing it has reasonable grounds for not being satisfied that the person to whom it is being applied meets it)

The second condition ('proportionate means of achieving a legitimate aim') is the same test as is applied in the context of the justification defence against a claim of indirect discrimination.

3.9 Chan eil cumhachan sònraichte ann an [EqA 2010](#) gus casg a chur air sanasan-obrach a nì leth-bhreith. Ge-tà, ma thèid sanas fhoillseachadh anns am biodh e reusanta a thuigsinn math dh'fhaodte gu robhar a' ciallachadh leth-bhreith a dhèanamh air sàllibh feart a tha fo dhion, bidh sin fhathast na chomharra air leth-bhreith gu direach a tha ga dhèanamh an lùib a' ghniomh fhastaidh, agus an sanas mar phàirt den ghniomh sin. Faodaidh an EHRC na cumhachdan reachdail aca a chur gu feum a thaobh shanasan a nì leth-bhreith.

3.10 'S e an eisimpleir a thathar a' cleachdadh ann an Notaichean Mineachaidh Achd na Comionannachd airson an t-seòrsa leth-bhreith dhìrich seo, fastaiche a tha foillseachadh sanas airson dreuchd a tha bànn far a bheil iad a' dèanamh soilleir san t- sanas nach leig Roma leas cur a-steach air a son. 'S e leth-bhreith gu direach a bhiodh ann air sgàth cinnidh an aghaidh Roma, a dh'fhaodadh a bhith air beachdachadh gu reusanta cur a-steach airson na h-obrach ach nach do chuir air sàllibh an t-sanais.

3.11 Chan eil sanasan mi-laghail ma nochdas iad gu bheilear a' ciallachadh leth-bhreith a dhèanamh ann an dòigh a tha *laghail*. Mar eisimpleir, bhiodh e laghail sanas fhoillseachadh airson tagraichean de ghnè shònraichte far a bheil gnè an neach na nì riatanach airson na h-obrach.

3.12 Faodaidh cuid a bhriathrachas ann an sanasan a bhith mar fhianais air poileasaidh fastaidh a tha dèanamh leth-bhreith gu *neo-dhireach*. Mar eisimpleir, ma dh'iarrar àireamh shònraichte de bhliadhnaichean de dh'eòlas aig a' char as lugha, dh'fhaodadh sin leth-bhreith neo-dhireach a dhèanamh air tagraichean nas òige.

There is no specific prohibition regarding discriminatory job advertisements under [EqA 2010](#). However, publishing an advertisement which might reasonably be understood as indicating an intention to discriminate because of a protected characteristic will nonetheless go to show direct discrimination in the recruitment exercise of which that advertisement formed a part. The EHRC can use its enforcement powers in relation to discriminatory adverts.

The Equality Act Explanatory Notes example of this form of direct discrimination involves an employer advertising a vacancy who makes it clear in the advertisement that Roma need not apply. This would amount to direct race discrimination against a Roma who might reasonably have considered applying for the job but was deterred from doing so because of the advertisement.

Advertisements are not unlawful if they indicate an intention to discriminate in a way that is *lawful*. For example, it will be lawful to advertise for applicants of a particular gender where gender is an occupational requirement for the job.

Some advertisement wording might be evidence of a recruitment policy that is *indirectly discriminatory*. For example, requiring a certain minimum number of years' experience may indirectly discriminate against younger candidates.

3.13 Le dreuchdan a tha comharrachadh Gàidhlig mar sgil a tha na 'buannachd' no 'riatanach', chan eil e coltach gun tèid sin fhaicinn mar leth-bhreith gu direach. Tha sin air sàillibh nach eilear a' coimhead air luchd-labhairt na Gàidhlig mar bhuidhinn chinneadail fon lagh. Ge-tà, tha saorsa aig daoine fa leth tagraighean a dhèanamh leis an Tribiùnal Chosnaidh feuch an deach leth-bhreith a dhèanamh gus nach deach.

