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promoting employment diversity
in higher education

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Equality and Diversity: Update on External Requirements

This paper summarises the new developments in equality and diversity legislation and notes the aspects of it to which HEIs will need to pay immediate attention.

Introduction

1. Over the next three-year period to December 2006 further equalities legislation is to be introduced in the UK and existing provision will be amended. In accordance with European Directives, domestic legislation has to be enacted in the previously disregarded areas of sexual orientation, religion or belief and age. Existing legislation relating to race, sex and disability has been, and will be, adjusted to comply with the requirements of the Directives. This paper provides an overview of new and forthcoming equalities legislation, areas of commonality between Acts and Regulations and suggestions for integrating legislative requirements into institutions' policies and procedures.
2. The new regulations will build on existing provision. They should not be difficult for HEIs to effect given the equal opportunities measures that are already in place and the reappraisal of systems and procedures that has recently been undertaken (for example in respect of disability, race, and fixed and part-time contracts).

Background

3. Article 13 of the Treaty of Amsterdam gave the Council of the European Union powers to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. In pursuit of this objective the following were passed:

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- 2000/43/EC implementing the principle of equal treatment between person of racial or ethnic origin (the 'Race Directive');
 - 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the 'Employment Directive') and
 - 2002/73/EC amending 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (the 'Equal Treatment Directive').
4. The Race Directive was translated into UK domestic legislation on 19 July 2003 when the Race Relations Act 1976 (Amendment) Regulations came into effect.
 5. The Employment Equality (Sexual Orientation) Regulations 2003 will come into force in the UK on 1 December 2003 and the Employment Equality (Religion or Belief) Regulations become law on the following day. The Disability Discrimination Act 1995 (Amendment) Regulations 2003 will not take effect until 1 October 2004 and legislation outlawing discrimination on grounds of age will be introduced in October 2006. These statutes will ensure the UK's compliance with the equality dimensions of the Employment Directive.
 6. In addition, amending regulations will ensure that the Sex Discrimination Act 1975 complies with the Equal Treatment Directive by 5 October 2005.
 7. A table summarising this timetable is at the end of this paper.

Scope of the legislation

8. All three Directives extend to 'vocational training' expressly and case law from the European Court of Justice suggests that 'vocational training' includes most higher and many further education courses. Therefore, the UK legislation extends protection against discrimination to students in further and higher education, which places additional responsibilities on HEIs in the revision of their policies and procedures. There is, however, the advantage that the new equality measures are thus exactly aligned with those already existing for disability and race.
9. Due to the relatively recent revision of race legislation in the UK, through the Race Relations (Amendment) Act 2000, only relatively minor amendments had to be made to existing provision to comply with the European Race Directive. Similarly, the Sex Discrimination Act will not be greatly altered by the requirements of the Equal Treatment Directive. The greatest change to existing law will be made to the Disability Discrimination Act to ensure its compliance with the Employment Directive. The new legislation concerning religion or belief, and sexual orientation will be broadly similar in structure and form to the Sex Discrimination Act 1975 and the Race Relations Act 1976. The government is consulting about the age strand of the Employment Directive at the moment.
10. In a previous consultative document concerning the implementation of all three EU Directives, the government undertook to 'use the same wording, where appropriate, for all the main

concepts: direct and indirect discrimination, harassment and victimisation'. This will facilitate implementation at institutional level. Internal documents may need to be reviewed with reference to these legally established definitions.

11. Direct discrimination is defined as it is currently for race and sex. That is, it will be automatically unlawful to discriminate against someone on, for example, grounds of sexual orientation or religion or belief unless it can be shown that there is a genuine occupational requirement (GOR). However, the application of the GOR is likely to be given strict interpretation.
12. Harassment was not explicitly defined in either the Race or Sex Discrimination Acts originally, and both have been or will be amended accordingly. The definition focuses on 'unwanted conduct', which is consistent with the European Commission Code of Practice on measures to combat sexual harassment. Harassment occurs when someone's actions or words, based on the relevant grounds, are unwelcome and violate another person's dignity or create an environment that is intimidating, hostile, degrading, humiliating or offensive. The intention is that, when deciding whether it is reasonable to consider that conduct amounts to a violation of dignity or creation of an offensive environment etc., tribunals should be required to take into account all relevant circumstances, in particular the perception of the person alleging harassment. There may be implications here for internal documentation at institutional level that may not currently make this point explicit.
13. The employer is responsible for the actions of its staff as well as staff being individually responsible. If harassment occurs at work, the HEI might be liable and may be ordered to pay compensation, unless it can show that it took reasonable steps to prevent harassment. The individual who harasses may also be ordered to pay compensation.
14. The definition of victimisation in respect of sexual orientation or religion or belief is similar to that in the Race and Sex Discrimination Acts. It relates to the law itself and makes it an offence to discriminate against someone because of something they have done connected to upholding the law. This could extend beyond the current employment in respect of references for former employees, and students. For example, the cause of an adverse reference or refusal to provide one might be examined to see whether it was due to a complaint of discrimination. Claims under this provision are not time-limited, but the farther removed the alleged act of discrimination is from the former relationship, in both time and context, the less likely it is that a person will be able to establish the necessary close connection back to the relationship. Again, policies and procedures will need to be reviewed and here it will also be necessary to bear in mind the requirements of the Data Protection Act with respect to the length of time information on staff and students is kept.
15. The burden of proof in race, disability, religious or sexual orientation discrimination cases is and will be the same as for sex discrimination.¹ If a prima facie case is made (where a tribunal could consider that discrimination or harassment has taken place), it is for the HEI to prove that it did

¹ Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001

not occur. The fact that the burden of proof rests with the HEI has major implications for operational practice.

