



Mind Your Language?

The Immigration Act 2016 and the Code of Practice on the English language requirement for public sector workers

Advice for Teachers



National identity. Immigration controls. Fundamental rights. Access to justice. British values. These are just some of the issues that have been the focus of policy-making since the 2015 UK General Election.

Following the UK's Referendum vote for European Union (EU) Brexit, the Prime Minister, Theresa May MP, pledged that her government would "make Britain a country that works not for a privileged few, but for every one of us".

The NASUWT supports the Prime Minister's avowed ambition, but we also want a country that works for all sections of the population – whether male or female, disabled or non-disabled, black/asian or white, refugee or migrant.

In 2015, the NASUWT launched its Act for Racial Justice campaign.

However, since then, we have witnessed a greater public confidence to express racial and religious prejudice, anger and bigotry.

Reports of racial and religious hate crime increased dramatically following the EU Referendum vote on 23 June, and the narrative around migrants and religious minorities has become particularly toxic.

One of the hallmarks of the UK is its diversity, founded, in general, on a history of positive race relations, cohesive communities, decency and a sound respect for human rights.

For Britain to succeed economically, it remains the case that we must continue to be a country that is inclusive and welcoming to all, where rights are respected and where injustice is never tolerated.

Policies that marginalise or demonise sections of our society, or which discriminate against or divide our communities, should have no place in modern Britain. Such policies are not based on our shared values and nor should they be the basis for teaching future generations who will need to make their way with confidence in a globalised world.

History will judge how the landscape for race and community relations in the UK is being transformed by the 2016 Referendum vote and the enactment of the Immigration Act 2016.

As the teachers' union, the NASUWT will be playing its part in standing up for the values of solidarity, democracy, equality and justice. That will be our organising mission as we strive to make the UK a country that works for all teachers and for all children and young people.



Chris Keates (Ms)
General Secretary

Background to the Code of Practice

In its 2015 Election Manifesto, the Conservative Party promised to take a series of actions on immigration, including:

- implementing the requirement for all landlords to check the immigration status of their tenants;
- a straight in-out referendum on our membership of the EU by the end of 2017;
- strengthening the enforcement of immigration rules;
- extension of the 'deport first, appeal later' rule to all immigration appeals and judicial reviews;
- establishing the Controlling Migration Fund to ease pressures on local services and pay for additional immigration enforcement;
- require employers utilising the Shortage Occupation List to train British workers;
- promotion of integration and 'British values';
- legislating to ensure that every public sector worker operating in a customer-facing role must speak fluent English.

The Conservatives' pre-election Manifesto provides the blueprint for the Conservative Party in Government. The Code of Practice takes forward the provisions in the Immigration Act 2016 regarding language proficiency.

The language-proficiency requirement

In order to take forward the commitment that every public sector worker operating in a customer-facing role must speak fluent English, the Government has:

- secured the passage of the Immigration Act 2016 which includes the provision on language-fluency requirements (see Part 7 of the Act);
- published a statutory Code of Practice that explains the English (or English or Welsh in Wales) 'fluency duty' that applies to all public authorities.

The Immigration Act and the Code of Practice apply to all public authorities in England and to public authorities exercising functions relating to non-devolved matters in Wales, Scotland and Northern Ireland. In Wales, the conditions and standards relating to the employment of teachers' education is a non-devolved matter and is, therefore, covered by the Act and the Code of Practice.

Public authorities exercising functions in Wales must also ensure that someone working for them in a customer-facing role dealing with non-devolved matters speaks fluent English or Welsh and complies with the requirements of language schemes under the Welsh Language Act 1993 and/or the standards stipulated by the Welsh Language (Wales) Measure 2011. All public authorities are subject to the English language (or English and Welsh in Wales) fluency duty. All public authorities must have regard to the guidance in the Code. The Code does not prescribe the process employers must follow when determining language fluency and this is a matter for the relevant public authority to determine.

The Code applies to the employment of staff in customer-facing roles, including:

- permanent and fixed-term employees;
- apprentices;
- self-employed contractors;
- agency workers/temps.

What the Code of Practice says

The Code contains guidance on the standards and practices expected of public authorities when complying with their legal duty under the Immigration Act.

The Code confirms that the legislation applies to employees working in customer-facing roles in the public sector. The term 'customer-facing' applies to any role where the member of staff, as a regular and intrinsic part of their role, is required to speak to members of the public in English or Welsh.