4 Molaidhean

4.1 Chan eil e coltach gum biodh e mi-laghail, fo EqA 2010, a bhith comharrachadh Gàidhlig mar sgil a tha na 'buannachd' no 'riatanach', fhad 's a tha 'riatanas dreuchdail' dha-rìribh ann (faicibh 3.7.1). Thathar a' moladh gun tèid aire a thoirt gu sònraichte do na trì cumhachan fo 3.7 nuair a thathar a' stèidheachadh adhbharan gnothachais airson dreuchd sam bith far a bheil Gàidhlig mar riatanas dreuchdail. Thèid amas dligheach (faicibh 3.5) a stèidheachadh a rèir nan geallaidhean a tha an t-Ùghdarris Poblach air a thoirt seachad sa Phlana Ghàidhlig reachdail aca (faicibh 2.4) gus seirbheisean a libhrigeadh tron Ghàidhlig.

4.2 Tha e buailteach gum bi na geallaidhean ann am planaichean Gàidhlig a' freagairt gu cubhaidh air suidheachadh sònraichte gach ùghdarris poblach fa leth, agus bidh e riatanach gun tèid ealla a ghabhail riutha ann a bhith a stèidheachadh amas dligheach (faicibh 3.5).

4.3 Tha eadar-dhealachadh laghail agus pragtaigeach ann eadar cànan mar theisteanas agus cànan mar sgil airson a bhith coileanadh slatan-tomhais airson dreuchd. Tha am Bòrd a' moladh gum bi Gàidhlig air a comharrachadh mar sgil a thaobh nan slatan-tomhais a dh'fheumar a choileanadh airson dreuchd, mura h-eil teisteanas Gàidhlig gu sònraichte a dhith airson na dreuchd. Cuideachd, gus nach bi mi-thugse sam bith ann, 's e cleachdadh math a th' ann a bhith dèanamh soilleir san t-sanas-obrach carson a tha a' Ghàidhlig mar sgil a dhith.

Posts which designate Gaelic as a 'desirable' or 'essential' skill are unlikely to be considered as direct discrimination. This is because Gaelic speakers are not a distinct racial group in legal terms. However, individuals are free to raise claims to let the Employment Tribunal determine whether or not discrimination has taken place.

Recommendations

It is unlikely to be unlawful, under the EqA 2010, to designate Gaelic as a 'desirable' or 'necessary' skill, as long as there is a genuine 'occupational requirement' (cf 3.7.1). It is recommended that particular cognisance is given to the three conditions listed in 3.7 when drafting a business case for any given role which lists Gaelic as an occupational requirement. The establishment of a legitimate aim (cf 3.5) will be driven by commitments made by a Public Authority in their statutory Gaelic language plan (cf 2.4) to deliver a service through the Gaelic language.

Commitments in Gaelic language plans will likely be proportionate to a public authority's specific circumstances and will be essential in terms of determining a legitimate aim (cf 3.5).

There is a legal and practical difference between language as a qualification and language as a skill in terms of fulfilling the requirements of a post. The Bòrd recommends that Gaelic be included as a skill in terms of fulfilling the requirements of a post, unless the post has a specific need for a Gaelic qualification. Furthermore, to avoid any possible misunderstanding, it is good practice to clarify the motive behind the required skill in the job advertisement.

4.4 Thathar a' moladh gum bi Gàidhlig na sgil a tha na 'buannachd' ann an dreuchdan far am gum feum an neach-obrach:

4.4.1 Luchd-labhairt na Gàidhlig a chuideachadh, a' gabhail a-steach luchd-obrach no luchd-cleachdaidh na seirbheis;

4.4.2 A bhith ag obair leis a' mhòr-shluagh, gu sònraichte ann an sgìrean far a bheil grunn math de dhaoine aig a bheil Gàidhlig;

