



## Equality Bill

### *Implications for students' unions*

This briefing summarises some key implications for students' unions of the Equality Bill (<http://services.parliament.uk/bills/2008-09/equality.html>). It will be useful for students' union staff and officers with responsibility for human resources, student activities and liberation.

The briefing summarises the main potential implications of the Equality Bill for students' unions. It does not describe the legal position as it currently stands; instead, it summarises what the legal position will be if the Equality Bill (as introduced to the House of Commons on 24 April 2009) is subsequently passed and becomes law.

It is important to note that the Equality Bill is very likely to change as it goes through the process of parliamentary scrutiny. If the Equality Bill is enacted, students' unions should consult the final version of the new Act.

Equality issues are underpinned by a mandatory legal framework, which extends to an institution's relations with staff, students and other third parties. The legal requirements are extensive, affording varying protection to staff and students in areas of employment, education, and the provision of goods, facilities and services (for details of key equality legislation and case law see ECU's law web pages: [www.ecu.ac.uk/law](http://www.ecu.ac.uk/law)).

### Promoting equality and diversity in higher education

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Latest developments regarding the Bill can be found on ECU's Equality Bill web pages: [www.ecu.ac.uk/our-projects/equality-bill](http://www.ecu.ac.uk/our-projects/equality-bill).

## **Aims of the Bill**

The stated aim of the Bill is to 'harmonise discrimination law, and to strengthen the law to support progress on equality'. The Bill will replace all of the main pieces of existing equality legislation, including the Equal Pay Act.

## **Timeline**

The Bill successfully passed scrutiny by committee MPs in the House of Commons on 7 July 2009. It will now go to the Report stage in the House of Commons, when all MPs will be given the opportunity to debate and propose further amendments.


The Bill is expected to receive Royal Assent in spring 2010. The majority is expected to come into force in autumn 2010, with the general public duty following in April 2011. The Bill does not include details of the planned legislation to extend the prohibition of age discrimination to goods and services, which will come into effect at a later date.

## **Prohibited conduct**

The Bill outlines new definitions for current prohibited conduct in discrimination law: direct discrimination, indirect discrimination, disability discrimination, victimisation and harassment. It also introduces the term 'protected characteristics'.

The following are classed as protected characteristics:

- = age
- = disability
- = gender reassignment
- = marriage and civil partnership

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- = pregnancy and maternity
  - = race
  - = religion or belief (including lack of belief)
  - = sex
  - = sexual orientation.


## Direct discrimination

A new definition of direct discrimination is given in the Bill (**clause 13**). A person discriminates against another if, because of a protected characteristic, they treat them less favourably than they would treat others.

### Direct discrimination may occur if, for example:

- = a students' union decides not to interview a Muslim applicant for a job because it assumes, on the basis of their religion or belief, that he or she will not be prepared to work in a bar
- = an employer shortlists only male job applicants for an interview because they assume women will not 'fit in'
- = an education provider refuses to let a student go on a residential trip because they are a wheelchair-user
- = an employer doesn't offer the job to the best candidate because they are 'too old'.

Regarding age, however, different treatment is justified if it is a proportionate means of meeting a legitimate aim. So, for example, an institution that places an age limit on admission to a union-operated social event would be directly discriminating against people above the age limit, unless it could show that the age limit was objectively justified.



The new definition of direct discrimination (**clause 13**) extends protection based on association and perception, already applicable to race, sexual orientation and religion or belief, to include age, disability, gender reassignment and sex.

**Discrimination based on *association* can occur if, for example:**

- = a student whose partner has a mental health condition is refused access to a society event because of this association
- = an employee is spurned by their work colleagues because their partner has undergone gender reassignment.

**Discrimination based on *perception* can occur if, for example:**

- = an employer decides not to promote a female employee because senior staff *believe* her to be pregnant
- = a member of union bar staff refuses to serve a customer because staff *believe* the customer to be gay.

## Indirect discrimination

**Clause 18** applies the European definition of indirect discrimination, replacing pre-existing domestic definitions to ensure uniformity of protection across all the protected characteristics (except for marriage, civil partnership, and pregnancy and maternity).

Indirect discrimination occurs when a provision, criterion or practice is neutral on the face of it, but in its impact particularly disadvantages people with a protected characteristic. Where a person is disadvantaged in this way, they are indirectly discriminated against, unless the person applying the provision can justify it.



