

Guidance on positive action for students

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1 WHAT IS POSITIVE ACTION?

The Equality and Human Rights Commission's *Equality Act 2010 Technical Guidance for Further and Higher Education* sets out the background to the positive action provisions:

Students who share a protected characteristic may be socially or economically disadvantaged as a result of this protected characteristic, or may be affected by the consequences of past or present discrimination or disadvantage. Certain groups of students may experience institutional or systemic discrimination or be prevented from pursuing educational opportunities as a result of a protected characteristics – for example:

- Low participation of women in certain courses resulting in future economic disadvantage.
- Low academic achievement of Gypsy and Traveller young people limiting work opportunities.
- Low representation of disabled students on apprenticeships.

The Act contains provisions which enable education providers to take proportionate action to achieve fuller and more effective equality outcomes for members of groups that share a protected characteristic that are socially or economically disadvantaged or excluded, or who otherwise face the consequences of past or present discrimination or disadvantage, even though these actions involve discrimination against members of other groups which might otherwise be unlawful.¹

The EHRC provides detailed guidance on taking positive action and includes a number of realistic examples.

2 WHEN CAN THE UNIVERSITY TAKE POSITIVE ACTION?

Under section 158 of the Equality Act 2010², an education provider which *reasonably thinks* that persons who share a protected characteristic:

Equality Act 2010 s.158(1) Positive action: general

- a) Suffer a disadvantage *connected to* that characteristic;
- b) Have needs that are *different* from the needs of those who do not share that characteristic;
or
- c) Have *disproportionately* low participation in an activity.

May voluntarily take any action which is a *proportionate* means of achieving the aims of:

¹ See Chapter 13 of the Equality and Human Rights Commission's *Equality Act 2010 Technical Guidance for Further and Higher Education* (EHRC, 2014): www.equalityhumanrights.com/en/publication-download/equality-act-2010-technical-guidance-further-and-higher-education

² www.legislation.gov.uk/ukpga/2010/15/section/158

- a) Enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage;
- b) Meeting those needs; or
- c) Enabling or encouraging persons who share the protected characteristic to participate in that activity.

3 WHAT ARE THE ADVANTAGES OF TAKING POSITIVE ACTION?

- Increased attractiveness to underrepresented groups
- A more diverse student body
- Higher student engagement
- Wider range of backgrounds and experience
- Improved outcomes for students
- Increased uptake of courses
- Decreased drop-out
- Raised standards
- Reputational benefits

4 IS THIS POSITIVE DISCRIMINATION?

Positive discrimination is still unlawful. There is a continuum of permitted activity:

4.1.1 Eradicating discriminatory policies or practices

General good practice to, e.g.

- Improve access to education
- Adjust benefits, facilities or services to meet specific needs
- Train staff

This is not positive action, even where it may disproportionately benefit one group.

4.1.2 Positive action

Actions which meet the statutory conditions but do not exceed the limitations of s158 of the Equality Act.

4.1.3 Positive discrimination

Preferential treatment of a protected group to address disadvantage or underrepresentation which does not meet the statutory conditions (unless some other exception applies).

It is not unlawful direct discrimination to treat a disabled person more favourably than a non-disabled person so an education provider could choose to restrict courses, benefits, facilities and services to disabled students, or offer them on more favourable terms.

However, the provider could use targeted positive action measures to address the disadvantage/needs/participation of people with a particular impairment where these are different from those of people with other impairments.

5 DEFINITIONS

5.1 WHAT IS 'REASONABLY THINKS'?

Some indication or evidence is required, e.g.