4.4.3 A bhith ag obair ann an sgìre far a bheil Gàidhlig na cànan coimhairsnachd;

4.4.4 A bhith dèiligeadh ri luchd-labhairt na Gàidhlig gu tric is minig;

4.4.5 No ann an suidheachaidhean far an cuireadh e ris an ire de sheirbheisean tron Ghàidhlig a tha rim faotainn.

4.5 Thathar a' moladh gum bi Gàidhlig air a comharrachadh mar sgil 'riatanach' ann an dreuchdan far am faodadh gum feum an neach-obrach:

4.5.1 Luchd-labhairt na Gàidhlig a chuideachadh, a' gabhail a-steach luchd-obrach no luchd-cleachdaidh na seirbheis;

4.5.2 A bhith ag obair leis a' mhòr-shluagh agus dùil ann gum bi seirbheisean ann am Beurla agus Gàidhlig rim faotainn;

4.5.3 A bhith ag obair leis a' mhòr-shluagh ann an sgìrean far a bheil Gàidhlig na cànan coimhairsnachd;

4.5.4 A bhith obair far nach urrainn do dh'oifigear eile seirbheis tron Ghàidhlig a thoir seachad;

It is recommended that Gaelic be a 'desirable' skill in posts where the employee may be required to:

Assist Gaelic language speakers, including staff or service users;

Work with the public, particularly in areas where there is a higher proportion of people with Gaelic;

Work in an area where Gaelic is a community language;

Have a great deal of contact with Gaelic speakers;

Or in situations where it would increase the level of Gaelic-medium services on offer.

It is recommended that Gaelic be an 'essential' skill in posts where the employee may be required to:

Assist Gaelic language speakers, including staff or service users;

Work with the public and there is an expectation that services in English and Gaelic are available;

Work with the public in areas where Gaelic is a community language;

Work where it is not possible for another officer to provide a Gaelic language service;

4.5.5 A bhith ag obair còmhla ri buidhnean eile a tha ag obair tron Ghàidhlig taobh a-staigh na buidhne aca; no ann an suidheachaidhean far a bheil poileasaidh càinain na buidhne a' gabhail ealla ri feuman ionadail, me, mar a dh'fheumar obair rianachd taobh a-staigh na buidhne a dhèanamh ann am Beurla agus Gàidhlig.

4.6 Tha e cudromach, nuair a thathar a' beachdachadh air na slatan-tomhais seo, gum bi fianais ann a bheir taic don cho-dhùnadh agus do mar a thathar ag ràdh gu bheil riatanas ann a thaobh sgil ann an Gàidhlig.

Tuilleadh Stiùiridh

Ma tha tuilleadh stiùiridh a dhith oirbh a thaobh a bhith sanasachd dhreuchdan far a bheil eòlas air a' Ghàidhlig na 'buannachd' no 'riatanach', feuch gun cuir sibh fios gu Daibhidh@gaidhlig.scot.

Bha am fiosrachadh san stiùireadh seo ceart aig an àm a chaidh a sgriobhadh agus cha bu chòir gabhail ris ach mar fhiosrachadh a-mhàin. Cha bu chòir gabhail ris mar chomhairle laghail air dhòigh sam bith.

'S e an tionndadh Beurla am priomh thionndadh den sgriobhainn seo agus tha an tionndadh Gàidhlig direach mar stiùireadh airson na dreachd thùsail.

Work with other organisations who operate through the medium of Gaelic internally; or where an organisation's language policy takes into account local considerations, e.g. the need to undertake internal administration in English and Gaelic.

It is important, when considering these criteria, that evidence is available to justify this decision and support any case for the Gaelic language requirement.

Further Guidance

Should you require any further guidance on the advertisement of posts where knowledge of the Gaelic language is 'desirable' or 'necessary' please contact Daibhidh@gaidhlig.scot.

The information contained in this guidance note is correct as at the time of writing for information purposes only. It should not be construed in any way as providing legal advice.

The English version of this document is the primary version and the Gaelic version only provides guidance to the original.



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