



## Equality Act 2010

(Briefing note updated March 2012 to reflect Specific Duties Regulations and the proposed Scottish Specific Duties)

### 1. Introduction

The Equality Act 2010 consolidates and streamlines previous anti-discrimination legislation, introducing a consistent basic framework of protection against direct and indirect discrimination, harassment and victimisation in work, education, services and public functions. It also introduces some new measures and concepts that have implications for universities as employers and providers of education and services.

### 2. Protected Characteristics

The protected characteristics under the Act are:

#### Age

**Disability:** a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.

**Gender reassignment:** the process of transitioning from one gender to another.

#### Marriage and civil partnership

**Pregnancy and maternity:** pregnancy, the period of maternity leave or the 26 weeks after giving birth, and breastfeeding

**Race:** race, colour, nationality (including citizenship), ethnic or national origins

**Religion and belief:** religious and philosophical beliefs, including lack of belief

#### Sex

## Sexual orientation

### 3. What has changed through the Equality Act?

#### Key changes from 1 October 2010:

- Anti-discrimination rights and concepts have been harmonised – ironing out the anomalies between previous legislation
- Staff recruitment: the Act makes it unlawful for employers to ask job applicants questions about disability or health before making a job offer, except in specified circumstances.

**Guidance to recruiters:** Recruiters must not ask a job applicant questions about health or disability, including sickness absence, in any part of a recruitment selection process prior to making a job offer, other than in very restricted circumstances. This precludes such questions during the application process, in pre-offer reference requests, through a health questionnaire or Occupational Health referral, or during an interview, and any health information received should not be used to make a recruitment decision

Recruiters should continue to ask shortlisted candidates what, if any, adjustments may be needed for them to participate in the interview or assessment process.

Following an employment offer – which may be a conditional offer – recruiters may ask for information on relevant health matters, including attendance/sickness absence and the successful applicant should be asked what adjustments, if any, may be needed to enable them to undertake the job. The recruiter must continue to avoid discrimination and should seek advice if any issues arise.

EHRC guidance, including examples of when disability or health questions may and may not be asked is available at [www.humanresources.ed.ac.uk/Recruitment/default.htm](http://www.humanresources.ed.ac.uk/Recruitment/default.htm)

If you believe that you have a valid need to ask about health or disability prior in relation to a particular recruitment selection exercise, you should seek advice from your College/Support Group HR team.

- Discrimination based on association or perception: the Act extends protection to people discriminated against because they are perceived to have, or are associated with someone who has, a protected characteristic. E.g. people who are caring for a disabled child or relative will be protected by virtue of their association to that person.
- Disability:

- the Act extends protection from indirect discrimination to disability and introducing a new concept of “discrimination arising from disability”
  - the thresholds for the duty are harmonised to make reasonable adjustments for disabled people
  - the list of “capabilities” in the Disability Discrimination Act 1995 are removed, which may make it less burdensome for an individual to prove they are disabled
- Positive action: the law is extended to allow positive action for students, as well as in relation to employment. This provides scope for universities to adopt voluntary measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce under-representation and meet particular needs. Positive discrimination, however, remains illegal.
  - Third party harassment: the Act extends protection to workers who are harassed by third parties, such as students, customers or suppliers. The employer will become legally responsible if they know that such harassment has taken place twice before and has failed to take reasonable steps to protect the worker from further harassment.

**Guidance for managers:** if an employee informs you of, or you observe, harassment by a third party, such as a student, supplier or customer, it is important that you take action to address and resolve the matter in a timely, fair and proportionate manner, with a view to preventing it happening again. Guidance is available in the University’s [Dignity and Respect Policy](#) and in the [Code of Practice on dealing with Personal Harassment](#)

- Pregnant women and mothers: extended protection from discrimination. The Act makes clear that mothers can breastfeed their children in places like cafes and shops and not be asked to leave (as was already the law in Scotland).
- Gender reassignment: changed definition by removing the requirement for medical supervision.
- Private clubs: protection is extended to cover more protected characteristics

#### **4. Single Public Sector Equality Duty**

The Equality Act 2010 (Specific Duties) Regulations 2011 (the Regulations) came into force on 10 September 2011. The Regulations set out the specific public sector equality duties that certain public bodies must comply with. The aim of the specific duties is to help public bodies comply with the general duty to promote equality in the workplace contained in the Equality Act 2010, which has been in force since 5 April 2011.

##### **4.1 General equality duty**

The general single equality duty requires public bodies, in the exercise of their functions, to have due regard to the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity and foster good relations between those who share or have different protected characteristics.

