



## SPOTLIGHT ON THE STUDENT CONTRACT

**R**ecent developments at Oxford have thrust the issue of the terms of the student/institution contract back into the limelight. For those who may have missed the story, a model "contract" has been circulated to the constituent colleges for students to sign to confirm that they will attend seminars and lectures, submit assessments and sit examinations. The move has met with some resistance from both sides: students say the document is "one sided" because it does not record the institution's obligations, while other institutions have argued that they already have policies and procedures dealing with attendance and academic diligence, so the new contract is unnecessary.

Although the relationship between institutions and their students has long been classified as a contractual one, there has never been one single document which set out all the terms of the relationship. Instead, the terms of the contract have had to be gleaned from a variety of documents and sources, including:

- The prospectus
- The offer letter

- Enrolment documents
- Student handbooks, regulations and codes of practice
- The institution's constitutional documents.

The "express terms" contained in these documents are supplemented, and in some cases modified by a range of terms implied into the contract by statute and case law. For example, there is an implied term that any facilities promised by the institution will be of a reasonable standard, and that any services will be provided with reasonable care and skill.

A further complication lies in the fact that students are regarded as consumers for the purposes of the consumer protection regime, and therefore some of the express written terms of the contract may be deemed unenforceable against the student, for example because they are unduly onerous, or written in unintelligible jargon, or not drawn to the student's attention in advance of entering into the contract.

Another area of statutory intervention in the student-institution relationship can be found in "rights-based" legislation. So, terms which contravene the

institution's duty to act in a manner compatible with the Human Rights Act (e.g. terms which improperly restrict a student's right to freedom of speech) or terms which are discriminatory in contravention of the raft of anti-discrimination legislation will also be unenforceable.

The upshot of all this is that students embarking on courses are entering into a binding legal relationship with their institutions, but on terms which are not necessarily clear or easily identifiable. As freshers, they are bombarded with information from a number of sources, some of which will be significant in terms of this contractual relationship, such as the fact that failure to follow the institution's code of conduct could lead to expulsion, and others, such as information about student societies, which will not impinge on the key rights and responsibilities of the parties. Some surveys suggest that each fresher receives as much as 2000 pieces of information on enrolment, and that figure could well rise as institutions seek to draw the attention of new and prospective students to particularly important terms. It is hardly surprising





# AGE DISCRIMINATION: ARE YOU PREPARED?

therefore that many complaints from and disputes with students centre on the fact that they did not know that the institution had a right to act as it subsequently did, or that they (the students) had a responsibility to act in a way that they subsequently failed to do. Given this background, the Oxford "model contract" has a laudable aim, but is almost certainly too narrow in its focus. In focussing only on the need for students to be diligent in their studies, key issues such as student conduct, respect and tolerance for diversity, plagiarism, and payment of fees and other financial obligations may be missed or their importance inadvertently diminished. There is a legal case for setting out the principal terms of the student-institution contract in one comprehensive document, but there seems to be little benefit in adding yet another partial and selective document to the welter of paperwork that already underpins this particular relationship.

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**L**egislation prohibiting discrimination on the grounds of age is due to be introduced in October 2006.

Although the draft Employment Equality (Age) Regulations 2006 were published last July and consultation on them has now ended, a final version has yet to be published. Institutions will therefore have a relatively short period of time to digest the legislation before having to implement it.

The legislation will apply to HE and FE institutions both as employers and in their dealings with students.

## EMPLOYEES

The introduction of age discrimination legislation is likely to have a profound effect in the workplace. A MORI survey conducted in 2002 concluded that 20% of staff questioned had experienced discrimination at work, with 38% citing ageism as the main reason.

The Regulations aim to protect staff of all ages from being discriminated against on the grounds of their age. They offer protection from pre-employment selection processes to the giving of references post-employment, and will apply to all employers regardless of their size.

## What will amount to age discrimination?

The draft Regulations prohibit direct and indirect discrimination, harassment on the grounds of age and victimisation.

