

Equality Challenge Unit Update

Student and applicant admissions and bursaries: lawful positive action and unlawful discrimination

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This briefing alerts Heads of Institutions to the application of equality law to the provision of bursaries to underrepresented equality groups. In particular it flags up the distinction between lawful positive action, and unlawful positive discrimination.

It was developed in response to the many queries Equality Challenge Unit has received about the legality and appropriateness of bursary schemes, often established many years ago in a different environment and legal framework.

The briefing provides an outline of the main issues, but does not constitute legal advice. If an institution has concerns as to the legality of a particular programme they should seek legal advice.

Admissions, bursaries and other benefits

Positive action initiatives to compensate for historic disadvantage are often invaluable initiatives that in some circumstances may represent the only way that past cycles of disadvantage can be addressed.

Some institutions operate bursary schemes or prizes which provide money or other benefits to specified underrepresented applicant or student groups. This most commonly arises in the context of race and nationality, and to a lesser extent gender and age.

Other examples are reserved places for applicants or students from a particular ethnic background, with associated bursaries, or scholarships to mature students.

Equality legislation allows limited exceptions for what might otherwise amount to unlawful discrimination, and care must be taken to ensure that the schemes fall within these exceptions. Otherwise those groups not entitled to benefit from the bursaries or prizes – for example white or male candidates – may be entitled to claim unlawful discrimination.

Positive action and positive discrimination

As a matter of law a distinction is drawn between lawful positive action and unlawful positive discrimination.

Positive action is used to describe *encouragement* given to certain groups to apply for training or employment positions, and is generally lawful where those groups are underrepresented in a particular discipline or institution (see below). Positive action is also often used in a broader, non-legal, sense to describe any intervention or initiative which encourages certain disadvantaged groups.

Positive discrimination goes beyond this and encompasses the conferring of actual benefits – a job, or a financial bursary – and is rarely lawful, subject to the narrow exceptions below in relation to specific needs (race) and vocational training.

The law

The law differs according to the different equality areas:

Race

In the context of the Race Relations Act 1976 (s35), the exception that is available under the legislation allows for organisations to offer different facilities, services or benefits to people of one race rather than another in order '*to meet the special needs of persons of that group in regard to their education, training, welfare or any ancillary benefits*'. If therefore additional tuition, support or mentoring were required to support students from a particular ethnic or national background, that is likely to fall within the exception and be lawful.

Nationality

Section 36 of the Race Relations Act 1976 permits benefits to be provided to applicants or students who are not ordinarily resident in Great Britain to afford access to education or training, provided that such persons do not appear to be intending to remain in the UK after their period of education or training. This exception from the effect of the legislation was limited in its scope by the Race Equality Directive (2000/43/EC) when it was implemented in the UK from 19 July 2003. The exception now applies only where the benefit is *not* conferred on the grounds of race, ethnic or national origins.

There is no exception in the Act which allows bursaries or other admission benefits to be conferred only on applicants or students who are ordinarily

resident in Great Britain or any constituent part of it. Tuition fees and certain specified grants and awards are exempted from the Race Relations Act 1976 by the Education (Fees and Awards) (England) Regulations 2007 which expressly allow more favourable treatment of students from the UK and EU.

Gender and race

The Sex Discrimination and Race Relations Acts allow benefits which discriminate on the grounds of gender or race, nationality, or ethnic or national origins (but not colour) to be provided through charitable trusts. It would be possible for institutions to establish their own bursary schemes as charitable trusts and this is often how gender and nationality specific schemes are provided by third party donors.

A further exception is also available in relation to both race and gender in the provision of vocational training. This applies where it can be shown that certain groups are underrepresented in certain areas of work to which the vocational training relates. This may for example therefore allow for specific training or support to be provided for women to train as engineers, where women are underrepresented. But where a bursary is being offered in the context of a non-vocational subject, it may be more difficult to establish an exception.

Religion and belief and sexual orientation

An exception from discrimination in relation to vocational training would also apply to benefits or bursaries targeted at groups on grounds of religion and belief, or sexual orientation. This exception applies in a similar way to the exception for gender and race.

Disability

Benefits for disabled applicants or students are not caught by these sorts of concerns, in that there is no parallel protection provided as a matter of law to non-disabled people. It is therefore lawful to provide disabled students with support, which they need to compensate for the disadvantages they would otherwise experience due to disability, even if it offers advantages which are not provided to non-disabled students.

Age

The provisions on age allow for positive action in relation to underrepresented age groups by allowing access to training for particular work. Further, age discrimination differs from the other equality areas because differential treatment can in any event be justified. For justification to be established there must be a good reason for it ('a legitimate aim') and it must be proportionate in terms of its impact. So if for example a bursary is targeted at mature applicants or students only, there must be a valid policy or social justification for this, and the benefits must be implemented in a way that least disadvantages younger students.

Future changes to the law

The Equality Bill, to be published later in 2009, may introduce more freedom for organisations to apply positive action in the employment context, but the government has given no indication that similar flexibility will be available in relation to students. Equality Challenge Unit has made submissions to government, as part of the consultation on the Equality Bill, to the effect that institutions should be allowed to have more freedom to choose to operate bursary schemes in favour of underrepresented equality groups (see <http://www.ecu.ac.uk/news/2007/08/ecu>).

Policy considerations

Many bursaries and schemes were created in an era where the social concerns and the law were different. Some of these schemes may now need to be revisited.

Particularly some schemes were created before considerations of age equality were even on the policy agenda, and many current bursaries available to certain age groups may be premised on stereotypes or assumptions that no longer hold good.

Conclusions

Where benefits are offered, in terms of reserved places or bursaries, the position is in broad terms as follows:

- It is not unlawful to provide additional support or finance to disabled applicants or students (to compensate for the disadvantages that they experience).
- Benefits that favour older or younger people can be justified provided that the institution can show that the benefits are proportional and meet a legitimate need.
- Benefits for applicants or students of a particular race may be lawful in order *'to meet the special needs of persons of that group'*.
- Benefits for applicants or students for groups of a particular race, gender, sexual orientation, religion or age, are lawful if they relate to the provision of vocational training where those groups are underrepresented in the areas of work to which the vocational training relates.
- The opportunity to offer benefits for particular nationalities is now very limited, unless it relates to grants and awards in respect of UK and EU nationals, or are established under a charitable trust.

This briefing is not intended to discourage positive action, and as noted above it is often only by taking explicit steps to compensate for past disadvantage that change can be effected. However, given the structure of the law as it is currently drafted, care must be taken to ensure that good practice positive action initiatives remain lawful.

Next steps

If institutions do operate bursaries schemes or other benefits that may amount to unlawful positive discrimination, it may be appropriate to take the following steps:

- Review all relevant benefits and bursaries targeted at particular equality groups to ensure that the policy considerations that originally underpinned them are still valid.
- Provide clear justification and explanation for those that are lawful.
- Seek legal advice on the terms of benefits and bursaries that may be unlawful.
- Consider reframing or withdrawing those that are unlawful.

Contact details

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You can download an electronic version of this briefing from our website:
www.ecu.ac.uk/publications/admissions-bursaries-lawful-positive-action

This briefing has been produced in consultation with Eversheds LLP

About the Equality Challenge Unit

Equality Challenge Unit 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, higher education institutions and society

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