This briefing sets out the main issues higher education institutions (HEIs) in England, Wales and Scotland may experience by the application of the Equality Act 2010 to the provision of bursaries, scholarships and prizes. In particular, it identifies the key risks faced by HEIs and steps that should be taken to avoid engaging in unlawful discrimination when providing bursaries, scholarships and prizes.

This briefing replaces previous guidance on bursaries from Equality Challenge Unit (ECU). It has been developed in response to the many queries ECU has received about the legality and appropriateness of bursary and scholarship schemes.

The application of the law to a specific bursary or scholarship is complex and must be undertaken in the context of both the bursary and the institution offering it. This briefing provides an outline of the legal issues involved and how they may be applied to bursaries and scholarships. An HEI should seek legal advice if it has concerns about its bursaries and scholarships.

Contact

Gary Loke, Head of Policy
info@ecu.ac.uk

Prepared by Mills & Reeve LLP with additional input by Anderson Strathern LLP

Advancing equality and diversity in further and higher education
Background

Bursaries, scholarships and prizes

Bursaries, scholarships and prizes take many forms and are awarded or granted on a wide variety of selection criteria. For example, they may be awarded or granted on the basis of a student’s means (or the student’s family’s means), or on the basis of the student’s sporting or academic ability. Often the student may need to satisfy a residence criterion of some sort – that they have been ordinarily resident in a particular country, county or town, or that they attended a particular school. Some awards are available to students of one sex or the other, while others are offered only to students on certain courses or programmes.

Just as the criteria upon which a bursary, scholarship or prize are awarded vary, so do the bases upon which the award is established – the funding arrangements. Sometimes, the funding for the award will come from within the institution’s own resources, sometimes a third party will provide a capital sum from which the award is to be made in the future. Sometimes, a third party will sponsor an award for a defined period of time having been provided with the student’s name by the institution.

The nature of the award will also differ. The award might be a sum of money (whether cash or vouchers), or books. It could take the form of remission from, or discount of, certain fees. It could be a benefit in kind, for example free accommodation and meals.

Whatever the nature of the award, it is likely to be viewed as a ‘benefit, facility or service’ for the purposes of the Equality Act. The basis upon which the award is established will have a bearing on whether the HEI is liable for discrimination that may occur. The selection criteria for choosing who will receive the award would form the basis of any discrimination claim that could arise.
The Equality Act 2010 identifies nine protected characteristics, which are the grounds upon which discrimination is unlawful. The provisions in the Equality Act that relate to higher and further education prohibit discrimination on eight of the nine grounds:

- age
- disability
- gender reassignment
- pregnancy and maternity
- race (including colour, nationality and ethnic or national origin)
- religion or belief (including lack of belief)
- sex
- sexual orientation

The Act prohibits discrimination against applicants, current students and former students in connection with the terms upon which they are admitted and the availability of benefits, facilities or services. This will include the provision and availability of bursaries, scholarships and prizes.

ECU’s briefing, *Equality Act 2010: implications for higher education institutions* sets out what is unlawful discrimination under the Act. Of particular relevance in the context of bursaries, scholarships and prizes are direct and indirect discrimination.

**Direct discrimination** arises where a person is subject to less favourable treatment because of a protected characteristic. There is no justification defence for direct discrimination for any protected characteristic other than age.

**Indirect discrimination** arises where a policy, criterion or practice which appears to be neutral and is applied equally to all puts people who share a protected characteristic at a particular disadvantage. In limited cases, indirect discrimination can be justified.

**Justification** is a defence that arises where the discriminatory actions can be shown to be a proportionate means of achieving a legitimate aim.
It is not unlawful to treat a disabled person more favourably than a person who does not have that disability. This is a consequence of the duty to make reasonable adjustments to enable disabled people overcome substantial disadvantage.

HEIs also need to comply with the public sector equality duty, which requires HEIs, in carrying out their functions, to have due regard to the need to:

- eliminate unlawful discrimination
- promote equality of opportunity between people with different protected characteristics
- foster good relations between people with different protected characteristics

The Equality Act (in section 158) also allows positive action in certain circumstances. The Act sets out that an HEI does not engage in unlawful discrimination if it takes action that is a proportionate means of achieving the following:

- enabling people sharing a particular protected characteristic to overcome the disadvantage which the HEI reasonably believes they suffer, where the disadvantage is connected with that protected characteristic
- meeting the different needs of those sharing a protected characteristic where the HEI reasonably believes that people sharing that particular protected characteristic have needs different to those who do not share that characteristic
- enabling or encouraging participation in an activity by those sharing a protected characteristic where the HEI reasonably believes that participation in the activity by people sharing a particular protected characteristic is disproportionately low

There is also a narrow set of circumstances set out in schedule 23 of the Act which permits ‘ancillary benefits’ to education or training to be provided only to students from outside the European economic area (EEA). As a result, a student from within the EEA will not be able to claim discrimination based on
nationality where a bursary, scholarship or prize is reserved for students from outside the EEA whom the HEI ‘thinks … [do] not intend to exercise in Great Britain skills … obtained as a result’ of the education or training.

