

New laws: new opportunities

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Introduction

A number of reports and commissions have highlighted the crucial role of leaders, governors and managers in tackling equality issues in higher education. As we point out in this article, legislative changes are under way. While the law may be a key driver there is a need to move beyond a compliance approach, as Russell Seal, chair of Council, University of Exeter, said in his foreword to the Equality Challenge Unit's handbook for governing bodies:

"Equality legislation is now extensive and imposes specific responsibilities on governing bodies. More legislation is expected in 2009. However, it is increasingly clear that governing bodies must now consider moving beyond compliance. Many already are. More than ever before there is a need for clarity of vision, policy and priorities. Governors need to analyse the strategic importance to their institution of equality and diversity, together with the risks involved." (ECU 2009a, p.iv).

This edition of In Practice aims to provide an overview for leaders, governors and managers of higher education institutions. We set out key forthcoming legislative changes, highlight some of the main challenges for the sector, and provide information on projects and resources from which leaders, governors and managers can draw.

New legislative developments: the Equality Act 2010

The new Equality Act is scheduled to be brought into force between October 2010 and April 2011 (for further details see www.ecu.ac.uk/law/equality-bill). The overall purpose of the act is to bring together existing equality legislation, harmonise its provisions and introduce greater consistency and clarity. It also aims to strengthen the legislative framework for equality, providing more powers and responsibilities. The act represents an important milestone in the quest to achieve greater equality in society, from the creation in the 1970s of an individual right not to be discriminated against on the grounds of race, gender or (from 1995) disability, to the creation of public sector duties from 2001 onwards.

Under the new Equality Act the following 'characteristics' are 'protected' (PCs):

- | Age;
- | Disability;
- | Gender reassignment;
- | Marriage and civil partnership;
- | Pregnancy and maternity;
- | Race;
- | Religion or belief (including non-religious and philosophical belief);
- | Sexual orientation.

Some of the most significant changes introduced by this legislation (which as suggested by Hepple (2010, p21) are at the core of a new transformative approach to equality) are:

1. *The creation of a single general public duty extended to all the protected characteristics (except marriage and civil partnership).*

This is underpinned by three key objectives: taking steps to eliminate discrimination; advancing equality; and fostering good relations.

2. *The expansion of provisions for positive action currently only allowed in relation to employment.*

This means that, for example, HEIs will be able to take positive action to tackle disadvantages experienced by students on the basis of a protected characteristic. However, at present it is not yet clear whether positive action will be extended to cover the provision of bursaries that are restricted to students with a protected characteristic.

With regard to employment, under the act positive action measures will allow an employer to take into account protected characteristics of people who are under-represented when making decisions about staff recruitment or promotion. For example, in a so called 'tie-break' situation (Hepple 2010) between two job applicants or candidates for promotion who are equally well qualified for the post, it will be lawful for an employer to recruit or promote the person who because of a protected characteristic (eg gender or race) is under-represented in a particular occupational group or level (eg senior management).

3. *The introduction of a new public duty to take into account socio-economic disadvantage when making strategic decisions.*

This, however, does not apply to higher education but only to core government and administrative bodies. Such a measure is intended to tackle socio-economic inequalities and is considered to be "one of the most interesting and potentially wide-ranging reforms" but "there is doubt as to whether it will be brought into force by the new government as the Conservatives do not support it" (Ashtiany 2010, p25).

4. *Changes to the concept of direct discrimination.*

These include:

- | Discrimination by association, which relates to a situation where someone is treated less favourably because of their link or association with a person with a protected characteristic (eg a person is treated less favourably because their partner is transsexual).
- | Discrimination by perception, when for example an employee might be treated less favourably because it is believed that he/she is gay, irrespective of whether that person is gay.
- | Dual discrimination that protects people who experience direct discrimination as a result of a combination of two protected characteristics (eg a black woman who feels that she is being discriminated against because of her race and sex can make a combined claim for both protected characteristics).

Under the act, HEIs will also be required to publish figures about their gender pay gap and employment rates for disabled and black and minority ethnic staff.

For full details about other changes introduced by the act and its implication for HEIs see the ECU Briefing (www.ecu.ac.uk/law/equality-bill) and the Government Equalities Office (www.equalities.gov.uk).