- Statistical data
- Qualitative evidence (consultations, focus groups, surveys)
- Impact assessment
- Monitoring data
- Complaints and discrimination claims
- National reports

5.2 WHAT IS 'DISADVANTAGE'?

- Lack of opportunity or choice
- Rejection
- Barriers to accessing provision
- Exclusion

5.3 WHAT ARE 'DIFFERENT' OR 'PARTICULAR' NEEDS?

- Needs that are different from the needs of others, *due* to the protected characteristic
- Do not have to be unique to that group
- May be of particular importance to that group
- May be a shared need that is not being met for that group when compared with others
- Could include financial needs

5.4 WHAT IS 'PARTICIPATION' IN AN ACTIVITY?

Any education, benefit, facility or service provided by the education provider where participation is disproportionately low, e.g.

- Entry to the institution and/or a specific course
- Activities organised by the institution
- Study abroad opportunities
- Engagement with the careers service
- Work placements/internships
- Uptake of welfare services

5.5 WHAT IS 'DISPROPORTIONATELY LOW'?

- Reliable indication or evidence
- Participation low compared with other groups
- Participation low compared with the level that could reasonably be expected given the type of course and – possibly – location
- Empirical evidence (national/local) or, *if not available*,
- Qualitative evidence (consultation, surveys, review of uptake)

5.6 WHAT ACTION CAN BE TAKEN?

Provided that the action is a proportionate means of achieving one or more of the stated aims, the Act does not limit the action that could be taken.

5.7 WHAT IS 'PROPORTIONATE'?

- Is it intended to meet one of the 'stated aims'?
- What is the objective?
- What is the cost?
- What weight should be given to all the relevant factors?
- How serious is the disadvantage / how different the need / how great the underrepresentation?
- What is the impact on other protected groups?
- What is the relative disadvantage, need or participation of these other groups?
- Is the action an appropriate way to achieve the aim?
- Is the action reasonably necessary to achieve the aim, or would it be possible to achieve the aim as effectively by other actions that are less likely to result in less favourable treatment of others?

Positive action must be time-limited and subject to review to ensure that it does not continue longer than necessary (thereby ceasing to be proportionate).

6 PUBLIC SECTOR EQUALITY DUTY

The action taken may also contribute to the education provider's responsibilities under the Public Sector Equality Duty to have due regard, in the exercise of its functions, to the need to:

Equality Act 2010 s.149(1) Public Sector Equality Duty
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- Eliminate discrimination, harassment, victimisation and any other prohibited conduct;
- Advance equality of opportunity between persons who share a protected characteristic and persons who do not share it, by:
 - Removing or minimising disadvantages connected to that characteristic;
 - Taking steps to meet the needs of persons who share a characteristic that are different from the needs of those who do not share it; and
 - Encouraging persons who share a characteristic to participate in public life or any other activity in which their participation is disproportionately low; and
- Foster good relations between persons who share a protected characteristic and persons who do not share it, by:
 - Tackling prejudice; and
 - Promoting understanding.

7 HOW DO YOU TAKE POSITIVE ACTION?

Each proposal requires detailed case-by-case analysis to ensure positive action is both appropriate and proportionate. We have provided a template for recording the outcomes of your consideration which can also form the basis of your Memorandum of Justification.

To ensure a sound basis for action and avoid unlawful discrimination, providers should analyse and outline:

- Evidence of the disadvantage, particular needs and/or disproportionately low participation, with an analysis of the causes;
- Specific outcomes which they are aiming to achieve;
- Identification of possible steps to achieve those outcomes;
- Assessment of the proportionality of the possible steps (*are they appropriate, effective and necessary or could you achieve the same aim by taking less discriminatory measures?*);
- The steps they have decided to take to achieve the aims/outcomes; and
- Measurable indicators of progress towards the aims, set against a timetable.

The EHRC says that the results of this assessment should be documented in writing and retained to demonstrate compliance with the Act, e.g. a Memorandum of Justification.

The provider should regularly monitor and evaluate progress against the indicators and timetable to ensure the positive action is being effective and is (or isn't) still necessary.