The duty explains that having due regard for advancing equality involves:

- Removing or minimising disadvantages suffered by people due to their protected characteristics;
- Taking steps to meet the needs of people from protected groups where these are different from the needs of other people; and
- Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

#### **4.2 Public Sector Equality Duty - Scotland**

The revised draft regulations for the public sector equality duty in Scotland were announced by the Scottish Government on 9 March 2012, with the aim of the Regulations to be laid before Parliament later in March 2012.

There was support for the overall approach in the draft Regulations that were laid before the Scottish Parliament in January 2011. The 6 elements of the specific duties were not challenged. Rather, there was a desire for greater transparency and accountability and for more detail within the Regulations themselves rather than in guidance. The revised proposals which were the subject of consultation between September and November 2011 therefore maintained the 6 elements of the previous duties.

- Publishing equality outcomes, based on evidence and involvement of people with protected characteristics. (The date for publication of the first set of equality outcomes has been changed to 'not later than 30 April 2013')
- Reporting on 'mainstreaming' (The date for publication of the first report to 'not later than 30 April 2013')
- Assessment of the impact on equality of policies and practices, informed by evidence
- Gathering and publishing employment data
- Scottish Ministers' duty
- Publication duty
- Procurement

Details of the summary changes of the regulations can be found at:

<http://www.scotland.gov.uk/Publications/2012/03/4239/3>

#### **5. Key concepts**

Many of the concepts remain the same as in previous equality legislation, but there are some new aspects, and previous differences have been removed. The key concepts are summarised below.

### **Direct discrimination**

Direct discrimination is when you treat a student/employee less favourably than you treat/would treat another student/employee because of a protected characteristic. This includes racial segregation.

Direct discrimination is always unlawful, although there are some exceptions in relation to HE that allow for e.g. single sex institutions. The one exception is Age, for which different treatment can be justified if it is a proportionate means of meeting a legitimate aim. However, this would be a difficult test to meet.

**Discrimination based on association:** when you treat a student/employee less favourably because of their association with another person who has a protected characteristic (other than pregnancy and maternity)

**Discrimination based on or perception:** when you treat a student/employee less favourably because you think they have a protected characteristic (other than pregnancy and maternity)

**Discrimination because of pregnancy and maternity:** when you treat a woman less favourably because she is or has been pregnant, has given birth in the last 26 weeks or is breastfeeding a child.

### **Exceptions:**

- It is not direct discrimination against a non-disabled student/employee to treat a disabled student/employee more favourably.
- It is not direct discrimination against a male student/employee to offer a female student/employee special treatment in connection with her pregnancy or childbirth.
- It is not unlawful to treat workers who are married or civil partners better than workers who are not married/civil partners, but those who are married and those who are civil partners must be treated the same.

### **Indirect discrimination**

Indirect discrimination occurs when these four conditions are met:

- a) You apply/would apply a provision, criteria or practice equally to all relevant students/employees. EHRC guidance gives as an example of a 'provision, criteria or practice' arrangements for deciding who to admit. It would also include the way that education, or access to any benefit, service or facility is offered or provided as well as one-off decisions.

- b) This puts/would put students/employees sharing a protected characteristic at a particular disadvantage compared with students/employees who do not share that characteristic
- c) The particular student/employee is disadvantaged
- d) You cannot show that the provision, criteria or practice is justified as a 'proportionate means of achieving a legitimate aim'. Legitimate aims might include maintaining academic and other standards or ensuring the health and safety and welfare of students/employees. The financial cost of using a less discriminatory approach cannot, by itself, provide a justification, but can be taken into account if there are other good reasons for adopting the chosen practice. The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the justification must be. 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.

### **Discrimination arising from disability**

This is when you treat a disabled student/employee unfavourably, i.e. put them at a disadvantage, because of something connected with their disability and cannot justify such treatment by showing that it is 'a proportionate means of achieving a legitimate aim'.

By acting quickly to identify and put in place reasonable adjustments for disabled students/employees, you can often avoid discrimination arising from disability.

### **Harassment**

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

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

### **Victimisation**

Treating someone badly because they have done a 'protected act' (or because you believe that a person has done or is going to do a protected act). A 'protected act' is:

- Making a claim or complaint of discrimination (under the Equality Act).
- Helping someone else to make a claim by giving evidence or information.
- Making an allegation that you or someone else has breached the Act.
- Doing anything else in connection with the Act.

