



 Scotland's Colleges

Legal Obligations on Colleges under the Equality Act 2010

1. About this Report

- 1.1 The purpose of this guidance is to clarify the legal requirements applicable to Colleges under the Equality Act 2010 ("the 2010 Act").

2. Background and Implementation

- 2.1 The 2010 Act which received Royal Assent on 8 April 2010 harmonises existing law by consolidating and replacing 9 major pieces of legislation and over 100 other instruments which previously used to govern this area.
- 2.2 It makes the law easier to understand and has been welcomed by the Equality and Human Rights Commission.
- 2.3 Although the timetable remains largely uncertain, the dates when the different parts of the 2010 Act ought to come into force are:

October 2010: Main provisions.

April 2011: The integrated public sector Equality Duty, the Socio-economic Duty and dual discrimination protection should be implemented in England and Wales. These are intended to replace the current public sector duties. It is not yet clear when the implementation date will be in Scotland.

2012: The ban on age discrimination in provision of goods, facilities, services and public functions.

2013: Private and voluntary sector gender pay transparency regulations (if required) and political parties publishing diversity data. This date remains provisional. The Government is also currently considering, as per the Government Equalities Office statement, whether or not it wishes to activate this Section of the Act. It may be that this is not activated and will not be introduced in 2013.

- 2.4 The Public Sector Equality Duty in Scotland will be separate to that set out in the Act for England and Wales (subject to any formal activation measures that fall within the competence of the Welsh Assembly Government.) This requires a UK Commencement Order.
- 2.5 The Scottish Government launched a Consultation on 2 July 2010 on secondary legislation providing new rules of procedure for the Additional Support Needs Tribunals for Scotland (ASNTS), to enable them to hear disability claims (discrimination, harassment and victimisation) cases in school education. It will also produce draft Regulations which will include Scottish specific duties. The entire statute, save for Section 190 and Part 15 applies to Scotland.
- 2.6 The Scottish Government has not yet published a response to its consultation, and has not set out

dates for implementation. These are likely to slip in light of the delay (per the expected timetable for UK implementation).

3. What the 2010 Act does

- 3.1 The stated aim is to "reform and harmonise discrimination law, and to strengthen the law to support progress on equality."
- 3.2 In harmonising the existing law, Section 4 of the 2010 Act will see the introduction of the following "Protected Characteristics":
 - Age
 - Disability
 - Gender reassignment
 - Marriage and civil partnership
 - Pregnancy and maternity
 - Race
 - Religion or belief
 - Sex
 - Sexual orientation
- 3.3 Main aims of the 2010 Act:
 - (1) It provides protection of the Protected Characteristics from the following prohibited conduct:
 - (a) Direct Discrimination;
 - (b) Indirect discrimination;
 - (c) Victimisation; and
 - (d) Harassment.
 - (2) There now exists the possibility of claiming "combined discrimination" on the basis of a combination of two of the Protected Characteristics. (to be implemented from April 2011)
 - (3) Each individual claim can only be based on up to two Protected Characteristics. Theoretically, an individual person can raise separate cases on as many grounds as they wish.
 - (4) Protection is extended to those who associate with those who have a Protected Characteristic and/or are perceived to have a particular characteristic.
- 3.4 This will see the introduction of a single objective 'justification' test to replace the different tests currently in use. To rely on the justification defence, an employer/service provider etc. will have to show that its conduct is a 'proportionate means of achieving a legitimate aim'. It is believed that:
 - in employment, this will be a higher threshold than the present test. In other words, employers will not find it so easy to justify less favourable treatment.
 - service providers could potentially use a wider range of circumstances than at present to justify their conduct - but 'proportionality' will be a more difficult test for service providers to pass compared with the 'reasonable opinion' criterion used at present.

- 3.5 Whereas previously all different characteristics were protected separately by different pieces of legislation, the 2010 Act creates a single equality duty. This means that all characteristics will be protected under the same duty.
- 3.6 New ways to claim for disability discrimination are being introduced, to counter the House of Lords decision in *LB Lewisham v Malcolm* which severely restricted the right to claim for less favourable treatment.
- 3.7 The general duty requires Public Authorities to have due regard to:
- (1) eliminating unlawful discrimination and harassment;
 - (2) promoting equality of opportunity between people who have one or more of the Protected Characteristics; and
 - (3) foster good relations.

4. Implications for Scotland's Colleges

4.1 Direct discrimination.

This occurs when a person treats one person less favourably than they would another because of a protected characteristic. It occurs, for example, if a College's Students' Union were to decide not to interview an applicant on the basis of their religion having made the assumption that they will not work behind a bar.