■ **Direct discrimination** will occur if someone of a particular age group is treated less favourably than someone of a different age group on the grounds of their age, e.g. where an employer only allows access to a training programme for those members of staff below the age of 55

■ **Indirect discrimination** will occur where an employer applies a provision, criterion or practice to all staff, but this disadvantages staff of a particular age, e.g. where an employer stipulates that only staff with a certain number of years' experience will be considered for promotion

However, both direct and indirect discrimination may be **objectively justified** if the discrimination can be shown to be a proportionate means of achieving a legitimate aim. The draft Regulations contain the following examples of what might constitute a legitimate aim:

- The setting of requirements as to age in order to ensure the protection or promote the vocational integration of people in a particular age group
- The fixing of a minimum age to qualify for certain advantages linked to employment or occupation in order to recruit or retain older people
- The fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

## RETIREMENT

The current position is that staff who want to work past the age of 65 or their employer's normal retirement age have no recourse against compulsory retirement, because of the upper age limit imposed for bringing an unfair dismissal claim.

As part of its overall aim of encouraging employers to recruit and retain a more diverse workforce, the government proposes a number of measures in the Regulations to promote a change in attitude to the recruitment and retention of older staff:

- **A national default retirement age** will be introduced. Employers will be able to set retirement ages at or above 65. The compulsory retirement of a member of staff under the age of 65 will not be permitted unless the employer is able to show that it can objectively justify setting a lower retirement age.
- The upper age limit for bringing an unfair dismissal claim will be lifted, as will the tapering down of the basic award for unfair dismissal compensation, so that those over 65 will be able to bring an unfair dismissal claim.

- A new **duty to consider** procedure will be introduced requiring employers to consult with staff about their proposed retirement. The main stages of this will be:

1. The employer must give the member of staff at least six months' written notice of his/her retirement date and at the same time inform the member of staff that he/she has a right to request to work beyond the set retirement age.

2. The employee must make a request to work beyond the retirement date at least six weeks before the retirement is due to take place.
3. The employer can accept the request or it can arrange a meeting to discuss it. It must then make a decision within two weeks of the meeting having taken place.
4. The member of staff has two weeks to lodge an appeal.

If an employer fails to inform a member of staff about his/her right to request to work beyond the retirement date, any subsequent dismissal will be automatically unfair, and if the procedure itself is not conducted properly the member of staff may claim unfair dismissal.

The procedure should be repeated towards the end of every renegotiated retirement age extension and there is no limit on the number of extensions which can be granted.



## IMPACT ON THE SECTOR

**The Regulations will affect many current practices in the education sector, as follows:**

**Recruitment** - institutions should carry out a review of their recruitment and selection procedures. Quite often employers specify a number of years of experience in job advertisements which will deter younger applicants from applying. Such a requirement may be objectively justifiable, but in practice employers should try and word job adverts so that they focus on the nature of the job and the skills that are required to perform it.

**Training** - institutions should review their training programmes. There is a tendency for employers to target training at younger or less experienced members of staff on the assumption that older staff are likely to be winding down towards their retirement, or that they do not need to develop or learn new skills. This kind of assumption will be challengeable under the new legislation. However, in some instances this might be objectively justified under the Regulations, e.g. an institution may be able to show that its refusal to offer a member of staff who is nearing the default retirement age of 65 access to

training is justified on the grounds that the costs and length of training will not be recouped by the member of staff's increased productivity before retirement.

**Pay and benefits** - pay scales within the education sector are largely based on long-service criteria. These could be open to challenge as amounting to direct or indirect age discrimination and in the future it may be necessary to adopt more merit-based pay scales. Some benefits, such as enhanced entitlements of holiday leave, sickness benefit and notice periods may also depend on length of service. A number of exemptions have been included in the draft Regulations to permit the award of pay/benefits based on long-service criteria without a requirement to objectively justify the award.