### **Reasonable adjustments**

The duty to make reasonable adjustments operates slightly differently under the Equality Act, but the object is the same: to avoid as far as possible by reasonable means the disadvantage which a disabled student/employee experiences because of their disability. The duty requires you to take positive steps to ensure that disabled students (including applicants) can fully participate in the education and other benefits, facilities and services provided for students and that disabled employees or applicants have the same access to everything that is involved in getting and doing a job as non-disabled employees/applicants, as far as is reasonable.

The Act specifies three requirements of the duty to make reasonable adjustments that apply in situations where a disabled person would otherwise be placed at a substantial disadvantage compared with people who are not disabled.

1. Changing the way things are done (i.e. a provision, criterion or practice)
2. Making changes to overcome barriers created by the physical features of your place of work or study
3. Providing extra equipment (an 'auxiliary aid') or getting someone to do something to assist the disabled person (an 'auxiliary service')

**For students:** where a provision, criterion or practice places disabled students at a substantial disadvantage in accessing education and any benefit, facility or service, the HEI must take such steps as it is reasonable to take 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 further and higher education institutions already show to their students.

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 staff:** the need to make adjustments for an individual worker or job applicant:

- must not be a reason not to appoint someone to a job or promote them if they are the best person for the job with the adjustments in place
- must not be a reason to dismiss a worker
- must be considered in relation to every aspect of a person's job
- provided the adjustments are reasonable for you to make.

You are required to make adjustments that are reasonable, and what is reasonable depends, among other factors, on the size and nature of the organisation (i.e. the University of Edinburgh). Many of the adjustments you can make will not be particularly expensive.

Many factors will be involved in deciding what adjustments to make and they will depend on individual circumstances. Different people will need different changes, even if they appear to have similar impairments.

You only have to make adjustments where you are aware – or should reasonably be aware – that a student/employee or applicant has a disability.

## 5. Further information and resources

The **Equality and Human Rights Commission (EHRC)** has a statutory remit to promote and monitor human rights; and to protect, enforce and promote equality. It has extensive guidance on the Equality Act at

[www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/](http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/)

This includes separate guidance for: employers; education providers (both HE and Schools); workers; service providers; service users; and advisers.

Within the guidance for education providers, there is specific guidance on Admissions; Providing education and access to any benefit service or facility and exclusions; Dispute resolution and enforcement; Protected Characteristics; Responsible bodies for further and higher education; Public sector equality duties.

The EHRC is also producing statutory codes to cover all aspects of the new Act.

[The draft Code of Practice on Employment](#) has been laid before Parliament and awaits a Government Order bringing it into force. The [draft Code of Practice on Further and Higher Education](#) is currently out to consultation.

The **Equality Challenge Unit (ECU)** has been set up to promote equality and diversity in higher education and has extensive guidance on the Equality Act and other equality and diversity matters at [www.ecu.ac.uk](http://www.ecu.ac.uk)

The **University of Edinburgh’s Equality and Diversity website** provides links to a range of information and guidance on the Equality Act as well as news, events and other information about equality and diversity in the University, at [www.ed.ac.uk/schools-departments/equality-diversity/home](http://www.ed.ac.uk/schools-departments/equality-diversity/home).

## Recommended Reading

It is recommended that those responsible for the following services and activities in the University should read the relevant EHRC guidance, and review practices as appropriate.

<b>Responsible for:</b>	<b>Guidance:</b>
Student admissions – at a college, school or central level	Guidance on Admissions, within <a href="#">the EHRC Equality Act guidance for education providers</a> .
Teaching, provision of education	Guidance on ‘Providing education and access to any benefit, service or facility and exclusions’, within the <a href="#">EHRC Equality Act guidance for education providers</a> .



Any student service, facility or benefit – centrally or within a college or school	<p>This includes specific guidance on how to avoid discrimination on the following topics:</p> <ul style="list-style-type: none"> <li>• Types of education, benefits, facilities and services</li> <li>• Academic progression and transfer</li> <li>• Field trips</li> <li>• The physical environment</li> <li>• Centrally provided services</li> <li>• Residential accommodation and accommodation-finding services</li> <li>• Assessments and examinations</li> <li>• Disabled students</li> <li>• Qualifications</li> <li>• Graduation and certificate ceremonies</li> <li>• Exclusions</li> </ul>
Staff management	Core guidance for employers, within the <a href="#">EHRC Guidance for Employers</a> .
Staff recruitment	Guidance on recruitment, within the <a href="#">EHRC Guidance for Employers</a> .

### Alternative Format

If you require this document in an alternative format please email [UHR@ed.ac.uk](mailto:UHR@ed.ac.uk), or telephone 0131 650 8127.