7.1 ARE SCHOLARSHIPS A PROPORTIONATE MEANS?

Scholarships are considered a very large benefit and need careful justification under the Act, particularly if they are not being proposed as a measure to address demonstrable financial need connected to a protected characteristic. However, the University's experience is that a wide scholarship offer is effective in attracting a wider range of qualified applicants. Our experience shows that fully funded (fees and maintenance) support is more effective than a partial or top-up bursary in attracting and supporting less advantaged students. In addition, full scholarships have a high totemic value and serve as a strong communicator of the University's commitment to widening participation and diversity. There is evidence that they may have helped to increase the number of applications from underrepresented groups.

The EHRC has advised that the University must be able to demonstrate that it has considered, and preferably tried, less discriminatory measures but that these were ineffective, or less effective than scholarships, before proceeding to scholarships. Only where the University could evidence a serious chronic problem might there be a good argument for proceeding directly to scholarships.

Scholarships should be supplemented by other, less discriminatory good practice measures to help correct imbalances.

7.2 DATA SOURCES

Athena SWAN / Race Equality Charter applications	Examination Results
Admissions data	Student Barometer
Annual Programme Statistics	HESA data in Heidi Plus (Gold users only)

7.3 CONTACTS

Equality and Diversity Unit	Sara Smith	sara.smith@admin.ox.ac.uk
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Positive Action

Preparing a Memorandum of Justification under the Equality Act 2010

When can you take positive action?

Section 158 of the Equality Act 2010³ permits e.g. education providers to take proportionate steps to promote equality where they 'reasonably think' that:

- a) Persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
- b) Persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
- c) Participation in an activity by persons who share a protected characteristic is disproportionately low.

Protected characteristics (tick all that apply):⁴

Age	Race (including colour, nationality and ethnic or national origins)
Disability	Religion or belief
Gender reassignment	Sex
Marriage & civil partnership	Sexual orientation
Pregnancy & maternity	

Do people sharing this protected characteristic (or characteristics):

- Experience a disadvantage *connected* to that characteristic?
- Have needs that are *different* from the needs of those who do not share that characteristic?
- Have *disproportionately* low participation in an activity?

N.B. If you are proposing to take positive action in relation to more than one protected characteristic, a case must be made in support of each.

What is the cause of their disadvantage, different needs or low participation? How is it connected to their protected characteristic?

³ www.legislation.gov.uk/ukpga/2010/15/section/158

⁴ See Chapter 2 of the Equality and Human Rights Commission's *Equality Act 2010 Technical Guidance for Further and Higher Education* (EHRC, 2014) for definitions of these terms:
www.equalityhumanrights.com/en/publication-download/equality-act-2010-technical-guidance-further-and-higher-education

What specific outcomes are you trying to achieve by implementing positive action? What is the timeframe for action?

What measures have you considered or already tried to achieve these aims? How effective have these been?

What new steps have you identified as a means of achieving these outcomes? Would these constitute discrimination in favour of people sharing one or more protected characteristic?

Are the proposed measures proportionate, i.e. are they *appropriate, effective and necessary*? Could you achieve the same aim by taking less discriminatory measures? What evidence do you have that less discriminatory measures are or would be ineffective or less effective?

Will there be an adverse impact on people with different protected characteristics as a result of your taking these positive action steps? How will you mitigate this disadvantage?

Having considered the requirements for justifying positive action, what steps have you decided to take in order to achieve the aims?

What are the measurable indicators by which you will measure your progress towards the aims, and what is the timetable for action?

Have you documented your rationale and established a review process? Positive action must be time-limited and subject to review to ensure it continues to be necessary and proportionate.

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Have you considered how you will communicate your reasons for taking positive action to e.g. students, staff, the Press?

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Signed:	
Role:	
Department (faculty, school or equivalent unit):	
Date:	
Date of next review:	

Please return this form to **Sara Smith** in the Equality and Diversity Unit for review. Legal Services will review the final version and advise the department (or equivalent) of any legal concerns.

Reviewed by EDU:	
Reviewed by LSO:	