### **Indirect discrimination may occur if, for example:**

- = an employer who requires staff to commit to working from 8 to 11 pm every evening indirectly discriminates against women, who are more likely to be primary carers of children
- = in order to stand for election to an employed post within a union, candidates must attend a meeting held on a regular religious holiday, such as a Saturday, which indirectly prevents Jewish students and others with particular religious beliefs from attending.

In substance, the Bill reproduces existing provisions and also for the first time explicitly extends the concept of indirect discrimination to disability.

### **Disability discrimination**

The provision for disability in the Bill creates a new type of discrimination – discrimination arising from disability – which replaces disability-related discrimination as currently found in the Disability Discrimination Act. It also makes some changes to the existing duty to make reasonable adjustments. These provisions do not apply to the other equality strands, but are unique to disability.

### **Discrimination arising from disability**

**Clause 14** provides that it is discrimination to treat a disabled person in a particular way that, because of their disability, amounts to treating them badly when the treatment cannot be shown to be justified. For this type of discrimination to occur, the employer, or other person, must know, or could reasonably be expected to know, that the disabled person has a disability.



### **Discrimination arising from disability can occur if, for example:**

- = a student with diabetes, carrying medication related to their condition, is refused entry by the students' union to an event with a strict no-drugs policy – the union may be discriminating against the student unless the treatment can be shown to be justified.

### **Failure to make reasonable adjustments**

Students' unions need to implement reasonable adjustments to ensure they accommodate disabled students in all aspects of union life and do not create any substantial disadvantage.

**Clause 19** defines what is meant by the duty to make reasonable adjustments. The duty comprises three requirements that apply where a disabled person is placed at a substantial disadvantage in comparison with non-disabled people.

- = The first requirement covers changing the way things are done, for example, providing ballot papers in alternative formats to allow all students to have the opportunity to cast their vote.
- = The second covers making changes to the built environment, such as providing inclusive access to a union building.
- = The third requirement covers providing auxiliary aids and services, for example providing web-based interactive tours and online maps of union offices and buildings, which can help some students to orientate themselves.

The extent of the duty will differ slightly depending on the context. For example, the duties in the employment field differ from those in the goods and services field. Most significantly, there is no 'anticipatory' duty in the employment field, whereas in the field of goods and services the duty will normally extend to disabled people generally.



## Harassment

The Bill outlines three types of harassment (**clause 24**):

- = unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant, or violating the complainant's dignity (this applies to all the protected characteristics apart from pregnancy and maternity, and marriage and civil partnership)
- = unwanted conduct of a sexual nature (sexual harassment)
- = treating a person less favourably than another because they have either submitted to, or did not submit to, sexual harassment or harassment related to sex or gender reassignment.

### Harassment may occur if, for example:

- = a member of union staff makes jokes about or comments on a student's sexuality in a way that makes the student feel uncomfortable.

Courts and tribunals will continue to be required to balance competing rights on the facts of a particular case; this includes consideration of the value of freedom of expression (as set out in Article 10 of the European Convention on Human Rights) and of academic freedom. The ECU/Universities UK/GuildHE publication *Promoting good campus relations – an institutional imperative* ([www.ecu.ac.uk/publications/promoting-good-campus-relations-update](http://www.ecu.ac.uk/publications/promoting-good-campus-relations-update)) provides guidelines and case studies on how institutions can manage these competing rights.

## Victimisation

Victimisation (**clause 25**) takes place where one person treats another less favourably because he or she has asserted their legal rights in line with the Bill or helped someone else to do so.



### Victimisation may occur if, for example:

- = a student alleges that they have encountered racism from a students' union staff member, and as a result they are ignored by other staff members
- = a senior member of staff starts to behave in a hostile manner to another member of staff after they supported their friend in submitting a formal complaint against the senior manager for sexist behaviour
- = an employer brands an employee as a 'troublemaker' because they raised a lack of job-share opportunities as being potentially discriminatory against working mothers.


### Public sector duty

The Bill proposes a general public equality duty on public authorities (**clause 143**) – higher education institutions (HEIs), as well as their funding councils, will be subject to this duty. HEIs also need to ensure the 'fair' operation of the students' union pursuant to the Education Act 1994. Thus students' unions, while not public bodies in their own right, will be affected to some extent – depending on the degree of control exerted over them – by the positive duties of their parent institution.