IN PRACTICE: NEW LAWS: NEW OPPORTUNITIES

Race

Positive trends have been reported in terms of the statistical representation of black and minority ethnic (BME) staff in academic roles (Hefce 2010). The proportion of UK-domiciled BME staff in senior posts rose by 0.6% in the period 2005-6 to 2008-9 and the proportion of permanent BME academic staff also rose (although with a slight decrease in the proportion of international staff). While this small change has occurred, leaders in higher education are overwhelmingly white, and though structural diversity may be important in increasing the opportunities for the exchange of knowledge it is only part of the solution. According to Brown (2004, p26), diversity requires conceptual changes “through a reformulation of the mental models one uses to construct his or her context, a context that too often resists reorganisation to reflect the changing reality of a racially diverse society.”

Cultural change

The need for cultural change is underlined in a review of literature that investigated the experiences of BME staff in the sector (ECU 2009b). Senior staff felt that their leadership ability was in question, and lecturers teaching in the areas of race, equality and multiculturalism reported that these subjects had low status when performed by themselves, yet had higher status when performed by white staff. There were experiences of invisibility, isolation, marginalisation, racial discrimination, heavy workloads, and more scrutiny of BME staff than their white peers.

There is a view that race has slipped down the agenda after a brief period of progress following the Race Relations (Amendment) Act 2000 (Pilkington 2009). Current initiatives to address race equality in the sector are thus crucial.

Leadership

A number of ongoing initiatives are focusing on leadership and cultural and ethnic diversity in higher education. The University of Salford is carrying out the ‘Leading Culturally Diverse Communities in Higher Education’ project (www.lcdc.salford.ac.uk). This aims to identify those higher education institutions with the most diverse communities, and seek out drivers that enable institutions to successfully engage with such communities. In this context communities include staff, students and the public. The research team comprises senior leaders and researchers at the university, including Professor Martin Hall, vice-chancellor, and Professor Ghassan Aouad, pro-vice-chancellor for research.

A cross-institutional leadership development programme is currently under way. Funded through Hefce’s Leadership, Governance and Management Fund, the Stellar HE project aims to counter the under-representation of BME staff and improve their promotion prospects. There are 16 participants from 10 institutions, working in a range of professional and academic roles. They are carrying out, with the support of their managers, institution-based projects with the aim of embedding good practice at strategic level. The final conference will take place on 6 December 2010. For further information please contact Christine Yates, Imperial College London (E: c.yates@imperial.ac.uk).

Gender

In spite of the increasing proportion of women in academic posts, they remain significantly under-represented in senior posts. According to Higher Education Statistics Agency (HESA) data only 22% of professors are women, while women’s representation is even lower – 10% – in STEM departments (Hefce 2010). Such marked gender differences at professorial level may be partly attributable to differences in men and women’s research careers.

Research Assessment Exercise 2008 (RAE2008)

A qualitative study undertaken by Hefce of the selection of staff for inclusion in RAE2008 (Hefce 2009) shows a lower selection rate for women – 48%, compared to 67% for their male colleagues. This is in spite of a more robust approach taken by the Higher Education Funding Councils to promote equality in the RAE.

A study commissioned by ECU to investigate the methods adopted by a sample of 32 HEIs to implement the RAE2008 equality guidance found that most of the equality impact assessments (EIAs) conducted by these institutions reflected a similar pattern of gender differences in the selection rate of their staff. It also found that out of 22 institutions that provided documented evidence of RAE-related EIAs only a few indicated that further investigation would be undertaken to explore the causes for these differences (Manfredi and Vickers 2009a). This suggests that although EIAs can be a useful tool to identify patterns of inequality and pinpoint the areas where these occur, they need to be followed up by an action plan with a set of clear objectives to tackle the causes of such inequalities.

Causes of gender inequality

There is a significant body of academic literature which has identified a number of causes that can impact negatively on women’s research careers. These include occupational segregation, both horizontal in terms of discipline and vertical in terms of academic grades (Doherty and Manfredi 2006, 2010). They are also disadvantaged by the way in which academic excellence is constructed (Rees 2004) and work-life balance issues (Brouns and Addis 2004, Ackers 2007). There is a tendency for women to have greater teaching, pastoral care and administrative workloads compared to their male colleagues (Bagilhole 1993, Wells 2002).

HEIs can draw on these and other studies to take a robust evidence-based approach to set objectives and inform practice to achieve greater equalities in research careers.