16. The regulations that have been passed by Parliament do not require the statistical monitoring of individuals for sexual orientation or religion or belief. However, it is good practice to monitor the effect of policies and practices since this might assist in the defence of any action against an institution.

Strand-specific Provisions

Religion or Belief

17. Religion or belief is defined as being any religion, religious belief or similar philosophical belief. The belief must be similar to a religious belief and case law will be the ultimate determiner of what is covered by the regulations.
18. The provisions for religion and belief extend to discrimination against contract workers and qualifications bodies. In auditing their practices and procedures to ensure that they accord with the new legislation, HEIs will wish to include such matters as the provision of a wide range of staff and students' religious and cultural needs, such as dietary requirements and prayer room facilities, and flexibility with respect to cultural or religious holidays. Aspects of the interpretation of the regulations will be settled by case law; one of the more obvious test cases might be time-off in respect of religious festivals.

Sexual Orientation

19. Sexual orientation is defined as
 - Orientation towards persons of the same sex
 - Orientation towards persons of the opposite sex
 - Orientation towards persons of the same or opposite sex

The regulations do not extend to sexual preferences and practices such as paedophilia.

20. Perception of sexual orientation harassment also covers discrimination against someone who 'looks' or 'acts' gay, even if they are not. The terms and conditions of the employment contract will probably have to be assessed to ensure that staff in a same sex relationship are entitled to the same benefits as those who are married or have partners of the opposite sex. This would include issues such as compassionate leave.

Disability

21. From its inception the Disability Discrimination Act 1995 was different from the Sex and Race Discrimination Acts. Its amendments will, among other things, provide protection against 'blanket bans' on the employment of persons with a particular disability.
22. The definition of disability discrimination will remain the same, but there will be the provision that less favourable treatment cannot be justified if it occurs merely because an individual has a disability. It has always been unlikely that such treatment would be not justifiable and this will be made explicit.
23. It will no longer be possible to justify failure to make a reasonable adjustment. The duty to make adjustments has been extended to training and mentoring. Adjustments will also have to be made in respect of occupational pension schemes, which were previously excluded under the Act. Trustees or managers of occupational schemes will have to fulfil particular duties, whereas employers' responsibilities will not be as prescriptive. However, they will have to ensure that aspects of the schemes do not substantially disadvantage disabled employees. This would include access to information about a scheme where, for example, provision may have to be made for someone to read information about it to a visually impaired person.
24. The DDA made it illegal to discriminate against a disabled person by dismissing him or her simply on the grounds of disability. The new regulations will make it explicit that constructive dismissal and the termination of employment by the expiry of a period of time (unless employment is immediately renewed on the same terms) come within the definition of dismissal.²

Age

25. The government intends to outlaw age discrimination in general (with one or two exceptions) with similar definitions and sanctions to those that already exist in the other equalities strands. However, there may be scope to justify an age-based policy with reference to specific aims and the particular circumstances that make the practice appropriate and necessary. Justifications might include the facilitation of employment planning, for example, where a business has a number of people approaching retirement at the same time, and encouraging and rewarding loyalty.
26. The government is also consulting on specific practices. They are retirement age, pay and non-pay benefits based on 'seniority', and age limits for recruitment, selection and promotion. While these will affect every employer, they are likely to have far-reaching implications for HEIs due to the age profile of their existing staff, and their pay and promotion structures,

² The Fixed-term Contract Regulations make it very clear that expiry of a period of time (i.e. the expiry of a fixed-term contract) is in any case a dismissal within the terms of the law.

notwithstanding the justification of specific aims (see paragraph 25). As well as having the potential to have a significant financial impact on HEIs, there are major implications here for HE employment practices.

27. At present, the government's view on retirement age is that compulsory retirement ages would be unlawful but that, exceptionally, employers would be able to justify mandatory retirement ages in certain circumstances. There is more uncertainty about introducing a default compulsory retirement age, although 70 is the age under consideration. Current thinking on pay and non-pay benefits is that the legislation should allow employers to provide them based on length of service or experience, even though this might otherwise amount to unlawful direct or indirect discrimination, if they can justify doing so. This effectively means that rewarding and encouraging loyalty can be a legitimate aim. The probability of an upper limit to recruitment is currently under consultation, but only if it can be justified. It might be permissible if, for example, it is based on the training requirements of the post or the need for a reasonable period of employment before retirement.

Action

28. Sector practitioners will wish to note these developments and consider the implications for their own HEIs. Attention is drawn particularly to the comments in paragraphs 2, 8, 10, 11, 12, 13, 14, 15, 16, 18, 20, 23, 24 and 26.
29. The ECU will be issuing further advice in these areas that will be circulated to heads of institutions and sector practitioners. At present, there are links to the legislation on its website, www.ecu.ac.uk, which is regularly updated to provide information and advice about recent developments.

Legislative Timetable

Legislation	Comes into force
Employment Equality (Sexual Orientation) Regulations 2003	1 December 2003
Employment Equality (Religion or Belief) Regulations 2003	2 December 2003
Disability Discrimination Act 1995 (Amendment) Regulations 2003	1 October 2004
Amendments to the Sex Discrimination Act	5 October 2005
Age Discrimination Legislation	1 October 2006