The public sector duty will replace the three existing duties (relating to race, gender and disability) with a single duty covering the protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief (including lack of belief), sex and sexual orientation.

The duty will require HEIs to have due regard to the need to:

- = eliminate discrimination, harassment and victimisation
- = advance equality of opportunity between persons who share a protected characteristic and persons who do not share it
- = foster good relations between persons who share a protected characteristic and persons who do not share it.



The new duty to eliminate discrimination requires HEIs to consider taking proactive steps to address disadvantage arising on grounds of age, for example in relation to mature students or early career researchers.

Tensions occasionally exist between students and staff of different religions and lesbian or gay staff and students in various spaces such as accommodation and teaching environments, as reported in the ECU guidance *Experience of lesbian, gay, bisexual and trans staff and students in higher education: research report 2009*

([www.ecu.ac.uk/publications/lgbt-staff-and-students-in-he](http://www.ecu.ac.uk/publications/lgbt-staff-and-students-in-he)).

The new positive duty to foster good relations would require HEIs to consider addressing such tensions through, for example, discussion, consultation, policies, induction and training.


*Promoting good campus relations: update* ([www.ecu.ac.uk/publications/promoting-good-campus-relations-update](http://www.ecu.ac.uk/publications/promoting-good-campus-relations-update))

provides guidelines and case studies on how institutions can tackle prejudice and promote understanding between persons from different equality groups. This illustrates how the new duty to foster good relations might apply.

While, in most cases, the parent HEI will be covered directly by the new public sector duty, rather than the students' union (particularly if the union is separately incorporated), students' unions still need to be aware of this new duty, as it is likely to affect them in various ways.

### **Potential impact of the new public sector duty on students' unions**

- = Certain students' union activities may create issues in terms of their parent university's compliance with the public duty. For example, if a students' union organises an event that is likely to raise tensions between different community groups, and the event is going to be held on university premises or will require the involvement of HEI services (e.g. security services), then the HEI has a strong basis for being consulted about the event



beforehand or intervening to stop the event taking place. This is because the HEI will need to demonstrate its own compliance with a duty to foster good relations between different groups of people.

- = Where a students' union has any kind of contractual relationship with the HEI (e.g. the lease of premises; the union's provision of services on behalf of the HEI), the institution is likely to require that the union's activities are consistent with the public sector duty. Increasingly, HEIs are likely to start building such requirements into any written agreements or contracts that they enter into, particularly if the government decides to place additional responsibilities on public bodies to reflect equalities issues in their procurement work.
- = In some cases, students' unions are constitutionally integral parts of their parent HEI, rather than being a separate legal entity. Where this is the case, it appears from the Bill that the students' union will be covered directly by the public duty as part of the HEI.

## Positive action

**Clause 153** extends positive action to recruitment and promotion. It permits an employer to take a protected characteristic into consideration when deciding who to recruit or promote, where people with the protected characteristic are at a disadvantage or are under-represented. Positive action can be applied only where candidates are equally qualified. The clause does not allow employers to have a policy of automatically treating people who share a protected characteristic more favourably than those who do not. Also, it is important to note that employers are not compelled to take advantage of this positive action provision; it simply allows them to do so, if they so choose.



### Examples of positive action

- = Two equally qualified and experienced applicants, one male and one female, apply for a job as general manager of a students' union. The rest of the senior management team are men. In this case, it would be lawful to use gender as a tipping factor in the decision-making process.
- = A students' union carries out a diversity survey of its staff and finds out that, in comparison with the local and/or student population, it employs a very low number of black and minority ethnic staff. When two equally qualified candidates are interviewed for a job, one of whom is black, it would be legal to consider this survey information when making the appointment.

The Equality and Human Rights Commission will publish guidance on the new positive action measures to illustrate the range of actions employers are able to take – see [www.equalityhumanrights.com](http://www.equalityhumanrights.com).


### Implications for students' unions

Most students' unions facilitate student activities (clubs and societies, volunteering opportunities, sport); offer support (through advice centres, helplines, job shops); and provide venues to bring their members together. The Bill has far-reaching implications for students' unions.

The impact of the Bill varies to some extent according to whether or not the union is separate and independent of the HEI.

A few students' unions and societies are constitutionally and legally an integral part of the HEI. In these circumstances, a union or society member bringing a case of discrimination (including harassment) may choose to do so against the HEI, although the union's officers and employees could also be liable in their personal capacity.

