

THE EQUALITY ACT 2010 – IMPLICATIONS FOR STUDENT-RELATED ACTIVITY

1. Overview

The Equality Act came into force on 1 October 2010 and brings together over 116 separate pieces of legislation into one single Act. Combined, they make up a new Act that provides a legal framework to protect the rights of individuals and advance equality of opportunity. The nine main pieces of legislation that have merged are:

- the Equal Pay Act 1970
- the Sex Discrimination Act 1975
- the Race Relations Act 1976
- the Disability Discrimination Act 1995
- the Employment Equality (Religion or Belief) Regulations 2003
- the Employment Equality (Sexual Orientation) Regulations 2003
- the Employment Equality (Age) Regulations 2006
- the Equality Act 2006, Part 2
- the Equality Act (Sexual Orientation) Regulations 2007

The categories of people covered by the further and higher education institution provisions are:

- Prospective students (in relation to admissions arrangements)
- Students at the institution (including those absent or temporarily excluded)
- Former students (if there is a continuing relationship based on them having been a student at the institution)
- Disabled people who are not students at the institution but who hold or have applied for qualifications conferred by the institution

The Act says that it is unlawful for a provider of higher education to discriminate against a student:

- in the arrangements it makes for deciding who is offered admission as a student
- in the terms on which it offers to admit the person as a student
- by not admitting the person as a student
- in the way it provides education for the student
- in the way it affords the student access to a benefit, facility or service
- by not providing education for the student
- by not affording the student access to a benefit, facility or service
- by excluding the student
- by subjecting the student to any other detriment

University Council is liable for any breaches of the Equality Act, unless it can show that it took 'all reasonable steps' to prevent the discrimination, harassment or victimisation from taking place. A student who believes they have been discriminated against may bring civil proceedings. If the courts can draw an inference that an unlawful act has occurred, the burden of proof is on the University to prove that it did not act unlawfully. Damages are unlimited in such cases. Before taking legal action, the student may complain to the OIA if (usually) they have exhausted the University's Student Complaints Procedure.

2. The Protected Characteristics

The Equality Act applies to nine 'protected characteristics' – age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. However, being married or in a civil partnership is **NOT** a protected characteristic for the further and higher education provisions.

Age

The Act protects people of all ages. However, different treatment because of age is not unlawful direct or indirect discrimination if it can be justified as a proportionate means of meeting a legitimate aim. Age remains the only characteristic where direct discrimination can be justified.

Disability

A person has a disability if s/he has a physical or mental impairment that has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities. The University is still under a legal duty to make reasonable adjustments for disabled students.

Gender reassignment

The definition of gender reassignment has been amended so that people no longer have to be under medical supervision to be protected by the law. The protected characteristic of gender reassignment is defined in the Act as 'where a person has proposed, started or completed a process to change his or her sex'.

Pregnancy and maternity

To claim pregnancy or maternity discrimination a female student must show that she has been treated unfavourably because of her pregnancy or maternity. This is likely to mean that education providers are unable to refuse an applicant entry because they are pregnant or require them to withdraw because they become pregnant. It is not direct discrimination against a male student to offer a female student special treatment in connection with her pregnancy or childbirth. Universities should not penalise students who miss examinations or coursework deadlines because of pregnancy or maternity.

Race

Race includes colour, nationality (including citizenship) and ethnic or national origins. A racial group can be made up of two or more different racial groups (for example, Black Britons).

Religion and belief

Religion includes any religion with a clear structure and belief system, and also a lack of religion. Belief includes religious and philosophical beliefs including lack of belief (e.g. Atheism).

Sex

Both men and women are protected.

Sexual orientation

The Act protects bisexual, gay, heterosexual and lesbian people.

All protected characteristics (with the exception of marriage and civil partnership) will be subject to the general public sector equality duty that was introduced in April 2011 which will require us to have due regard to:

- ***Eliminate discrimination***
- ***Advance equality of opportunity***
 - Remove/minimise disadvantage
 - Meet different needs of protected groups
 - Encourage participation in public life where low
- ***Foster good relations***
 - Tackle prejudice (where tensions arise, address those tensions)
 - Promote understanding

3. Types of discrimination

The Act makes it unlawful for a university to discriminate against students or prospective students because of any of the eight protected characteristics listed in Section 2 above.

Direct discrimination occurs when you treat a student less favourably than you treat (or would treat) another student because of a protected characteristic. It is not possible to justify direct discrimination, so it is always unlawful. There are, however, exceptions to the further and higher education provisions that allow, for example, single-sex institutions to only admit students of one gender without this being unlawful direct discrimination.

Discrimination based on association occurs when you treat a student less favourably because of their association with another person who has a protected characteristic (other than pregnancy or maternity).

Discrimination based on perception can occur when you treat a student less favourably because you mistakenly think that they have a protected characteristic (other than pregnancy or maternity).