The belief that the student will not exercise the skills gained in Great Britain will require some evidence. Care will need to be taken that the bursary, scholarship or prize does not constitute discrimination on some other ground – for example between nationals of different non-EEA states or other protected characteristics.
Using the institution’s own resources

An HEI that applies its own resources to funding a bursary, scholarship or prize will need to be particularly alert to the risk of engaging in unlawful discrimination.

Where the selection criteria for the bursary, scholarship or prize are not directly related to a protected characteristic, there is a risk that it will have an indirectly discriminatory impact. It would be good practice in all circumstances, and would identify a defence to a claim of indirect discrimination, for the HEI to:

- identify the particular purpose or aim of any bursary, scholarship or prize
- show that making the award (and the particular amount or nature of that award) is a proportionate means of achieving that aim

In doing this, the HEI will have taken steps to justify the bursary, scholarship or prize in advance of there being any suggestion of a discrimination claim.

Direct discrimination may occur where the selection criteria for the award use protected characteristics. If an HEI proposes to have a bursary, scholarship or prize that is confined only to individuals of a particular protected characteristic (for example, only women), it will need to ensure it falls within the scope of positive action under the Equality Act. The exception is where the protected characteristic is disability – a bursary available only to disabled students would not be unlawfully discriminatory against students not having a disability.

Evidence

In order to demonstrate that the bursary, scholarship or prize is positive action, the HEI will need to have evidence of one of the following:

- disadvantage that is linked to the protected characteristic
- a particular need of those sharing the protected characteristic
- low participation by people sharing the protected characteristic
The evidence will need to be more than supposition or anecdotal and it is likely that statistical evidence will be needed. The HEI will also need to be able to show that the bursary, scholarship or prize is a proportionate means of overcoming that disadvantage, providing for that need or promoting participation. This is likely to involve showing how the bursary, scholarship or prize specifically addresses the issue. The HEI should also monitor the impact of the bursary, scholarship or prize both to ensure that it is having the intended impact and to ensure that the need for it remains.

Since opening in the 19th century, an HEI has offered a prize of book tokens for the highest performing Methodist student. The funding for the prize comes from the HEI’s budget.

This is likely to be unlawful direct discrimination since the benefit (the prize) is not available to non-Methodists, therefore subjecting them to less favourable treatment because of their religion.

HEI’s must also meet the public sector duty that they are under. A possible way to help meet this, and one that would assist the HEI in identifying that its bursary, scholarship or prize both had a legitimate aim and was proportionate, would be to undertake an equality impact assessment (EIA). There is no obligation to undertake EIAs in England, but there are specific requirements to do so in Scotland and Wales.

Since opening in the 19th century, an HEI has offered a scholarship to the offspring of agricultural workers from within the county in which the institution lies. The funding for the scholarship comes from the HEI’s budget.

The geographical restriction on the scholarship means that it is potentially indirect racial discrimination since it is likely that non-British students are at a disadvantage in connection with the benefit. If challenged, the HEI will need to show that the geographical restriction is a proportionate means of achieving a legitimate aim. The HEI should also review the scholarship’s selection criteria through an EIA.
In undertaking an EIA, there are five key points for the HEI to consider:

- is the purpose for the bursary, scholarship or prize clearly set out?
- have those affected by the proposed action been involved?
- have potential positive and negative impacts of the bursary or scholarship been identified?
- are there plans to alleviate any negative impacts?
- are there plans to monitor the actual impact of the bursary, scholarship or prize?

**Review**

The need to keep any bursary, scholarship or prize under review cannot be overstated. Where the purpose of the bursary, scholarship or prize is to overcome a particular hardship or encourage participation, should that hardship diminish or participation increase, the bursary, scholarship or prize may no longer serve its purpose and may then no longer be justified.
HEIs will often receive money from a benefactor or commercial organisation which the donor wishes to have passed to students. The donor may wish to set the selection criteria to be used in deciding how to make the award. Although the money for the bursary, scholarship or prize comes from the third party (ie the HEI is not using its own resources for the award) there remains a possibility that the institution will be liable for discrimination.

First, the HEI will need to bear in mind its public sector duty, as agreement to having the bursary, scholarship or prize given to its students is likely to be one of the HEI’s functions and the institution is to have due regard to the need to eliminate unlawful discrimination.

An HEI receives an offer from a company to provide an annual amount to fund a student to pursue postgraduate studies in a particular field of study. The company wishes to restrict the funding to a male student.

The funding could amount to direct discrimination on grounds of sex. The HEI will need to review the offer carefully in light of the public sector duties, particularly those concerning preventing unlawful discrimination and promoting equality of opportunity.

Also, the Equality Act prohibits acts that aid or assist another in engaging in unlawful discrimination.

In the example above, the company wants the funding to go to the male student scoring highest in the HEI’s admission process for the field of study.

