STAFF RECRUITMENT AND THE EQUALITY ACT 2010

1. Overview
A new Equality Act came into force on 1 October 2010. The Equality Act brings together over 116 separate pieces of legislation into one single Act. Combined, they make up a new Act that provides a legal framework to protect the rights of individuals and advance equality of opportunity for all.

The Act is intended to simplify, strengthen and harmonise the current legislation to provide Britain with a new discrimination law that protects individuals from unfair treatment and promotes a fair and more equal society.

The nine main pieces of legislation that have merged are:
- the Equal Pay Act 1970
- the Sex Discrimination Act 1975
- the Race Relations Act 1976
- the Disability Discrimination Act 1995
- the Employment Equality (Religion or Belief) Regulations 2003
- the Employment Equality (Sexual Orientation) Regulations 2003
- the Employment Equality (Age) Regulations 2006
- the Equality Act 2006, Part 2
- the Equality Act (Sexual Orientation) Regulations 2007

The timeline for the different parts of the Act to be brought into force is currently proposed as follows:

- **October 2010**: the main sections of the Act relating to employment, equal pay and services, public functions and associations, education (further and higher education) will come into effect, replacing relevant sections of current anti-discrimination legislation covering these areas.
- **April 2011**: the public sector equality duty will be brought into force, replacing the current public sector duties in the Race Relations (Amendment) Act 2000, the Disability Discrimination Act 2005 and the Equality Act 2006.
- **2012**: the ban on age discrimination in the provision of goods, facilities, services and public functions will come into effect.

The Act’s employment provisions largely reflect the current law and cover all workers. As with current legislation the scope of the Act is broad enough so that protection from discrimination may extend to people who are not necessarily employees. This could include contract workers and, in some circumstances, volunteers.

2. The Protected Characteristics
The Act applies to nine ‘protected characteristics’ – the grounds upon which discrimination is unlawful. These are:

**Age**
The Act protects people of all ages. However, different treatment because of age is not unlawful direct or indirect discrimination if it can be justified as a proportionate means of
meeting a legitimate aim. Age remains the only characteristic where direct discrimination can be justified. The default retirement age (which was set at 65) was abolished on 6 April 2011.

**Disability**
A person has a disability if s/he has a physical or mental impairment that has a substantial and long-term adverse effect on that person’s ability to carry out normal day-to-day activities. Employers are still under a legal duty to make reasonable adjustments for disabled staff. The Act introduces a new provision where it is unlawful to ask about a job candidates health before offering them work, except in certain circumstances. It will also be illegal to ask a job applicant how many days of sickness absence they have taken in their previous employment.

**Gender reassignment**
This covers a transsexual person who proposes to, starts or has completed the gender reassignment process. The Act no longer requires a person to be under medical supervision to be protected. Transgender people such as cross-dressers who do not plan a permanent gender transition are not protected by the Act. Any absence relating to treatment connected to the gender reassignment process should be treated as any other absence due to illness or injury, and not as a ‘lifestyle’ choice.

**Marriage and civil partnership**
Marriage is defined as a 'union between a man and a woman'. Same-sex couples can have their relationships legally recognised as 'civil partnerships'. Civil partners must be treated the same as married couples on a wide range of legal matters. Single people are not protected as they do not share this protected characteristic.

**Pregnancy and maternity**
Protection is afforded to women during the period of her pregnancy and any statutory maternity leave to which she is entitled. During this period, pregnancy and maternity discrimination cannot be treated as sex discrimination. Any period of absence due to pregnancy-related illness cannot be taken into account when making a decision about her employment. An employer cannot refuse to employ a woman because she is pregnant, on maternity leave or because she has (or has had) an illness related to her pregnancy.

**Race**
Race includes colour, nationality (including citizenship) and ethnic or national origins. A racial group can be made up of two or more different racial groups (for example, Black Britons).

**Religion and belief**
Religion includes any religion with a clear structure and belief system, and also a lack of religion. Belief includes religious and philosophical beliefs including lack of belief (e.g. Atheism). A belief must satisfy various criteria, including that it is a weighty and substantial aspect of human life and behaviour.

**Sex**
Both men and women are protected.

**Sexual orientation**
The Act protects bisexual, gay, heterosexual and lesbian people.
All protected characteristics (with the exception of marriage and civil partnership) will be subject to the general public sector equality duty from April 2011 which will require us to have due regard to:

- **Eliminate discrimination**
- **Advance equality of opportunity**
  - Remove/minimise disadvantage
  - Meet different needs of protected groups
  - Encourage participation in public life where low
- **Foster good relations**
  - Tackle prejudice (where tensions arise, address those tensions)
  - Promote understanding

### 3. Types of discrimination

The Act makes it unlawful for an employer to discriminate against or victimise employees or people seeking work. 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:

- terms of offer
- access to opportunities for promotion
- transfer or training
- receiving benefits
- facility or service
- dismissal
- subjecting employees to detriment

**Direct discrimination** is less favourable treatment of a person compared with another person because of a protected characteristic. The new definition of direct discrimination extends protection based on association and perception, already applicable to race, sexual orientation and religion or belief, to include age, disability, gender reassignment, sex and pregnancy and maternity.

