Equality Act 2010: Guidance for Managers

Introduction

This briefing outlines the key changes of the Equality Act and how they might apply to your role as a manager within the University. It also highlights current University developments to ensure that the requirements of the Equality Act are met.

Summary

The Equality Act 2010 harmonises and replaces previous legislation. The Sex, Race and Disability Discrimination and Equal Pay Acts are repealed in their entirety; and the Sexual Orientation and Religion/Belief Regulations and the Age Discrimination Regulations (except for Schedule 6, which contains the duty to consider working beyond retirement) are also revoked. The Part-time Workers Regulations and Fixed-term Employees Regulations are untouched by the Act and will remain in force.

The Act has two main purposes – to harmonise discrimination legislation and to strengthen the law to support progress on equality.

The Act covers the same groups that were protected by existing legislation which are now called ‘protected characteristics’.

The Act extends some protections to characteristics that were not previously covered, and also strengthens particular aspects of equality law.

Most of the provisions in the Equality Act 2010 came into force on 1 October 2010, others in April 2011.

The provisions that came into force from 1 October 2010 include:-

1. **The definition of the protected characteristics of:-**

   1) Age
   2) Disability
   3) Gender re-assignment
   4) Marriage and civil partnership
   5) Pregnancy and maternity
   6) Race
   7) Religion or belief
   8) Sex
   9) Sexual orientation
University developments:

- A new suite of web pages has been developed by the Equality and Diversity Office on the Equality Act. The web pages are structured around the 9 ‘protected characteristics’ with links to University policy and developments and national guidance.
- The first in a series of leaflets on the Equality Act has been developed aimed at international and EU students. Additional leaflets for students and staff are planned.
- Equality and Diversity Policies have been reviewed and updated
- HR Policies affected by the Act have been identified and are currently being reviewed
- University training and induction sessions are being revised.
- The content of the online training “Diversity in the Workplace” has been revised in line with the Act.

2. The new definition of direct discrimination common to all protected characteristics

Direct discrimination occurs when someone is treated less favourably than another person because of a protected characteristic (a) they possess (b) they are thought to possess; discrimination by perception - or (c) because they associate with someone who has a protected characteristic; discrimination by association.

3. The new definition of harassment to include conduct related to a protected characteristic so that there is no need for the characteristic to be that of the complainant

Harassment is “unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the individual.”

Harassment applies to all protected characteristics except for pregnancy and maternity and marriage and civil partnership – though it will still be possible to bring claims related to those characteristics as direct discrimination claims. Both staff and students will now be able to complain of behaviour that they find offensive even if it is not directed at them, and the complainant need not possess the relevant characteristic themselves. Staff and students are also protected from harassment because of perception and association.

The Act makes it unlawful for Higher Education Institutions to victimise students or prospective students.
University development:

The review of the University’s Code of Practice on Harassment currently underway will ensure that the requirements of the Equality Act are incorporated.

4. The extension of employers’ liability for third-party harassment (which was previously limited to sex-related and sexual harassment) to all protected characteristics, except marriage and civil partnership and pregnancy and maternity

The Equality Act makes an employer potentially liable for harassment of their employees by people (third-parties) who are not employees of their organisation, such as students, customers or clients. The employer will only be liable when (1) its employee has been harassed by a third party on at least 2 occasions (not necessarily by the same person) (2) the employer is aware of this and (3) the employer does not take reasonably practicable steps to prevent it happening again.

University development:

Work is planned on the issue of third-party harassment as part of the review of the Code of Practice on Harassment to ensure that students, contractors, conference attendees and all visitors to the University are made aware of their responsibilities to treat others in accordance with University equality policies.

5. The extension of indirect discrimination to disability and gender reassignment

Already applies to age, race, religion or belief, sex, sexual orientation and marriage and civil partnership.

Indirect discrimination can occur when there is a condition, rule, policy or practice that applies to everyone but particularly disadvantages people who share a protected characteristic. Indirect discrimination can be justified if it can be shown that the employer acted reasonably in managing the organisation i.e. that it is “a proportionate means of achieving a legitimate aim”. A legitimate aim might be any lawful decision the employer makes in running the organisation, but if there is a discriminatory effect, the sole aim of reducing costs is likely to be unlawful.