Useful resources and information to promote gender equality can be downloaded at www.ecu.ac.uk/subjects/gender

Disability

While positive developments have taken place for disabled students there is concern that, in spite of the introduction of disability legislation, discrimination against disabled staff persists. Furthermore, their experiences in the lifelong learning sector are reflective of their experiences in the wider labour market. Key findings of the Commission for Disabled Staff in Lifelong Learning (NIACE 2008) included:

- That disabled people in the further and higher education sectors are not treated equitably in recruitment, employment and promotion;
- A lack of disclosure policy and practice;
- A lack of confidence in understanding mental health;
- Inconsistency in attitudes towards disabled staff;
- A lack of disabled staff role models at senior level.

Some of the key outcomes required by the commission are set out below.

Outcomes for disabled staff

- More disabled staff recruited to and working in the lifelong learning sector;
- More successful disclosure procedures thereby improving the accuracy of data;
- Targets to secure substantially more disabled staff in senior and strategic positions;
- Identification and encouragement of disabled staff to attend and complete leadership and management programmes;
- Formal events celebrating disability equality achievement in the sector;
- Disability equality training for staff at all levels, particularly senior managers.

Adapted from paragraph 1.4, p4, NIACE (2008).

In addition, the commission highlighted the vital role of leaders and managers in bringing about disability equality, stating that leaders should not delegate this to others but should take direct responsibility. A new project, to be undertaken by NIACE and De Montfort University, will explore the experiences of disabled staff in higher education and produce guidance for the sector. In particular it will consider what can be done at strategic level to bring about change. For more information contact Kate Byford, senior policy adviser, ECU (E: kate.byford@ecu.ac.uk).

Disclosure

Since the publication of the NIACE report, work has developed around disclosure issues. ECU, for example, published their guidance (ECU 2009c).

Disability disclosure is particularly low in higher education, and this may mean that employers fail to make reasonable adjustments or provide the workplace support that staff need. The ECU guide gives practical advice in a number of areas including:

- | Creating a positive culture for disclosure;
- | Creating practical opportunities for disclosure;
- | Using self-service online systems for HR data;
- | Data protection and privacy issues;
- | Communicating the case for disclosure to staff.

Sexual orientation

Almost a decade ago a report by the Association of University Teachers (AUT 2001) found that lesbian, gay, bisexual and transgendered (LGBT) staff in higher education had low levels of 'comfortableness' in the workplace and were likely to receive treatment that was unequal to that received by their heterosexual colleagues.

In the meantime, the legal landscape for LGBT individuals has changed drastically with the introduction of various pieces of legislation including:

- | The Employment Equality (Sexual Orientation) Regulations 2003;
- | The Civil Partnership Act 2004;
- | The Gender Recognition Act 2004.

However, staff and students who attended focus groups as part of research undertaken by ECU (ECU 2009d) were not aware of any attempt to communicate the implications of these legal developments via HR or their equality and diversity unit. Some key findings for students were that:

- | Higher education provided an important space for students to be themselves and establish their independent adult identities;
- | They were mainly out to their university friends, but not to their tutors for fear of discrimination;
- | LGB students reported significant levels of negative treatment on grounds of sexual orientation, particularly from fellow students;
- | Trans students reported even higher levels of negative treatment than LGB students.

Key findings for LGB staff included concerns over employment security, discrimination in relation to promotions, discretionary pay rises and redundancies, and reports of negative treatment on grounds of sexual orientation, primarily by colleagues. The report also identified a view among LGBT staff that issues of sexual orientation were treated less seriously than those of race or disability.

Practical guidance

ECU recently published practical guidance for institutions on improving the experience of LGB staff and students in higher education (ECU 2010). This focuses on legal developments, addressing homophobia, improving the visibility of and commitment to LGB equality, monitoring sexual orientation, and addressing issues of sexual orientation and religion or belief.

Moving beyond process, Walsh (1995, p90) draws connections between female identity, sexuality and academic production. For lesbian academics, claiming a lesbian identity can be risky and requires "balancing confidence, activism, and a sense of privacy, with a recognition of the possible consequences for the quality of daily life and career prospects, and therefore, economic and social self-determination". Walsh argues, however, that it is only by transgressing limits and constraints that women can survive and thrive in their creative endeavours, even though as transgressors they may be targets particularly as feminists, lesbians and/or single women.