Where the students' union is a separate entity independent from the HEI (and they will increasingly become so under the changes



brought about by the Charities Act 2006 ([www.opsi.gov.uk/acts/acts2006/ukpga\\_20060050\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060050_en_1)), the effect of the Bill is to extend the principle of non-discrimination to their members. In general, any legal cases would be taken against the students' union directly. The Bill applies to both students' unions and individual student societies provided they have 25 or more members.

## Employment


Many students' unions recruit staff via advice centres, helplines and job shops. The Bill's provisions largely reflect the current law and cover all workers. As with current legislation, the scope of the Bill is broad enough so that, in many situations, protection from discrimination will extend to volunteers.

The Bill makes it unlawful for an employer to discriminate against or victimise employees and people seeking work (**clause 36**), which may include sabbatical officers. The provisions for direct and indirect discrimination and victimisation apply where the employer is making arrangements to fill a job, and in respect of anything done in the course of a person's employment. For example, if a students' union doesn't recruit a staff member for a campaigning role because they are in their 50s and they are considered to be too old to identify with the student population, this would be deemed unlawful discrimination unless objective justification can be shown.

The Bill also imposes on employers the reasonable adjustments duty set out in **clause 19** in respect of disabled employees and applicants.

### For example:

- = if an applicant for a job needs extra time for an assessment task because they have repetitive strain injury and find it difficult to use a computer without special equipment, an employer may be discriminating if they refuse to grant the extra time.



**Clause 37** makes it unlawful for an employer to harass employees and people applying for employment. It also makes the employer liable in the case of harassment of its employees by third parties, such as students purchasing goods from students' union bars and shops, over whom the employer does not have direct control.

**For example:**

= if a bar manager does nothing when students using the union bar make constant comments and unwanted jokes about a bartender's sexuality, the employer would be liable.

### **Commercial services**

Many students' unions provide services, goods and facilities through students' union bars, shops, cafés, restaurants, printing and binding, excursions, travel services, and many other forms of retail or entertainment.

The Equality Bill prohibits discrimination, harassment and victimisation by people who supply services, including goods and facilities (**clause 27**). Customers are protected both when requesting a service and during the course of being provided with a service.

The Bill also imposes the reasonable adjustments duty set out in **clause 19** in relation to providing services and exercising public functions.

Most of these new provisions will reflect the current law. The most obvious exception is the age strand, where there is currently no legislation in the goods and services field. There is no information in the Bill about how this will be applied, although it is known that it will not apply to the under 18s. These measures are unlikely to come into effect until a considerable time after the remainder of the provisions in the Bill.



## Clubs, societies and associations

Students' clubs, societies and associations are a key tool for developing the personal and social development of students and are part of the educational purpose of students' unions.

The Bill will make it unlawful for an association to discriminate against, harass or victimise an existing or potential member, or associates, guests and potential guests because of a protected characteristic. In practice this will afford new protection on grounds of gender, age, religion or belief, pregnancy and maternity, and gender reassignment (**clauses 96 and 97**). This will apply to both students' unions and the individual student societies, provided there are 25 or more members, and admission to membership is regulated in accordance with the society's constitution and involves a process of selection. This is in line with the equal opportunities statements that exist in most students' unions. The Bill does not, however, prohibit harassment of members, potential members, associates, guests and potential guests because of religion or belief or sexual orientation (**clause 98**).

An association cannot, because of a protected characteristic:

- = refuse membership to a potential member or grant it on less favourable terms (e.g. if a club or society refuses membership to a student because they seem 'too old')
- = refuse an existing member, associate or guest access to a benefit, or deprive him or her of membership or rights as an associate
- = refuse to invite a person as a guest, or invite that person on certain conditions which the association would not apply to other would-be guests.

It is not unlawful for an association to treat a pregnant woman differently in the terms on which she is admitted as a member, or is given access to benefits as a member, if the association reasonably believes that to do otherwise would create a risk to her health or safety and the association would take similar measures in respect of persons with other physical conditions. So, for example, a sailing



society could ask the relevant activities manager to conduct a risk assessment with a pregnant woman to ensure her safety is not compromised during a particular activity.