In order for the company to identify the student who will receive the award, the HEI will need to provide it with information as to who the highest scoring male applicant was. Before agreeing to do so, the HEI will need to consider the extent to which it will be assisting with, or aiding any unlawful discrimination undertaken by the company.
Accordingly, an HEI will want to ensure that the selection criteria being used by the third party donor do not themselves amount to unlawful discrimination. Considerations similar to those set out in connection with the HEI’s own resources arise.

Continuing the example above, the company and the HEI identify through data that male students are significantly underrepresented in the particular field of study and surveys reveal that the reason for the underrepresentation is the perception that study is expensive and the diversion of male potential students to industry.

The company and HEI conclude that providing the funding will encourage the participation of greater numbers of male students in the field of study, and therefore the funding amounts to positive action, within the meaning of the Equality Act.
In some cases either or both an HEI or a donor commit a significant sum of money to a bursary, scholarship or prize. The sum of money would then fund the award for a number of years. In doing that, a separate charity may be established (even though the HEI itself may be a charity). The Equality Act does not make it unlawful for a charity to exist to support groups of individuals that are defined by protected characteristics (with the exception of colour). As a result, for example, it is neither sex nor religious discrimination for a charity to be established to support female Muslims.

Accordingly, it is possible for a donor or an HEI to endow a charity in order to provide support for individuals based on their protected characteristics.

However, the charity created will need to meet the requirements of the Charities Act 2011, and, in Scotland, the Charities and Trustee Investment (Scotland) Act 2005 as well. The restriction will need to be set out in the charity’s ‘charitable instrument’, which is its governing document; the charity will need to be for charitable purposes (within the meaning of the Charities Acts) and those charitable purposes will need to satisfy the Charities Commission, HMRC and, in Scotland, the Office of the Scottish Charity Regulator. It is observed by the Equality and Human Rights Commission (EHRC) that seeking to restrict a charity to people with particular protected characteristics is ‘a difficult legal question’ (see EHRC’s online resource, Exceptions: charities and religion or belief organisations) and it is recommended that legal advice is obtained.
Inevitably, any restriction on the beneficiaries of the charity that is based on a protected characteristic will need to be shown to be a proportionate means of achieving a legitimate aim or for the purpose of preventing or compensating for a disadvantage that is linked to the protected characteristic.

For the HEI, it will still need to be satisfied that accepting or endorsing the support provided by the separate charity meets its public sector duties, which include a duty to promote equality of opportunity and eliminate unlawful discrimination.

An HEI (which is itself a charity) receives a significant gift from an overseas donor who wishes a proportion of it to be committed to providing a fixed annual payment to nationals of the donor’s home country studying a subject of the donor’s choice. After receiving the gift, the HEI will put some of it into a charitable trust with the object of funding a student in line with the donor’s wishes.

As a separate charity will be formed, it could contain a provision restricting its recipients to a nationality without contravening the Equality Act. The HEI should take advice on whether the trust will be charitable as a matter of law and that will include considering the justification for the restriction on nationality. The HEI must also have due regard to the matters set out in the public sector equality duty.

Accordingly, the HEI would be advised to undertake an EIA before agreeing to endorse the charity’s award.
To assist HEIs in thinking through selection criteria for a bursary, scholarship or prize, the following questions should be considered.

- Is there a particular need or disadvantage among a group that the HEI wishes to address?
- What is the evidence of that need or disadvantage?
- What is the cause of that need or disadvantage?
- Is there underrepresentation in a particular area by a particular group? Is there evidence of the cause of that underrepresentation?
- How will the bursary, scholarship or prize address the particular need, disadvantage or underrepresentation?
- Is there another, more effective, way for the HEI to address that need, disadvantage or underrepresentation?
- For what period of time will the bursary, scholarship or prize be in place?
- What arrangements will be made for the review of the bursary, scholarship or prize and its need?
- Will there be an adverse impact on other groups as a result of the provision of the bursary, scholarship or prize?
- What steps can be taken to mitigate any adverse impact?
Conclusion

Through the provision of bursaries, scholarships and prizes, many individuals who might otherwise not have access to higher education have benefitted from the experience and enhancement that higher education offers. However, it is important that any such awards do not unwittingly unlawfully discriminate against people with protected characteristics. The Equality Act does not operate in a way that prevents bona fide and necessary support from being given to individuals. It does, however, require that HEIs identify the underlying need for the support or bursary with some precision and care and that the particular form of support is proportionate.
Further reading

Updates, news and information about the Equality Act 2010. www.ecu.ac.uk/subjects/equality-act-2010


Equality Challenge Unit works to further and support equality and diversity for staff and students in higher education across all four nations of the UK, and in further education in Scotland.

ECU works closely with colleges and universities to seek to ensure that staff and students are not unfairly excluded, marginalised or disadvantaged because of age, disability, gender identity, marital or civil partnership status, pregnancy or maternity status, race, religion or belief, sex, sexual orientation, or through any combination of these characteristics or other unfair treatment.

Providing a central source of expertise, research, advice and leadership, we support institutions in building a culture that provides equality of both opportunity and outcome, promotes good relations, values the benefits of diversity and provides a model of equality for the wider UK society.