The two main exemptions are:

- Any length of service requirement of five years or less will be exempted;
- Employers will be able to award benefits to staff with more than five years' service where this reflects a higher level of experience of the member of staff, or to reward the loyalty of the member of staff, or to increase or maintain the motivation of staff.

**Redundancy** - the use of "last in, first out" as a selection criterion for redundancy is fairly common. However, this could amount to indirect age discrimination against younger staff, so use of this criterion should be avoided. The Regulations will remove the upper and lower limits on the right to receive a redundancy payment and the tapering down of the payment for those staff who are within one year of the upper age limit. However, the government has decided to retain the age bands used to calculate an award.

**Harassment** - the proposals will render it unlawful for staff to harass others on the basis of their age. Any comments or jokes made about a person's age will potentially amount to harassment. Line managers should ensure through training sessions that staff are aware of what the new legislation entails and what conduct is rendered unacceptable.

**Retirement** - institutions should ensure that managers receive training on how to implement the new retirement procedures.

To ensure that they are prepared, all institutions need to look carefully at their current practices and question their preconceived ideas about staff from particular age groups.



## STUDENTS

Despite their name, the draft Regulations also apply to the relationship between an institution and its students. It will be unlawful for an HEI or FEC to discriminate against a person on the grounds of age:

- In the terms it offers to admit that person as a student to the institution, or by refusing to admit him/her
- In the way in which it affords that person access to benefits, by refusing him/her such access, by excluding him/her or by subjecting him/her to any other detriment.

It will also be unlawful to subject a student or an applicant to harassment on the grounds of age.

The definition of discrimination is the same as for employees, which means that such discrimination may be justified if it can be shown to be a proportionate means of achieving a legitimate aim.

The legislation is likely to have a fairly limited impact on students, although may apply in the following circumstances:

- Where an institution imposes a lower age limit for admission to courses eg. restricting access to continuing education courses to over-18s only
- Where an institution imposes an upper age limit for admission to courses, although it is likely that the limits which apply to, for example, medicine, would be justifiable.

Institutions should review their admissions criteria to ensure that any unjustifiable age restrictions are removed.

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# TAXING DEVELOPMENT...AGAIN!

**T**he government is seeking views on the introduction of a planning gain supplement (PGS) which is designed to help finance vital infrastructure and to secure a "step change" in the supply of more and better quality homes. The PGS (which was recommended by Kate Barker in her review of housing supply) is a tax on the increase in land value when planning permission is granted which would be ploughed back into local communities to pay for additional infrastructure to support the government's proposed housing growth. The tax does not just apply to housing development however. Subject to some possible exemptions (see below) this tax will hit any form of development which requires "full planning permission" and will affect universities and colleges whether they are intending to dispose of land for an alternative use linked to a requirement to secure an alternative planning permission eg residential development, to build new campus buildings or to refurbish/replace existing buildings (again where the latter might require planning permission).

The PGS consultation paper published in December indicates that the government has accepted some of the earlier criticisms made by developers and landowners alike about the proposed tax - including for example concern that the PGS would probably suffer from the same problems as development gains taxes in the 1970s which led to widespread avoidance, created incentives to hold back development and land supply and which were eventually abolished. As now proposed, the PGS will be based on the value of the land when planning permission is granted, paid when development starts rather than earlier in the development process (such as on the grant of planning permission), and set at a "modest" rate which, the government says, should not act as a disincentive. PGS will not be levied on any increase in land value as a result of home improvements, and, in addition to having a lower rate for brownfield sites, the government is also considering excluding small-scale improvements on non-residential properties. However, no exemption is proposed for larger-scale improvements to non-residential buildings, nor is there anticipated to be an exemption for charities. The tax will clearly be an important consideration when considering the feasibility of

renewing old buildings which are no longer fit for purpose. Although the PGS would be paid by the person carrying out the development it will nonetheless have a greater impact on land owners who are likely to receive less for the land (although they would then for the purposes of capital gains be taxed on a potentially smaller gain), reducing the sale proceeds which can be ploughed back into the institution's growth and development. It is likely that the introduction of PGS will also add to the delays in the planning process which are currently experienced and that negotiations over Section 106 Agreements (without which planning permission will not be issued) will continue to be protracted. It is unlikely therefore that the proposed tax will help move forward those capital projects which are dependent upon the certainty of a planning permission to secure LSC or HEFCE funding. We await with interest the government's decision on whether or not to introduce the tax.

