

seminar



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Introduction

Good afternoon everyone.

The brief I took to myself with this talk seemed at first to be quite reasonable – after all I’ve been practising in equality law for a while and I knew that the main thrust of the Equality Bill was consolidating and harmonising the great many and disparate Acts and Statutory Instruments that make up equality law in the UK. And then I printed the Act¹.

I noted that it had enjoyed Parliamentary ping-pong on 6 April and received Royal Assent on 8 April. I saw that it has 218 Sections spread over 16 Parts and cannot be analysed without paying close attention to the 28 Schedules that follow it.

This could be a very long talk!

Then I remembered my 2nd year Geography exam and what Mr Pallester the teacher said to me after marking it. “Sykes” he said, “that was a really good essay on South America. It was only a shame that the question was about Central America”. So I looked more closely at the topic for this presentation. The key words? - “Student Perspective”.

Great! We need only consider in detail Parts 1, 2, 6 and 11 and Schedules 1, 3, 12, 13, 14, 18 and 21.

¹ Available at www.opsi.gov.uk.

seminar

However, as the Act does largely achieve the aim of “harmonising discrimination law”² - for example it doesn’t change the process for being sued and the consequences for breaches of anti-discrimination law - I will focus today on a few key changes and interesting points raised by the Act and, if I may, draw attention to an important area upon which universities may wish to continue to focus in terms of fairness and equality of access.

Protected characteristics

Fundamental to any progress that we are going to make in considering the Act is the concept of “protected characteristics”. What are they?

It’s the new jargon for the grounds upon which discrimination is unlawful. They are³:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion and belief
- Sex
- Sexual orientation

I will make a couple of points about two, of what I am sure you have noticed are, new specific “protected characteristics” and their application – from the “student perspective”.

Marriage and civil partnership.

Section 90, the very first sentence in the Chapter of the Act that sets out what and how anti-discrimination law applies to the provision of further and higher education, says, “This Chapter does not apply to the protected characteristic of marriage and civil partnership”.

So no student claim lies for discrimination on that ground.

² Explanatory Notes to the Equality Act 2010, paragraph 10.

³ See Part 2, Chapter 1 (sections 4 to 12) of Equality Act 2010.

seminar

Pregnancy and maternity.

This is a new protected characteristic for those involved in the provision of education. It protects women not men. It covers the period of pregnancy and the 26 weeks after birth and expressly includes treating a woman unfavourably because she is breast feeding⁴.

The Government Equalities Office's note on the Bill (published just before the Bill became an Act) says that the Act “makes clear that mothers can breast feed their children without being asked to leave places like cafés and shops, and ensures that schools cannot discriminate against pupils who are pregnant or new mothers”.

It goes further.

Direct discrimination, which is treating one person less favourably than someone else because of a protected characteristic⁵, by higher and further education institutions on grounds of pregnancy and maternity is unlawful in connection with admission decisions, the terms of admission and the provision of services including teaching and learning, once a person is a student.

Positive Action

Gary referred to the positive companion discrimination cases that were reported in the US involving the University of Michigan. What does the Equality Act say about that?

First, there is a, much debated in the media and here in Parliament, provision that is headed “positive action”. Therefore, the concept has been given a formal statutory footing.

The section⁶ covers all protected characteristics except that of marriage and civil partnership.

It is important to note that the provision only empowers a person to take action, it does not require you to do so – it is a “can do” not a “must do”. Although I must add here that a university must take into account the “due regard” obligation, which I will outline in a little more detail next.

⁴ See section 13(6), Equality Act 2010.

⁵ Section 13, Equality Act 2010.

⁶ Section 158, Equality Act 2010.

seminar

What the Act allows you to do is to take action which is “proportionate to achieving one or more of the following aims:”

- a) enabling or encouraging people to overcome a disadvantage which is connected to a protected characteristic.
- b) meeting the specific needs of a group of people with the same protected characteristic.
- c) enabling or encouraging people from a particular group to participate in an activity where participation in that activity by that group is disproportionately low.

There is a provision in the Act allowing more favourable recruitment or promotion on grounds that might otherwise be discriminatory⁷ BUT that section does not apply to the recruitment of students. It applies to employment.

The Equality Duty

The general statutory duties, which I mentioned just now, have been extended.

You will all no doubt be familiar with the obligations that universities and colleges⁸ have been under to have due regard to the need to promote equality of opportunity and eliminate unlawful discrimination on grounds of race, disability and gender⁹. These obligations have been amended in two significant ways.

First the duty has been extended⁷ so that it covers all of the protected characteristics except marriage and civil partnership. Therefore age, gender reassignment, pregnancy and maternity, religion or belief, and sexual orientation have joined race, disability and gender.

The second significant change is that the expression of the duty has been harmonised. In respect of those 8 protected characteristics, universities and colleges are expected to have due regard to the following three matters when exercising their functions:

- a) the elimination of conduct that is unlawful under the Equality Act;

⁷ Section 159, Equality Act 2010.

⁸ In essence, those higher education institutions receiving HEFCE funding and further education corporations.

⁹ Section 71, Race Relations Act 1976; section 49A, Disability Discrimination Act 1995 and section 76A, Sex Discrimination Act 1975.

seminar

- b) advancing equality of opportunity between people who share a protected characteristic and those who do not share it; and
- c) fostering good relations between people who share a protected characteristic and those who do not share it.