Being proportionate means being fair and reasonable, including showing that the employer has looked at ‘less discriminatory’ alternatives to any decision made.

A job applicant or employee could claim that a particular rule or requirement in place disadvantages people with the same disability. Unless this could be justified, it would be unlawful.

This may turn out not to be particularly useful in practice. Disability varies from person to person, so it will often be difficult to establish that a number of persons
share the same disability, meaning that claimants may not be able to establish group disadvantage. It is difficult to foresee a situation where an employer’s policy would be indirectly discriminatory, but would not also be covered by either discrimination arising from a disability or the duty to make reasonable adjustments – which are less complex provisions and easier to prove.

The law applies similarly to students.

6. **The removal of the requirement to show a comparator when claiming victimisation**

Victimisation occurs when an employee is treated badly because they have made or supported a complaint or raised a grievance under the Equality Act; or because they are suspected of doing so. An employee is not protected from victimisation if they have maliciously made or supported an untrue complaint.

The law applies similarly to students.

There is no longer a need to compare treatment of a complainant with that of a person who has not made or supported a complaint under the Act.

7. **The new definition of gender re-assignment**

The Act provides protection for transsexual people. A transsexual person is someone who proposes to, starts or has completed a process to change his or her gender. The Act no longer requires a person to be under medical supervision to be protected – so a woman who decides to live as a man but does not undergo any medical procedures would be covered.

It is discrimination to treat transsexual people less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent because they were ill or injured.

ECU Guidance on Trans Staff and Students was revised in 2010. The guidance includes a section about Higher Education Institutions’ responsibilities for supporting a staff member or student through the transition process.

**University development:**

Work is planned to provide more effective support to trans students. The work will be used to inform staff-related developments.

8. **Legal protection for students during pregnancy and maternity**

The Equality Act 2010 significantly strengthens legal protection for students (including applicants to higher education) during pregnancy and maternity in England, Scotland and Wales. The Act expands protection from discrimination on
the grounds of pregnancy and maternity, which already exists for women in the workplace and vocational training, to women outside the workplace.

Under the Act it is unlawful for Higher Education Institutions to discriminate against applicants and students in relation to admissions; the provision of education; access to any benefit, facility or service; and disciplinary proceedings.

**University development:**

Work is planned to develop guidance for managers and staff around maternity leave and breastfeeding and to identify space on campus for breastfeeding/expressing milk. Work is also ongoing with Student Support Services to ensure that the requirements of students during pregnancy and maternity are taken into consideration and key student policies, practices and procedures are reviewed.

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9. **A restriction on enquiries about disability and health prior to making a job offer**

**Pre-employment health-related checks**

The Equality Act limits the circumstances under which an employer can ask health-related questions before offering the individual a job. Up to this point, the employer can only ask health-related questions to help:

- Decide whether you need to make any reasonable adjustments for the person to the selection process
- Decide whether an applicant can carry out a function that is essential (‘intrinsic’) to the job
- Monitor diversity among people making applications for jobs
- Take positive action to assist disabled people
- Assure yourself that a candidate has the disability where the job genuinely requires the jobholder to have a disability

**University Development:**

Review application forms and recruitment procedures in light of the prohibition on making pre-employment health enquiries. Consider whether enquiries about health or disability come within the permitted exceptions.

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10. **A new definition and changes relating to disability**

The changes introduced by the Act are

- The introduction of two new types of discrimination (1) discrimination arising from disability (replacing disability-related discrimination); and (2) indirect disability discrimination – referred to in 5 above.
The definition of disability is extended to cover people who have had a disability in the past.

**The Act includes a new protection from discrimination arising from disability.** This states that it is discrimination to treat a disabled person unfavourably because of something connected with their disability (e.g. a tendency to make spelling mistakes arising from dyslexia). There is no requirement for a comparator. It will be unlawful to treat someone unfavourably “because of something arising in consequence of” their disability, for example their sickness absence. This type of discrimination is unlawful where the employer or other person acting for the employer knows, or could reasonably be expected to know, that the person has a disability. This type of discrimination is only justifiable if an employer can show that it is a proportionate means of achieving a legitimate aim.

