Positive Action Guidance (Provided by UCL Legal Services)

General Principles on Positive Action

Please note: please refer to this guidance if you are considering positive action initiatives within your department. If you have any further questions, please contact UCL Legal Services.

The Equality Act 2010 does not prohibit the use of positive action measures in certain circumstances, to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, and meet their particular needs. Any such measures must be a proportionate way of achieving the relevant aim.

The following are general principles on positive action only and must be considered in light of the specific circumstances of each case.


Please note that there are specific legal provisions on equal treatment which apply to, amongst other things, positive action in recruitment and promotion and the treatment of disabled persons, which are not addressed here. There are also circumstances where certain ‘ancillary benefits’ to education or training can be provided only to students from outside the EEA. Please see the ECU guidance for further information on this.

1. General Principle

The Equality Act (in section 158) allows positive action in certain circumstances. The general positive action provision can apply where UCL reasonably thinks that:

- Persons who share a protected characteristic suffer a disadvantage connected to the characteristic;

- Persons who share a protected characteristic have needs that are different from the needs of persons who do not share it; or

- Participation in an activity by persons who share a protected characteristic is disproportionately low.

The EHRC Technical Guidance (link above) gives further detail on the meaning of ‘disadvantage’, ‘different needs’ and ‘disproportionately low participation’.

If any of the above noted circumstances exist, then UCL can (but is not obliged to) take any action which is a proportionate means of achieving the aim of:

- Enabling or encouraging persons who share the protected characteristic to overcome or minimise the disadvantage identified;

- Meeting the needs identified; or
1. Enabling or encouraging persons who share the protected characteristic to participate in that activity.

'Protected characteristics' are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

2. Evidence

The fact that UCL must 'reasonably think' that one of the relevant conditions for positive action applies means that there must be evidence to support this view. The evidence will need to be more than supposition or anecdotal evidence. The ECU guidance (link above) states that it is likely that statistical evidence will be required.

The ECHR Technical Guidance states that the evidence does not need to be sophisticated statistical data or research. It may simply involve looking at the profiles of students and/or making inquiries of other education providers in the area. A decision to take positive action could be based on qualitative evidence such as consultations or focus group work with students and staff, equality impact assessments, surveys showing poor experience of an area of provision related to a protected characteristic, complaints and discrimination claims or evidence of similar problems gathered by other education providers.

In any event UCL should ensure that the evidence it relies on is sufficiently robust.

3. Proportionate means

To be lawful, any action which is taken under the positive action provisions must be a proportionate means of achieving one of the 'stated aims' set out in paragraph 1 hereof. The explanatory notes to the Equality Act state that the extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them.

UCL must be able to show how its actions specifically address the stated aim. UCL needs to consider:
• Is the action an appropriate way to achieve the stated aim?
• If so, is the proposed action reasonably necessary to achieve the aim; that is, in all of the circumstances, 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?

4. Continuous Review

UCL should have appropriate procedures in place which allow it to continuously review the impact of and need for its actions to ensure that these actions will continue to fall within the scope of positive action. If conditions change and the actions no longer serve their purpose, they may no longer be justifiable.

5. Money from Third Party Donors (i.e. UCL not using own funds for award)

Monies for bursaries, scholarships or prizes may come from third parties. The donor may wish to set the selection criteria for such award. In such circumstances UCL may still be liable for discrimination.

UCL must have due regard to the public sector duty to eliminate unlawful discrimination, should not assist others in engaging in unlawful discrimination and would therefore wish to ensure that
selection criteria used by third party donors would not themselves amount to unlawful discrimination.

In the case of third party funding, UCL would therefore still need to take steps to ensure that its actions are within the scope of positive action.

6. Public Sector Equality Duty

This duty gives public authorities legal responsibilities to demonstrate that they are taking action on equality in policymaking, in the delivery of services and in public sector employment.

The duty requires public authorities to take steps to eliminate unlawful discrimination and harassment, and also to actively advance equality and to foster good relations.

Positive action may in certain circumstances assist UCL in complying with its Public Sector Equality Duty.

A possible way to help meet the Public Sector Equality Duty, and one that would assist UCL in identifying that its bursary, scholarship or prize both had a legitimate aim and was proportionate, would be to undertake an equality impact assessment.

7. Questions to consider

To assist UCL in thinking through selection criteria for a bursary, scholarship or prize, the following questions should be considered.

- Is there a particular need or disadvantage among a group that UCL wishes to address?
- What is the evidence of that need or disadvantage?
- What is the cause of that need or disadvantage?
- Is there underrepresentation in a particular area by a particular group? Is there evidence of the cause of that underrepresentation?
- How will the bursary, scholarship or prize address the particular need, disadvantage or underrepresentation?
- Is there another, more effective, way for UCL to address that need, disadvantage or underrepresentation?
- For what period of time will the bursary, scholarship or prize be in place?
- What arrangements will be made for the review of the bursary, scholarship or prize and its need and impact?
- Will there be an adverse impact on other groups as a result of the provision of the bursary, scholarship or prize?
- What steps can be taken to mitigate any adverse impact?

UCL is advised to keep some form of written record which sets out the outcome of the consideration of the above noted points in relation to each scheme.