**Discrimination based on association** can occur if, for example, an employee is overlooked for promotion because their partner has undergone gender reassignment.

**Discrimination based on perception** can occur if, for example, an employer decides not to promote a male employee because senior staff believe him to be homosexual, irrespective of whether he is homosexual or not.

**Indirect discrimination** occurs when a provision, criterion or practice is neutral on the face of it, but its impact particularly disadvantages people with a protected characteristic, unless the person applying the provision can justify it as a proportionate means of achieving a legitimate aim. Ultimately, if tested, it will be for a court of law or tribunal to determine what is justifiable. Indirect discrimination applies to all of the protected characteristics, apart from pregnancy and maternity.

**Victimisation** takes place where one person treats another less favourably because he or she has asserted their legal rights in line with the Act or helped someone else to do so.
The Act outlines three types of harassment:

- 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 person because they have either submitted to, or did not submit to, sexual harassment or harassment related to sex or gender reassignment

4. Key changes

**Job Requirements**

Guidance issued by the Equality and Human Rights Commission (EHRC) focuses on careful consideration of the skills, qualities and experience that are required for a particular role. An employer must be able to objectively justify any requirements related to skills, qualities and experience; if the requirements cannot be objectively justified, then using them might be unlawful indirect discrimination. An example used in the EHRC guidance relates to publicising a vacancy on a full-time basis, without having looked at whether the job may be suitable for part-time working or job sharing. The requirement to work full-time would put women at a disadvantage compared to men because more women work flexibly because of childcare responsibilities. Unless the employer could objectively justify the requirement to work full-time, this is likely to be indirect discrimination.

**Occupational Requirements**

If an employer can show that a particular protected characteristic is central to a particular job, they can insist that only someone with that particular protected characteristic is suitable for that job as it would be an ‘occupational requirement’. The employer must show that:

- it is an occupational requirement;
- the application of the requirement is a proportionate means of achieving a legitimate aim; and
- the person to whom the requirement is applied does not meet it.

The concept of the requirement being ‘genuine’ has been dropped. Instead, the employer must show that there is a legitimate aim behind the decision to apply the requirement, and that it is a proportionate means of achieving this aim.

**Abolition of Default Retirement Age**

The default retirement age (that was set at 65) was abolished from 6 April 2011. It will no longer be possible to subject employees to compulsory retirement on or after 1 October 2011, unless the retirement can be justified in the particular circumstances. The University is no longer able to reject job applications from external candidates who are over 65; such applicants should be treated in the usual way. Age-related factors must not be used as a criteria for non-selection.

**Positive Action**

Positive action can be used to overcome disadvantage or under-representation of a particular group. Employers can target applicants with a particular protected characteristic as an occupational requirement where it can be demonstrated that only a person with that particular protected characteristic can do the job (see above). An employer can take a protected characteristic into consideration when deciding whom to recruit or promote, where people with the protected characteristic are at a disadvantage or are underrepresented. This can be done only where the candidates are equally qualified, and it
does not allow employers to have a policy of automatically treating people who have a protected characteristic more favourably than those who do not. The EHRC explains ‘equally qualified’ to mean the situation in which there are ‘two or more applicants for a job who would be able to do it equally well – although they may do it differently depending on their skills and qualities’. It should be noted that adopting this provision carries with it a risk of discrimination claims from unsuccessful candidates.

**Pre-employment health-related checks**

The Act limits the circumstances when health-related questions can be asked before a job offer is made. Health-related questions can be asked to:

- determine whether reasonable adjustments need to be made to the selection process
- determine whether an applicant can carry out a function that is intrinsic to the job (such as manual handling)
- monitor the diversity of job applicants
- take positive action to assist disabled people
- confirm that a candidate has a disability where this is an occupational requirement

Once a job offer has been made, appropriate health-related questions can be asked.

**Equal Pay – direct discrimination**

Equal pay law relates specifically to men and women where pay or benefits are part of the worker’s contract of employment. Unlawful discrimination arises where an employer treats an employee unfavourably in relation to pay and benefits due to a protected characteristic. There are exceptions to this – pay structures for younger workers (aged 16 to 21); differences in pay and benefit linked to length of service (for length of service up to 5 years, you do not have to justify differences at all); marriage and civil partnership (you must not treat workers who share this protected characteristic worse, but you can also treat them better).

**Extension of Employment Tribunal powers**

Under the Act an Employment Tribunal can now make recommendations that an employer must eliminate or reduce the effect of discrimination on all employees, not only the claimant. However, this provision will not extend to cover equal pay cases.

### 5. Additional information

If you require any guidance related to the recruitment process and the requirements of the Equality Act please contact:

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