Under the legislation, teachers and headteachers/principals are deemed to be working in customer-facing roles, given their contact with pupils and parents/carers.

School/college leaders will need to consider the implications of the language-fluency requirement for support staff, including:

- whether there is a need for the individual to interact with the public (e.g. pupils or parents/carers);
- the frequency and form of this interaction;
- the level of service quality and responsiveness expected;
- the proportion of the role that would require spoken interaction with the public;
- whether English or Welsh language would be the primary language required for the role.

A teaching assistant who is required to communicate with pupils to support their learning would be viewed as operating in a customer-facing role.

A cleaner may not be viewed as occupying a customer-facing role as their main duties do not require regular interaction with the public.

Duty on the employer

Public authorities are responsible for deciding on standards of English or Welsh spoken-language proficiency.

Employers must satisfy themselves that an employee in a customer-facing role has the necessary level of language fluency. The requirement applies to existing and potential new employees.

The Code of Practice notes that employees working for some public authorities (e.g. some schools) are already subject to an existing language standard. For example, teachers in maintained schools are subject to the Teachers' Standards which state that teachers must 'demonstrate an understanding of and take responsibility for promoting high standards of literacy, articulacy and the correct use of standard English, whatever the teacher's specialist subject.'

Where an existing standard applies (e.g. national induction or probationary standards), employers should not seek to vary these or impose a higher language-fluency standard.

The Code of Practice states that teachers in maintained schools in England and Wales must be appraised annually against the Teachers' Standards.

The Teachers' Standards should be used as a backdrop to the performance management/appraisal process and should not be used as a checklist.

Assessment against the Teachers' Standards should start from the premise that all teachers are already meeting the Teachers' Standards unless clear, compelling written evidence is provided to the contrary.

The relevant induction or probationary teacher standards should be applied without any need for variation by schools/colleges.

Agency workers

Supply/substitute teachers will work in a customer-facing role for public authorities under the terms of a contract between the public authority (e.g. school/college) and an employment agency.

In these circumstances, the school/college is required to make clear to the employment agency the standard of spoken English or Welsh required of teachers supplied by the agency. This should be set out in the service agreement between the school and the agency.

No higher or lower standard of spoken English or Welsh should be applied to agency workers than to employees of the public authority working in an equivalent role.

Employment agencies should not apply a language-proficiency standard to supply/substitute teachers that is potentially discriminatory or that would not apply to other teachers working in a similar role in a school/college.

The employment agency should also demonstrate that it is not otherwise acting in a discriminatory manner by not providing a teacher to work in schools/colleges on grounds of language proficiency, where there is no evidence that the teacher does not meet the necessary standard.

What is language proficiency or fluency?

The Code of Practice defines 'language fluency' in the following terms:

'Fluency relates to a person's language proficiency and their ability to speak with confidence and accuracy, using accurate sentence structures and vocabulary. In the context of a customer-facing role, a person should be able to choose the right kind of vocabulary for the situation at hand without a great deal of hesitation. They should listen to their customer and understand their needs. They should tailor their approach to each conversation appropriate to their customer, responding clearly with fine shades of meaning, even in complex situations.'

The Welsh Language Commissioner's guidance for workplace assessments states that fluent Welsh speaking refers to someone who is *'able to conduct a conversation and answer questions, for an extended period of time where necessary.'*

Applying the language requirement

The Code of Conduct states that *'employers will need to satisfy themselves independently that members of staff or prospective employees have the necessary level of fluency for the role.'*

This might be achieved by the use of formal tests or at interview when appointing new staff. Sources of evidence of fluency might include simply answering interview questions in English or Welsh, holding an appropriate recognised UK qualification, or passing an English or Welsh language competency test.

The Code makes clear that the Government does not envisage that existing employees will need to be tested.

Issues for the employer

Schools/colleges are required to:

- review their HR policies to ensure they are consistent with the legislation and the Code of Practice;
- make all customer-facing staff aware of the new requirements;
- explain to staff the possible actions that may be taken if fluency is found to be insufficient;
- amend appointment procedures to ensure compliance with the legislation;
- make required standards clear in job adverts and job descriptions;
- ensure that appointment panels understand the requirements and the criteria to be applied when evaluating job applicants;
- include the requirement for language fluency in the contract with any employment agency.

Schools/colleges should not require all existing employees to undertake a language-proficiency test.

The Code of Practice makes clear that *'fluency does not relate to regional or international accents, dialects, speech impediments or the tone of conversations'*.