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# TRANSNATIONAL PROVISION: MANAGING LEGAL RISKS

**A**s the drive to increase transnational provision gains ever-increasing momentum, how can UK institutions ensure that they are effectively managing the potential risks involved in establishing and running overseas ventures?

The benefits of international collaboration are clear: UK higher education is a highly marketable commodity and brings with it possibilities for increased international understanding, collaborative research and student opportunity. But, if not managed effectively, international activities can also create significant risks. The costs of extricating an institution from an unsuccessful venture can be substantial, and the 'divorce' is unlikely to be met with the same level of personal and institutional enthusiasm that was applied at the inception of the project.

International activities can take a variety of forms, from direct provision (eg establishing a branch campus), to participation in a joint venture (eg establishing a joint venture company), or, more commonly, via a contractual arrangement with an overseas institution. In all cases, although legal issues are a relatively small part of a bigger picture (with operational,

academic and quality assurance considerations a central focus), to maximise the benefits and minimise the potential risks of transnational provision, institutions must be willing, at the start of the process, to tackle some important issues head-on. These include:

- Good governance - ensure that the venture is within the institution's legal powers and has been approved at an executive level
- 'Due diligence' enquiries - appropriate enquiries should be made to understand the local law and practice (eg is the political climate stable? Are there restrictions on the operation of foreign institutions? Are local/national approvals required?) and to assess the good standing of any proposed partner (eg does it have legal capacity to enter into the arrangement? Has it been subject to prosecution?)
- Structures - what is the most appropriate structure for the venture, taking into account the likely duration/scale of the project, tax and financial considerations, and the potential complications of terminating the project? Possible

structures include straightforward contractual agreement between two partners, or a new joint venture company or other vehicle. Will the vehicle be established here, or under local law and practice?

- Contractual issues - contractual documents should clearly set out the responsibilities of each collaborative partner. Key issues include responsibility for students (which institution's disciplinary, complaints and academic appeals procedures will apply? What services are students entitled to access? It is essential that the structure of the relationship is fully explained to students), quality procedures, ownership of intellectual property rights and control of promotion and marketing activities
- Planning for the divorce - one of the most tricky, but important, issues to deal with in the contract is the basis on which the arrangement can be terminated (eg on notice, or failure to fulfil obligations, particularly in terms of quality procedures), the implications (arrangements for students to complete their studies, restrictions on further marketing/enrolment) and the



## THE EVER-CHANGING LANDSCAPE OF EQUALITY LEGISLATION

method of resolving disputes between the collaborative partners (including an informal process, and the ultimate law and jurisdiction applicable).

Transnational provision presents a wealth of new opportunities. To ensure that the integrity and reputation of UK higher education is maintained, and that students are provided with a high- quality learning experience equal to that available in this country, legal issues should be addressed up front, in the same way as academic and operational considerations. It is also important to remember that the awarding institution's obligations to students do not end when the collaboration does - students have a contract too.

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**C**hange is one thing, but progress is another, the philosopher, Bertrand Russell, aptly observed. The recent changes in equality legislation strive to achieve genuine progress in creating a society in which diversity is revered and the dignity and value of each individual are respected. Such progress inevitably creates obligations, as well as rights, and this article summarises those provisions that are relevant to FE and HE institutions.

### DISABILITY DISCRIMINATION

The Disability Discrimination Act 1995 (DDA) has been amended by the Disability Discrimination Act 2005. Some of the new provisions came into force on 5 December 2005, and others do not come into force until December 2006 (for example the duty of publicly-funded institutions to promote disability equality). That notwithstanding, publicly-funded institutions will need to prepare now to ensure that they can meet the deadlines for compliance with the new duty.