The Act formally acknowledges that compliance with the duties may involve treating some people more favourably than others. It emphasises that you may not engage in unlawful discrimination – which is prohibited under the Act¹⁰.

For higher and further education institutions, this means that you are both obliged to have due regard to promoting the equality of opportunity and empowered to undertake positive action.

So what does this mean in practice? I suggest that this frees up institutions' ability to undertake targeted recruitment efforts and to put in place services that might be particularly attractive to under represented groups in the institution. The Explanatory Notes¹¹ which now accompany the Act give this education example¹²:

“Having identified that its white male pupils are underperforming in Maths, a school could run supplementary classes exclusively for them”.

I think it will be interesting to see where UK courts draw the line between positive action (which is lawful and encouraged) and positive discrimination (which is not lawful).

Disability Discrimination

The Act doesn't change the thrust of the previous legislation although it does change some of the language and it reverses the effect of a previous decision of the House of Lords¹³. However, as a result of other recent developments – the issuing by QAA of its revised Code of Practice regarding disabled

¹⁰ See section 159(6), Equality Act 2010.

¹¹ The Explanatory Notes are published after the Act has been passed. Generally they are not considered by a Court or Tribunal when interpreting the Act. Codes of Practice will be published by the Equality and Human Rights Commission, to which Courts and Tribunals must refer.

¹² See paragraph 525 of the Explanatory Notes.

¹³ London Borough of Lewisham v Malcolm [2008] UKHL43.

seminar

students¹⁴ and decisions by the Office of the Independent Adjudicator for Higher Education, I think it right that we examine an issue of real corporate and reputational risk for universities – disability discrimination as regards students and graduates.

Gary's paper identified that there is consensus that everyone should have an equal opportunity to benefit from the transformative effects of higher education and reminded us that the right not to be denied an education appears in the European Convention on Human Rights¹⁵. Among those particularly seeking this fairness are disabled people.

The Equality Act continues to apply the concept of the reasonable adjustment¹⁶ which required universities and colleges to:

- consider changes to the way things are done;
- consider changes to the built environment; and/or
- provide auxiliary aids and services

where one or a combination of these will overcome substantial disadvantage suffered by a disabled person compared to a non-disabled person.

Exempt from this obligation are competence standards¹⁷. Competence standards are the academic, medical or other standards applied for the purposes of determining whether or not a person has a particular level of competence or ability¹⁸.

It is through the exemption of competence standards from the requirement to make reasonable adjustments, that academic standards and the academic judgment of those standards are protected. Institutions are required to make adjustments to teaching and learning, to the manner and mode of assessment and to the provision of other student services. However, they are not obliged to make

¹⁴ Code of Practice for the Assurance of Academic Quality and Standards in Higher Education, Section 3: Disabled Students (February 2010 and updated March 2010). Available at www.qaa.ac.uk.

¹⁵ Article 2, Protocol 1.

¹⁶ Section 20, Equality Act 2010.

¹⁷ Paragraph 4(2), Schedule 13 Equality Act 2010.

¹⁸ Paragraph 4(3), Schedule 13 Equality Act 2010.

seminar

changes to the thing that they are testing or the judgment (ie the standard) that an individual must attain in order to receive a reward. And it is here that I fear the risk exists, the university or college does need to identify what it is testing and, I suggest, needs to express it. This leads to some quite detailed and careful thought. Are you testing knowledge, recall, understanding, skill, speed, stamina, discernment, and/or physical ability?

Any awarding body could be challenged to explain why – objectively, it includes the particular factor among its competence standards. The question that is likely to be posed is towards what objective is that standard directed? Is that objective a legitimate aim and is the application of the standard a proportionate means of achieving that aim?

One of the problems I think we still have in this area is that institutions have not identified and expressed adequately what the particular competence standards are in respect of each course, programme or module and in respect of each award. I say that with some confidence because I hear from you within the sector that when a disabled student asks for an adjustment to a particular assessment, the reply is often received “doing that affects academic standards”. And where one asks how and which standard, one does not receive a detailed reply.

Naturally sometimes the answer does bring us back to knowledge, or a skill or an ability that the awarding body can identify and justify. And consistent with what Gary set out in his paper about the need to be clear about promises and explanations given prior to the student choosing a course – I suggest that that is the time to have identified and made available the information on competence standards for a programme.

But sometimes it seems that the response to the adjustment request is more along the lines of “we have done it like this for 20/50/100 years, why should we change? Why should government interfere with how we do things?”. And an answer to that is that yes, this is social change legislation. It is intended to make access to education fairer to all by seeking to remove barriers.

Social change legislation is not new. The first UK discrimination legislation was passed in the 1960's¹⁹ and, at the risk of stating the obvious, I suggest it is very much the aim of a Parliament to bring about social change. And as I reflected on this I strayed off law and found myself reaching for my

¹⁹ The Race Relations Act 1965.

seminar

embarrassingly unthumbed copy of *The Nichomachean Ethics*. After having observed that we learn by doing, Aristotle goes on “we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts. This is confirmed by what happens in states; the legislators make the citizens good by forming habits in them, and this is the wish of every legislator, and those who do not affect it miss their mark, and it is in this that a good constitution differs from a bad one”²⁰.

Unsurprising then that the legislator of what ever political hue should seek to influence our behaviour.

And with that, before Nick, David and Gordon descend upon us to try and take their own seats – and who knows how many they will have – I shall return to mine.