Religion or belief

There seems to be a lack of information about the experience of higher education staff and students with a religion or belief (including non-religious and philosophical beliefs) in higher education. The ECU has commissioned a study to gather evidence in this area and in particular to investigate:

- | Staff and students' perceptions of inclusiveness in higher education;
- | Staff and students' perceptions of how HEIs accommodate different religious observances in their policies and practices;
- | Issues of discrimination and harassment.

This study is being undertaken by a research team at the University of Derby, led by Professor Paul Weller, and is due to be completed in January 2011 (www.ecu.ac.uk/our-projects/religion-and-belief-in-higher-education-researching-the-experiences-of-staff-and-students).

ECU has also produced a briefing about religious observance in higher education: facilities and services (www.ecu.ac.uk/publications/files/Religious-obs-facilities-and-services-briefing.pdf).

For an in-depth understanding of this equality strand and its practical implications for policy and practice in the workplace see Vickers (2008a, 2008b).

Age

The default retirement age (DRA) of 65 is currently under review, and the UK coalition government has announced its intention to abolish it as from October 2011. If this proposal goes ahead, contractual compulsory retirement age, a form of direct age discrimination, will have to be objectively justified as a proportionate means of meeting a legitimate aim. For example in the case of certain types of jobs the adoption of a contractual compulsory retirement age may be justifiable on grounds of health and safety and the welfare of an employee. However, employers will need to think very carefully what factors, if any, may objectively justify the adoption of compulsory retirement within their workplace.

Most HEIs still operate a contractual compulsory retirement age. However, a staff survey undertaken in 12 HEIs (six pre-1992 and six post-1992), as part of a wider project funded by Hefce under its Leadership Management and Governance Fund to develop good practice in managing age diversity, shows that there is widespread support among staff across different occupational groups in the sector for the removal of the DRA (Manfredi 2008). Furthermore, significant proportions of both academic (36%) and manual (30%) staff indicated that they would like to continue to work beyond the age of 65. The results from this survey also show that the majority of respondents (56%) were interested in flexible retirement options but that the vast majority of them (71%) did not know whether their pension scheme allowed for this.

However, line managers who took part in a series of focus groups conducted as part of the same project expressed concern about allowing staff to continue to work beyond the age of 65, due to the anticipated effect of reducing staff turnover. Additionally there were worries about the potential implications for departmental budgets and career progression opportunities for younger staff.

Flexible retirement

Line managers lacked knowledge about flexible retirement options and seemed to have mixed feelings about flexible retirement. The idea of flexible retirement was generally supported for academic staff but was seen as more problematic for professional and support staff. This was because managers felt their departments had reached a level of 'saturation' regarding flexible working in order to accommodate the needs of other staff such as, for example, working parents (Manfredi 2008, Manfredi and Vickers 2009b). This is an evolving area likely to pose a number of challenges for the management of human resources in HEIs but equally likely to open up opportunities for extending working lives and retaining staff with valuable skills and expertise.

A full research report from this study and a resource guide to help HEIs develop good practice in managing age diversity can be accessed at www.brookes.ac.uk/services/hr/cdprp/age. ECU will be working with the Centre for Diversity Policy Research and Practice at Oxford Brookes University on approaches to flexible retirement and extending working lives in order to help the sector manage changes to the DRA. Contact Chris Hall (E: chris.hall@ecu.ac.uk) or Dr Simonetta Manfredi (E: smanfredi@brookes.ac.uk).

Conclusion

This article has focused primarily on staff issues. Nonetheless, inequalities persist among students, for example in terms of the differential degree attainment of black and minority ethnic students. It appears that staff perceive equality issues to relate mainly to students, particularly with regard to widening participation and student retention. At the same time they note a lack of attention paid to their own needs including those associated with a disability (Deem and Morley 2006).

The evidence and legal developments presented here provide a compelling rationale for promoting equality in higher education, and counteracting the trend noted by a number of researchers that this decade has seen equality deprioritised and depoliticised. Key points arising are:

- The vital importance of senior staff and governors in leading on equalities issues;
- The need for cultural change as well as compliance with the law;
- The need to focus on specific issues such as disclosure for disabled staff.

The NIACE report (2008, p13) makes the point that implementing steps to achieving disability equality benefits all in higher and further education, going "beyond disability to the heart of ethical and organisational functioning" – an aim that is also, surely, at the heart of leadership. **E**

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