The Act has made it easier for a person to show that they are disabled and protected from disability discrimination. Under the Act, a person is disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, which would include things like using a telephone, reading a book or using public transport. The Equality Act 2010 does not require a disabled person to demonstrate that, where the impairment adversely affects his or her ability to carry out normal day-to-day activity, that activity involves one of a specified list of capacities such as mobility, speech, or the ability to understand.

The Act continues the duty upon Higher Education Institutions to make reasonable adjustments in relation to staff, students and services. These adjustments apply where a disabled person is placed at a substantial disadvantage in comparison to non-disabled people. The previous duty applied when it was ‘impossible or unreasonably difficult for a disabled person to work study or use a service’.

**11. The extension of employment tribunal powers**

Under previous legislation, an employment tribunal could make a recommendation that an employer must eliminate or reduce the effect on the claimant of any discrimination. The Act extends this power so that it will now be possible for a tribunal to make recommendations that an organisation takes steps to eliminate or reduce the effect of discrimination on other employees, not only the claimant (and even if the claimant has left that employment). For example, the tribunal might specify that an employer needs to train all staff about the organisation’s bullying and harassment policy. This power does not apply to equal pay cases.

**12. The unenforceability of pay secrecy clauses in contracts of employment**

The Act makes it unlawful for an employer to prevent or restrict its employees from having a discussion to establish whether differences in pay exist that may be related to protected characteristics. It also makes terms of the contract of employment that require pay secrecy unenforceable because of these discussions.
An employer can require their employees to keep pay rates confidential from some people outside the workplace, for example a competitor organisation.

**University Development:**

Review any contractual pay secrecy clauses and consider whether they should be removed from contracts, handbooks and salary review letters. If they are to be retained make sure that managers receive training so that they are aware of their limitations.

13. **The removal of the requirement to show an actual comparator when claiming direct sex discrimination in relation to contractual pay**

The Equality Act retains the framework that was previously in place. This means that in most circumstances a challenge to pay inequality and other contractual terms and conditions still has to be made by comparison with a real person of the opposite sex in the same employment.

However, a change in the Equality Act allows a claim of direct pay discrimination to be made, even if no real person comparator can be found. This means that a claimant who can show evidence that they would have received better remuneration from their employer if they were of a different sex may have a claim, even if there is no-one of the opposite sex doing equal work in the organisation. This would be a claim under sex discrimination.

**University Development:**

An Equal Pay Review was undertaken in 2010 and a report produced in October 2010 by the HR Reward and Recognition Strategic Project Team and presented at the JNCC meeting in November 2010. This showed an analysis of pay by gender across Staff Category, within Academic, Research and Teaching (ART) roles, within Support roles and by full time/part time status. It also showed an analysis of pay by Age and Ethnicity. It was concluded that although the pay gap figures may initially have appeared quite high, they mirrored existing patterns in Higher Education and in the UK workforce and did not mean that the University’s pay practices were flawed. It was stated that the Team would continue to check their justification, eliminate bias and maximise fairness. An annual Equal Pay Review will be carried out which will give a clearer insight into the University-wide profile and highlight areas for further examination.

As no significant pay gaps were identified in the Review there were no recommendations for further action other than the need for an annual Equal Pay Review and monitoring of results. Results year on year will be reviewed to identify any trends or areas of concern.
Positive Action Provisions in recruitment and promotion

These provisions came into force on 6th April 2011 and mean that it is not unlawful to recruit or promote a candidate who is of equal merit to another candidate, if the employer reasonably thinks the candidate:

• has a protected characteristic that is underrepresented in the workforce; or
• that people with that characteristic suffer a disadvantage connected to that characteristic

Positive action does not allow an employer to appoint a less suitable candidate just because that candidate has a protected characteristic that is under-represented or disadvantaged.

Future provisions

The Government is also considering other provisions including the concept of dual discrimination and the requirement for employers with at least 250 employees to publish information about the pay differentials between their male and female employees.

Further information:


Trans staff and students in higher education – revised 2010: http://www.ecu.ac.uk/publications/files/trans-staff-and-students-in-he-revised-2010.pdf/view


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