

PERSONNEL SERVICES

University Offices, Wellington Square, Oxford OX1 2JD
 Director of Personnel and Administrative Services



To heads of departments and institutions, faculty board chairmen,
 departmental administrators and faculty board secretaries

Ref. EMS/5
 EMS/6

cc. heads of division, divisional secretaries; Dr Gambles, Mr Shaw;
 Dr Brown, Mr Dunn, Mrs Kinahan, Mrs McNish, Mr Quinn; Principal
 Administrator of the Conference of Colleges

6 October 2010

The Equality Act 2010

The Equality Act 2010, which harmonises and replaces most existing equality and discrimination legislation, came into force on 1 October. It covers employment, as well as education and service provision. In broad terms, the employment obligations continue as now and as such the University's existing equal opportunities policy and practice broadly satisfy the Act. However, there are some detailed changes which come into force immediately which are outlined in this circular.

Key features of the Act which came into force on 1 October 2010

- *The Act defines the following '**protected characteristics**': age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The definitions of disability and gender reassignment have been modified.*
- *Individuals may (as now) claim that they have been discriminated against because of more than one protected characteristic. Specific provisions on **dual discrimination** may be enacted in due course.*
- *The Act extends protection from **discrimination by association or perception** to all the protected characteristics except marital status and civil partnership. It is unlawful to discriminate against someone because they are perceived to possess the characteristic or because they associate with someone else (e.g. as a carer or family member) who possesses that characteristic.*
- *Employers must exercise care if they request any information about health (and therefore potentially about disability) before a job offer is made, except in relation to facilitating interview arrangements for disabled applicants. The **pre-employment health questionnaire** has been updated and should only be used with applicants once a conditional offer of employment has been made.*
- *Care must be taken to avoid inadvertent discrimination in the course of capability or other formal procedures relating to extended sickness absence where some or all of the absence relates to a protected characteristic (i.e. disability, pregnancy, or gender reassignment).*

- *Employers are potentially liable for **harassment** of their employees **by third parties** in certain circumstances.*
- *A new statutory form ('Schedule 1') has been published for use by individuals who wish to obtain information from the employer about 'prohibited conduct', usually in contemplation of litigation or other formal complaint.*

The University's Code of Practice on Staff Recruitment and Selection (including the standard statement for inclusion in further particulars) has been updated and is available at <http://www.admin.ox.ac.uk/eop/policy/cop.shtml>. The remainder of the University's web site is currently being updated to reflect the Act.

Future changes

Other aspects of the Act are still under consideration by the Government, including positive action where equally qualified candidates are identified in recruitment, and the detailed provisions of the specific duties on public bodies to publish equality data and set objectives. Further information will be issued in due course. For the time being, the existing race, disability and gender equality duties remain in force.

1. Action required of departments and divisions

Departments and divisions are asked to:

- i. familiarise themselves with the protected characteristics and forms of discrimination covered by the legislation. A summary is provided in Annexe A;
- ii. note that in light of the Act, job applicants **should not** be asked about their health, whether at interview, through references, or through medical health questionnaires, until **after** a conditional offer of employment has been made, except where that information is requested in order to establish whether reasonable adjustments are required for the interview;
- iii. use the revised pre-employment health questionnaire available to download from <http://www.admin.ox.ac.uk/ps/managers/appoint/medical.shtml> with immediate effect; UOHS will not accept any forms in the old format after 31 October 2010;
- iv. note that the Code of Practice on Recruitment and Selection (Annexe B and <http://www.admin.ox.ac.uk/eop/policy/cop.shtml>) has been revised slightly to reflect the protected characteristics, and ensure that selection panels are familiar with this document. Further particulars should include the revised summary of the university equality opportunity policy contained in the code of practice;
- v. seek advice from Personnel Services before initiating capability proceedings in respect of staff with extensive sickness absence where some or all of the absence might relate to disability, pregnancy-related illness, or gender reassignment treatment;
- vi. ensure that third parties working on university premises (e.g. as visitors or contractors) are aware of the University's commitment to provide an inclusive environment which

promotes equality, values diversity and maintains a working, learning and social environment in which the rights and dignity of all its staff and students are respected;

- vii. note that the University may be liable for third party harassment; liability will only arise when harassment has occurred on at least two previous occasions, and the department/division is aware that it has taken place and has not taken reasonable steps to prevent it from happening again;
- viii. note that a new statutory form (Annexe C) is now available to individuals (employees and applicants) who wish to seek information from the University about 'prohibited conduct', usually in contemplation of making a formal complaint or employment tribunal claim. As there are strict rules and deadlines for responding, departments/divisions should ensure that all line-managers are familiar with the forms and understand the importance of forwarding such forms to Personnel Services without delay; and
- ix. review local practices to ensure they are not inadvertently discriminatory.

2. Summary of changes under the Equality Act 2010

The Equality Act is intended to harmonise existing discrimination legislation into a single consolidating act and to support progress towards equality. As the University has previously adopted a holistic approach to discrimination and equality, its existing policies and practices on equality are generally compatible with the Act. However, there are some technical changes to the types and grounds of discrimination, which are set out below.

Protected characteristics

The Act covers the following: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Forms of discrimination

The current concepts of discrimination continue to apply, namely, direct and indirect discrimination, harassment and victimisation. These are summarised in Annexe A.

The existing law already protects carers to some extent, or those who associate with people with certain protected characteristics ('**associative discrimination**'). The Act extends this to all protected characteristics except marriage and civil partnership. Thus, it is now unlawful to discriminate against carers because they care for an elderly relative, or against an individual because of the gender reassignment of someone they are associated with.