Schools/colleges will need to be assured that the method by which they implement the new requirements do not discriminate unlawfully against staff with protected characteristics under the Equality Act 2010, including discrimination against black and minority ethnic (BME) teachers and disabled teachers.

Complaints

In addition to the requirement to have a policy that is consistent with the legislation and the Code of Practice, schools/colleges must operate a complaints policy and procedure that enables members of the public to complain if they feel that an employee in a customer-facing role has insufficient proficiency in spoken English or Welsh for the performance of their role.

The employer is not obliged to respond to complaints that are vexatious, oppressive, threatening or abusive. The Code of Practice also makes clear that a complaint about an employee's accent, dialect, manner or tone of communication, origin or nationality should not be considered legitimate by an employer.

The Code of Practice confirms that the employer has a duty of care toward their members of staff and should consider the individual employee's wellbeing and be mindful of the potential impact complaints will have.

The employer is required to keep a record of all complaints.

The NASUWT insists that schools/colleges must consult with the Union prior to establishing a complaints policy/procedure in accordance with the requirements under the Code of Practice.

Data should be kept and reported by the employer about the number of complaints made as a result of the language-proficiency requirements and the outcomes of complaints made.

Complaints must be managed in accordance with the provisions under the Data Protection Act 1998, ensuring confidentiality of personal and sensitive data. Information included in reports about the numbers and trends of complaints should be anonymised and should not identify an individual.

Where a complaint has been dismissed or issues of concern have been resolved, there should be an expectation that no information will be included on an individual employee's file.

Remedies?

Where an individual employee does not meet the necessary standard of fluency, the employer must take remedial action. The Code of Practice describes the options for remedial action as including:

- giving the member of staff a reasonable opportunity to meet the necessary standard of spoken English or Welsh fluency, including:
 - providing training or retraining to enable the individual to meet the fluency duty;
 - providing access to training during normal working hours and meeting the cost of training.
- adjusting the individual's role to reduce the frequency of communications with the public;
- moving the individual to a non-customer-facing role;
- dismissing the individual on the basis that they are not capable of fulfilling their duties.

Dismissal of an employee should be considered only where:

- a member of staff has unreasonably refused to undertake training aimed to bring them to the necessary standard;
- a member of staff has not been able to attain the standard of fluent English or Welsh required for the role;
- no other suitable post without customer-facing duties can be made available for the individual.

All procedures should be followed prior to dismissal (e.g. capability) and the employee must be afforded the opportunity to explain their position and provide mitigation.

Issues for NASUWT members

- The NASUWT is committed to ensuring that all members are treated fairly and are not subject to discrimination, prejudice or victimisation on any grounds.
- The NASUWT is committed to supporting members who believe that they have been subjected to less favourable and unfair treatment as a consequence of the provisions of the Immigration Act 2016 and the Code of Practice.
- Where NASUWT members are advised by their employer (or the employment agency) about the implementation of the language-fluency requirements, contact should be made with the NASUWT immediately.
- If existing employees are asked to complete any test or process to demonstrate their English language proficiency/fluency (including a requirement to demonstrate proficiency as part of the process of performance management/appraisal or for the purposes of statutory induction/probation), please contact the NASUWT immediately. An explanation should be sought from the employer as to the reasons for conducting the test, pointing out that this is not a requirement or expectation under the legislation.
- Where any member is subject to a complaint from a pupil, parent or other member of the public, please contact the NASUWT immediately for advice.
- Evidence that employment agencies are seeking to apply a language-proficiency standard to supply/substitute teachers that is potentially discriminatory should be reported to the NASUWT in order that appropriate action can be taken by the Union. An employment agency will be asked to demonstrate that it is not acting in a discriminatory manner with regard to the application of the language-fluency requirement.
- The NASUWT will continue to make robust representations to governments/administrations throughout the UK and to employers, setting out the Union's concerns about the potential for abuse arising from the provisions of the Immigration Act and the Code of Practice. The NASUWT invites members to report any incidents of discriminatory treatment arising as a result of the legislation or Code of Practice. The NASUWT will continue to advance these issues through the Act for Racial Justice campaign.
- NASUWT Representatives will, wherever possible, contact employers to discuss the implications of the Code of Practice and how it will be implemented by the school/college. There should be an expectation that the employer will consult on any proposals to implement the requirements and to demonstrate that any policies and procedures are compliant with the statutory duties under the Equality Act 2010.

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