Students' unions will still be able to form societies benefiting groups of people sharing a particular protected characteristic (**schedule 16**). This exemption also allows students' clubs and societies to target membership at people sharing a particular characteristic. This might cover, for example, women's networks, religious groups, mutual support groups, or sports/social clubs. This extends current legislation in relation to race or sexual orientation to cover all the protected characteristics in line with the prohibition on discrimination.


Women's societies, lesbian, gay, bisexual and trans (LGBT) societies and other such groups would therefore still be lawful under proposed legislation as long as the main purpose of the group is to 'bring together people who share that characteristic' – this would include the majority of liberation groups.

#### *Organisations relating to religion and belief*

It remains the case (**schedule 23**) that a students' society may be exempt from the non-discrimination principle in relation to sexual orientation or religion if the purpose of the society is the practice or advancement of a religion or belief. This will apply if the restrictions imposed by the society are 'necessary to comply with the doctrine of the organisation; or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.'

The scope of these exemptions allows organisations to restrict to people of a particular sexual orientation, and/or followers of a particular religion or belief:

- = membership
- = participation in activities
- = provision of goods, facilities and services
- = the use of premises it owns or controls.



This exemption may, in some specific circumstances, allow religion-based students' unions and societies to treat gay, lesbian and bisexual members differently if this is necessary to comply with the doctrine of the organisation or avoid conflict with strongly held religious convictions. However, crucially, the management of any potential conflict in this area is still being developed by case law. See ECU's religion and belief web pages for the latest developments:

[www.ecu.ac.uk/subjects/religion-and-belief](http://www.ecu.ac.uk/subjects/religion-and-belief)


## Charities

Due to their work in advancing education, most students' unions have charitable status, which differs depending on where in the UK they are. In England and Wales, they are currently exempt charities, but this will change with the imminent implementation of the 2006 Charities Act: they will remain charitable, but will have to register with the Charity Commission. In Scotland, they are subject to review by the Office of the Scottish Charity Regulator. In Northern Ireland, the process of regulation for the charity sector, which has already started in other parts of the UK, is just beginning.

The National Union of Students (NUS) has worked with the Charity Commission on model objects that outline the beneficiaries of the charity as the students of the partner college or university. It is unlikely that, beyond this, a students' union would ever limit its membership further.

The Equality Bill allows charities to provide benefits only to people who share the same protected characteristic if this is in line with their charitable instrument, and if it is objectively justified or to prevent or compensate for disadvantage (**clause 186**).

Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic. The clause does allow an exception where arrangements can be provided for supported employment for particular disabilities (a description to be set out by a Minister of



the Crown in future regulations). So, for example, it would remain lawful for a charity to provide specific facilities for blind and partially sighted people in preference to other disabled people.

The clause also allows certain charities to make acceptance of a religion or belief a condition of membership, if they have done so since before 18 May 2005. It also allows single-sex activities for certain specified purposes – for example, the purpose of promoting or supporting a charity (which would cover some events such as women-only fun-runs) or organising certain single-sex sporting events.

### **Future work**

ECU, NUS and the Association for Managers in Students' Unions (AMSU) will continue to support HEIs and students' unions to engage with the forthcoming Equality Bill.

Latest developments of the Bill can be found on ECU's website: [www.ecu.ac.uk/our-projects/equality-bill](http://www.ecu.ac.uk/our-projects/equality-bill).

### **Disclaimer**

The information in this briefing is a summary of the proposed implications of the Equality Bill; anyone requiring information about how the law applies in a particular situation should seek specialist or legal advice.

The Bill covers England and Wales and, with the exception of one clause, Scotland. Subject to some minor provisions, the Bill does not apply in Northern Ireland.



You can download this briefing from websites of ECU ([www.ecu.ac.uk/publications/equality-bill-students-unions](http://www.ecu.ac.uk/publications/equality-bill-students-unions)), NUS and AMSU.

### Equality Challenge Unit

ECU supports the higher education sector to realise the potential of all staff and students whatever their race, gender, disability, sexual orientation, religion and belief, or age, to the benefit of those individuals, HEIs and society.

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### National Union of Students

NUS is a voluntary membership organisation with 600 member students' unions. Through the member students' unions, NUS represents the interests of more than seven million students with the aim to promote, defend and extend the rights of students and to develop and champion strong students' unions.

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### Association for Managers in Students' Unions

AMSU supports all students' union staff who manage any aspect of students' unions services or activities – not just managers of staff – with the aim to enhance the management of students' unions through the support of staff in individual students' unions and other work on a national level.

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