### Definition of disability

Since 5 December 2005, the definition of "disability" no longer requires that a mental illness is "clinically well-recognised" before it can amount to a mental impairment for the purposes of the legislation. Consequently, someone who has a mental illness could be covered by the DDA even if it is difficult to name the precise condition. The amended definition of disability also includes progressive conditions such as HIV, cancer and multiple sclerosis from the point of diagnosis, rather than at the point when symptoms are manifested.



## Students' unions

Since 5 December 2005, students' unions have come within the ambit of the DDA. As a consequence, it is unlawful for students' unions to discriminate against their disabled members and guests in relation to access to benefits, facilities and services. It is also unlawful to discriminate in relation to the terms of membership and in refusing membership.

In the case of guests, unlawful discrimination may occur in relation to the terms of any invitation to be a guest of the students' union, including a refusal to issue an invitation. It is also unlawful to subject a disabled person to any other detriment. Discrimination can be justified on certain limited grounds, for example on grounds of health and safety, the mental incapacity of the disabled person, or cost.

The duty to make reasonable adjustments does not come into force until 4 December 2006 and is set out in regulations made by the Secretary of State. The duty will apply to students' unions' policies, procedures, practices or premises which adversely affect disabled members, potential members, guests or potential guests and may require the provision of auxiliary aids. Failure to make reasonable adjustments can be justified on health and safety and mental incapacity grounds. The duty will not require students' unions to take steps which fundamentally alter the nature of the services, facilities or

benefits that they provide to their members.

## General duty to promote disability equality

The amended legislation also imposes a general duty comparable to the duty to promote race equality. It imposes a positive general duty on publicly-funded institutions and other public authorities in carrying out their functions to have due regard to the need to:

- Eliminate unlawful disability discrimination and harassment
- Promote equality of opportunity between disabled persons and other persons
- Take account of persons' disabilities even where that involves treating disabled persons more favourably than other persons
- Promote positive attitudes towards disabled persons
- Encourage participation by disabled persons in public life.

In order to achieve these objectives, various specific duties are also imposed on institutions. By 4 December 2006, institutions must produce a Disability Equality Scheme setting out an action plan for promoting disability equality. The Scheme must also include statements with regard to the following:

- The ways in which disabled people have been involved in its development
- The methods for assessing the impact of the institution's policies and practices (or the likely impact of its proposed policies and practices) on equality for disabled persons
- The arrangements for gathering information on the effect of the institution's policies and practices on disabled persons and in particular its arrangements for gathering information on:
  - Their effect on the recruitment, development and retention of its disabled employees
  - Their effect on the educational opportunities available to, and on the achievement of, disabled students



- The institution's arrangements for making use of such information in discharging its general duty and in particular, its arrangements for:
  - Regularly reviewing the effectiveness of the steps which the institution takes in order to discharge the general duty; and
  - Preparing subsequent Schemes i.e. when publishing revised Schemes, which institutions are required to do every 3 years.

Institutions must have put into effect the arrangements set out in their Schemes within 3 years of the date they were published i.e. no later than 4 December 2009. In addition, reports detailing the implementation of the Schemes must be published annually by institutions.

A failure by an institution to discharge the general duty may be challenged by means of judicial review. This can be commenced by individuals or by the Disability Rights Commission (DRC). The DRC also has power to serve compliance notices on institutions which fail to discharge the specific duties.

### **DRC Code of Practice**

The DRC has published a statutory Code of Practice to provide practical guidance to public authorities generally on discharging their general and specific duties. The Code does not impose legal obligations. However, because it has been approved by Parliament, the Code is admissible as evidence in legal proceedings and must be taken into account by the courts. The Code can be found at [www.drc-gb.org/thelaw/public-sector/duty/codes.asp](http://www.drc-gb.org/thelaw/public-sector/duty/codes.asp).