Discrimination because of pregnancy or maternity is when a female student is treated less favourably because she is or has been pregnant, has given birth in the last 26 weeks or is breastfeeding a baby who is 26 weeks or younger. It is direct sex discrimination to treat a female student less favourably because she is breastfeeding a child who is more than 26 weeks old.

Indirect discrimination occurs when you a provision, criterion or practice is neutral on the face of it, but its impact particularly disadvantages people with a protected characteristic, unless the person applying the provision can justify it as a proportionate means of achieving a legitimate aim. To be legitimate the aim, the provision, criteria or practice must be legal and non-discriminatory and represent a real objective consideration. In the context of further and higher education, examples of legitimate aims might include:

- Maintaining academic and other standards.
- Ensuring the health and safety and welfare of students.

Even if the aim is legitimate the means of achieving it must be proportionate. Proportionate means 'appropriate and necessary', but 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim. In a case involving disability, if you have not complied with your duty to make relevant reasonable adjustments it will be difficult for you to show that the treatment was proportionate.

Indirect discrimination applies to all the protected grounds other than pregnancy and maternity, although something that disadvantages students who are pregnant or new mothers may be indirect sex discrimination.

Discrimination arising from disability occurs when you treat a student unfavourably because of something connected with their disability and cannot justify such treatment. For this type of discrimination, the following three conditions must be met:

- you treat a disabled student unfavourably, that is putting them at a disadvantage, even if this was not your intention, and
- this treatment is because of something connected with the disabled student's disability (which could be the result, effect or outcome of that disability), and
- you cannot justify the treatment by showing that it is a proportionate means of achieving a legitimate aim.

The unfavourable treatment does not amount to unlawful discrimination arising from disability if you can show that you:

- did not know that the disabled student had the disability in question, and
- could not reasonably have been expected to know that the disabled student had the disability

Victimisation takes place where one person treats another less favourably because he or she has asserted their legal rights in line with the Act or helped someone else to do so.

There are three types of **harassment** which are unlawful under the Equality Act:

- Harassment related to a relevant protected characteristic.
- Sexual harassment.
- Less favourable treatment of a student because they submit to or reject sexual harassment or harassment related to sex.

Pregnancy and maternity is not protected directly under the harassment provisions, however, unwanted behaviour will amount to harassment related to sex.

4. The duty to make reasonable adjustments

The reasonable adjustment duty under the Equality Act operates slightly differently but the objective is the same: to avoid as far as possible by reasonable means the disadvantage which a disabled student experiences because of their disability. The duty requires you to take positive steps to ensure that disabled students can fully participate in the education and other benefits, facilities and services provided for students. The duty to make reasonable adjustments is an anticipatory and continuing one that you owe to disabled students generally, regardless of whether you know that a particular student is disabled or whether you currently have any disabled students. You are not expected to anticipate the needs of every prospective student but you are required to think about and take reasonable and proportionate steps to overcome barriers that may impede people with different kinds of disabilities.

You are required to take reasonable steps to:

- Avoid substantial disadvantage where a provision, criterion or practice puts disabled students at a substantial disadvantage.
- Avoid substantial disadvantage, where a physical feature puts disabled persons at a substantial disadvantage; this includes removing the physical feature in question, altering it or providing a reasonable means of avoiding it.
- Provide an auxiliary aid where without one, disabled students would be put at a substantial disadvantage.

You owe this duty to existing students, applicants and, in limited circumstances, to disabled former students. **You cannot justify a failure to make a reasonable adjustment**; where the duty arises, the issue is whether or not the adjustment is 'reasonable' and this is an objective question for the courts to ultimately determine.

Where a provision, criterion or practice places disabled students at a substantial disadvantage in accessing education and any benefit, facility or service, the University must take such steps as it is reasonable to take in all the circumstances to ensure the provision, criterion or practice no longer has such an effect. This might mean waiving a criterion or abandoning a practice altogether but often will involve just an extension of the flexibility and individual approach that most higher education institutions already show to their students.

5. Disability and competence standards

A competence standard is defined as an academic, medical or other standard applied by or on behalf of an education provider for the purpose of determining whether or not a person has a particular level of competence or ability. It is not a provision, criterion or practice and there is therefore no duty to make reasonable adjustments in relation to the application of a competence standard. However, the duty does apply to the process of demonstrating that a person meets the competence standard. For example, the University may need to consider offering alternative formats through which a disabled student can apply for a programme; it does not need to lower the level of prior attainment required to study the programme. It is therefore imperative that any intended learning outcomes are in themselves justifiable as competence standards under the Equality Act; they will not then be subject to the requirement to make reasonable adjustments.

6. Further information

More advice, information and guidance is available from the University's Equality & Diversity Team:

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Additional resources are available from the Government's Equality Office and the Equality and Human Rights Commission.