4.2 Discrimination based on association and perception.

These are to become more obviously unlawful. Discrimination based on association can occur where there is perhaps a refusal to allow a student to attend a graduation ceremony because their child has ADHD. Discrimination based on perception can occur where a woman is prevented from getting promotion because someone believes her to be pregnant, whether or not she actually is pregnant.

4.3 Indirect discrimination.

This is covered by Section 19 of the 2010 Act. It applies the European definition of indirect discrimination. It occurs when a provision, criterion or practice is neutral on the face of it but its impact particularly disadvantages someone with one of the Protected Characteristics.

4.4 Reasonable Adjustments

This relates to a duty on bodies to make reasonable adjustments in relation to premises to accommodate those students with Protected Characteristics. Training facilities etc are covered by Section 93.

4.5 Gender Pay Gap.

These provisions introduce new provisions to ensure parity of pay. They offer more protection for employees in situations where a person's pay may be affected by their gender.

4.6 Admission of Students.

Section 91 of the 2010 Act largely reflects the current law in this area whereby an educational institution may not discriminate against a person by excluding them or not admitting them etc. The test that actions will be assessed by is "a proportionate means of achieving a legitimate aim".

4.7 Positive Action.

The current law allows only for positive action in relation to employment but this is extended to students by the 2010 Act. Existing discrimination law provides positive action in training and education: e.g. Sex Discrimination Act and Race Relations (Amendment) Act. Colleges can employ voluntary positive action. If a College believes a certain group of students needs particular support they can now target such a group.

4.8 Specific changes for employers:

- (1) The scope of positive action has been extended in employment especially with regard to disability;
- (2) Pay "gagging" clauses will be unenforceable;
- (3) Employers should not ask job applicants about their health and/or disability, except for the purposes of enabling them to attend an interview.

4.9 Public bodies spend over £220 billion a year. The Government want this "buying power" to be used to move companies towards better equality in the way they work.

4.10 Specific protection exists for people with any of the Protected Characteristics from being treated less favourably by a Public Authority. Colleges fall under the definition of a Public Authority.

4.11 Public Authorities are likely to have to publish key equality metrics, including gender pay gaps employment rates for individuals with other protected characteristics.

4.12 See the Appendix to this Guidance Note for some sector-specific examples of discrimination.

5. Status of Guidance

- 5.1 This Guidance relates only to specific obligations applicable to Scotland's Colleges as a result of the legal requirements of the 2010 Act and does not cover any other legal obligations which may apply to Scotland's Colleges under any other legislation.

6. Useful Links

- 6.1 <http://www.ecu.ac.uk>
- 6.2 http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100015_en.pdf
- 6.3 http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100015_en.pdf
- 6.4 <http://www.scotland.gov.uk/Publications/2010/07/02162412/0>
- 6.5 <http://www.equalityhumanrights.com/>
- 6.6 <http://www.closethegap.org.uk/>
- 6.7 <http://www.equalities.gov.uk/>

Appendix

Protected Conduct	Sector-Specific Examples
Direct Discrimination	A College refuses to let a student go on a trip because he/she is disabled.
Combined Discrimination	A black male member of staff who, on the basis of his/her sexual orientation, may claim on the basis of his sex and sexual orientation.
Indirect Discrimination	If a College requires employees to be in work before 9am, this may indirectly discriminate against women who may be primary carers for children who they take to school.
Harassment	Refusing to allow flexible working, even when business needs permit it, could be indirectly discriminatory against women, because of their unequal responsibility for caring for children, sick people, and older people.
Victimisation	A student alleges that they have encountered racism from one tutor and this is deliberately ignored by another. This might occur where a tutor who is aware of the allegations of racism against another tutor, deliberately brings it up in a lecture by suggesting that he can't say a particular word for fear of having a complaint put in against him/her by that student.

Equality Act at work	Sector-Specific Examples
Admission and Treatment of Students	A College does not provide education to a student with one of the Protected Characteristics or excludes the student for no reason.
Employment	If a College refuses to make a reasonable adjustment to give an employee extra time to do a piece of work when they have a legitimate excuse.
Provision of Services	The College must make reasonable adjustments in relation to the provision of services for disabled people.
Premises	Duty to make reasonable adjustments in relation to College premises such as making the College wheelchair accessible. Further, this might extend to the improvement of signage within a College so that they can be read by all students regardless of disability.
Training Facilities	A College must ensure that training facilities do not discriminate against any person.
Positive Action	If a College believes a certain group of students requires additional support, the Act allows positive action in certain circumstances.

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