Employees are also protected from direct discrimination and harassment if they are perceived to have a protected characteristic, whether or not they have it ('**Perceived discrimination**').

Age (no changes)

The Act protects people of all ages. However, different treatment on grounds of age is permissible provided it can be objectively justified, i.e. it can be demonstrated that is a proportionate means of achieving a legitimate aim.

Disability (new definition and changes)

The Act has made it easier for a person to show that they are disabled and protected from disability discrimination. A person is now considered disabled if s/he has a substantial and long-term mental or physical impairment that has an adverse effect on his or her ability to do any normal activities, such as using a telephone, reading a book, or using public transport. This is a more inclusive definition.

In addition, there is protection from 'discrimination arising from disability', i.e. an employer cannot treat an individual unfavourably because of something arising in consequence of that individual's disability, such as poor spelling when it is or should be known that the person is dyslexic. In particular, it will be more difficult lawfully to dismiss an employee on long-term sick leave if the absence is due to the employee's disability.

Employers may only ask questions about health **after** a conditional job offer has been made, so that information about disability is not a factor in selection decisions.

The obligation to make 'reasonable adjustments' for disabled employees continues.

Gender reassignment (new definition)

Transsexuals are now protected when they propose to undergo, are undergoing, or have undergone a process for gender reassignment. Under previous legislation, transsexuals were only protected when they were under medical supervision or undergoing surgery. Under the Act there is no longer a requirement that medical intervention is on-going.

Marriage and civil partnership (no change)

The Act protects employees who are married or in a civil partnership against discrimination.

Pregnancy and maternity (no change)

A woman is protected against discrimination on the grounds of pregnancy and maternity during the period of her pregnancy and of any statutory maternity leave to which she is entitled. The employer cannot take into account the employee's period of absence due to pregnancy-related illness when making decisions about her employment.

Race (no change)

For the purposes of the Act, race includes colour, nationality, and ethnic or national origin.

Religion or belief (no change)

The Act protects individual of all religions and beliefs, and those with none.

Sex (no change)

The Act protects both men and women.

Sexual orientation (no change)

The Act protects bisexual, gay, heterosexual and lesbian people.

Sickness absence

Disabled, transsexual and pregnant employees now have extended protection where sickness absence resulting from their characteristics gives rise to formal employment procedures (capability or performance procedures, or where an individual has exhausted

their paid leave entitlement). Departments should always seek advice from Personnel Services in such cases. The guidance on sickness absence management is currently under review to reflect the Act.

Employment Tribunals

Applicants and employees may bring claims of discrimination in the Employment Tribunal, alleging unfair treatment in relation to one or more protected characteristic. Where an individual feels that they have been discriminated against for a protected reason they may submit a questionnaire (a 'Schedule 1' questionnaire) seeking information about 'prohibited conduct'. By law, a response to the questionnaire must be supplied within eight weeks of receipt and will be admissible as evidence in any proceedings under the Act. An example of the Schedule 1 form is provided as Annexe C. Departments and divisions should ensure that all line managers are aware of the requirement to respond to such forms. Any forms received by departments should be forwarded to Personnel Services without delay for advice on how to respond as the forms potentially have important legal consequences.

In addition, where an Employment Tribunal makes a finding of discrimination it will now be empowered to make recommendations that an organisation takes steps to eliminate or reduce the effect of discrimination on other employees, not just the claimant. Breaches of the Act may therefore have much wider implications for the employer.

3. Pre-employment health questionnaires

Pre-employment medical health questionnaires should now only be issued **after** a conditional job offer has been made. The purpose of the medical health assessment is threefold:

(i) to assess the candidate's medical capability to do the job for which they have applied: this will include assessing whether there are any statutory reasons why an individual may not carry out particular work: for example, health and safety regulations would mean that a candidate with monocular vision would be deemed unfit to work with lasers, or that a candidate with epilepsy would not be allowed to undertake a post involving driving;

(ii) to determine whether any reasonable adjustments may be required to accommodate any disability or impairment which a candidate has declared: adjustments may include physical adaptations, or adjustments to working arrangements such as hours. For this reason the form now asks departments to attach a job description and also indicate whether the post is full or part-time, so that UOHS staff have sufficient information to make their assessment; and

(iii) to ensure that none of the duties of the job will adversely affect any pre-existing health conditions the candidate has declared.

As with the previous arrangements, candidates should not be allowed to commence employment until UOHS has confirmed whether the individual is fit for the proposed employment, or has identified the reasonable adjustments that should be put in place before employment commences. Since the assessment is specifically job-related, questionnaires should be completed both by candidates who are new to the University and by existing employees who are moving from one department to another.

The pre-employment medical health questionnaire has been updated, and departments should download the new version from the Personnel Services website at <http://www.admin.ox.ac.uk/ps/managers/appoint/medical.shtml>. An example is given as Annexe D. Departments are asked to destroy any old copies of the form and use the new format pre-employment medical health questionnaire with immediate effect. After 31 October UOHS will no longer accept any questionnaires they receive in the old format.

The following documents have also been updated:

- the pro-forma reference requests, which previously asked referees to comment on sickness absence, see <http://www.admin.ox.ac.uk/ps/managers/appoint/references.shtml>
- the pro-forma application form, which previously advised candidates that referees would be asked to comment on their 'attendance during the last 12 months', see <http://www.admin.ox.ac.uk/ps/managers/recruit/obtaining.shtml>

Jeremy Whiteley

Copy for noticeboards: YES
Website: <http://www.admin.ox.ac.uk/ps/managers/circular/>

JDW/KAB