### **EQUALITY ACT 2006**

The Equality Act 2006 received Royal Assent on 17 February 2006, although at the time of drafting no indication had been given as to when its provisions will come into force.

#### **General duty to promote gender equality**

Yet another broad, positive equality duty is being imposed on publicly-funded education institutions. The Equality Act amends the Sex Discrimination Act 1975 to create a duty to eliminate unlawful sex discrimination and to promote equality of opportunity between men and women. Attendant specific duties to bolster the achievement of the general duties will be imposed by means of regulations which have yet to be drafted, though it is likely that they will be similar to those imposed under race and disability legislation.



## **Discrimination on the grounds of religion or belief and sexual orientation**

It will be unlawful for institutions, insofar as they provide goods, facilities or services to the general public or insofar as they sell or let premises, to discriminate against individuals on the grounds of religion and belief.

The Act makes provision for the Secretary of State to make regulations to render such discrimination on the grounds of sexual orientation also unlawful.

## **Commission for Equality and Human Rights**

The Act establishes a single Commission for Equality and Human Rights (CEHR), replacing the three existing equality bodies (the Commission for Racial Equality, the DRC and the Equal Opportunities Commission). The CEHR's remit is to encourage the development of a society in which there is respect for, and protection of, human rights and diversity, together with the prevention of discrimination on the grounds of race, disability, sex, age, religion/belief and sexual orientation.

The CEHR will have enforcement powers with regard to equality legislation which are comparable to the powers of the three existing commissions. It may therefore give legal assistance in the form of advice and representation, as well as facilities for settling disputes. It may also issue practical guidance in the form of codes of practice, as the DRC has already done in relation to disability and the Commission for Racial Equality has done in relation to the race equality duty. It will also assess compliance with the general duties with regard to race, disability and gender.

The CEHR may also commence proceedings for breaches of human rights legislation relevant to any of its functions, notwithstanding that the CEHR is not itself a victim of that breach.

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# EDUCATION NEWS

## Team news

**Joanna Forbes** has resumed as editor of Education Brief following her return to work from maternity leave. Another member of the team, **Smita Jamdar**, will be leaving mid-May to have her second child.

**Zoë Preston** has joined as PA to the team. She will job share with the current PA, Karen Oakley. Zoë has previously worked as a secretary at the firm and has two young children.

## Firm news

Martineau Johnson has recently welcomed three new partners: Mario Conti, Andrew Poole and Stephen Claus.

- Mario joins as Head of Pensions. He brings with him over 25 years of pensions experience, during which the last 13 years were spent in one of the UK's leading pensions teams in private practice, and the previous period working as an in-house lawyer for the UK's leading pension consultancy, actuarial and administration organisations.
- Andrew has joined the Energy, Projects and Commerce Team as part of the continued growth of the firm's national energy and utilities practice. He will play a key role in advising clients on renewable energy

## STOP PRESS

### The end for VAT avoidance schemes?

The European Court of Justice has just handed down its decision in three tax cases relating to the University of Huddersfield, BUPA Hospitals Limited and Halifax plc. The essence of the decision was that various activities were carried on which had no commercial purpose and were purely for VAT avoidance purposes. The court held that despite the fact that the transactions had no commercial purpose and therefore had a tax avoidance purpose this did not prevent them from being taxable supplies or for the transactions to constitute economic activities. However the court did say that any attempt to recover the VAT in these circumstances would be negated as contravening the EC VAT abuse principle. Consequently the schemes failed.

projects such as biofuels facilities, waste management schemes and windfarms.

- Stephen joined the Charity Law Team on 1 March. He has worked for the last 13 years as a Senior Solicitor with the Charity Commission in Liverpool and has a national reputation in all areas of charity law, regulation and administration. His appointment is a great addition to our expertise in this area of law.

If you would like any further information about this edition of Education Brief, or about our work for education clients, please contact Paul Pharaoh, Partner and Head of Education, on **Direct Dial:** 0870 763 1314 or **Email:** paul.pharaoh@martjohn.com

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