

Equality and Human Rights Commission

Essential guide

to the Public Sector Equality Duty

A guide for public authorities
in Scotland

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1 | Introduction

Context for this guide

This guide is one of a series written by the Equality and Human Rights Commission (the Commission) to explain how public authorities can meet the requirements of the Equality Act 2010 (the Act), which harmonises and replaces previous equalities legislation. The Act includes a new public sector equality duty which replaced the separate duties relating to race, disability and gender equality. The public sector equality duty came into force on 5 April 2011.

There are eight guides giving advice on the public sector equality duty in Scotland:

1. Essential guide to the public sector equality duty
2. Equality outcomes and the public sector equality duty
3. Evidence and the public sector equality duty
4. Involvement and the public sector equality duty
5. Assessing impact and the public sector equality duty
6. Mainstreaming the equality duty
7. Employee information and the public sector equality duty
8. Board diversity and the public sector equality duty

The essential guide provides the main overview of the requirements of the public sector equality duty. The other seven documents provide additional practical advice.

Further information and resources are available at: www.equalityhumanrights.com

If you require this guide in an alternative format and/or language please contact us to discuss your needs. Contact details are available at the end of the publication.

Legal status of this guide

This guide gives advice on how to meet the public sector equality duty. It will help public authorities to comply with their legal duties under:

- Section 149 of the Equality Act 2010 (the public sector equality duty), and
- The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 as amended

Who this guide is for

This guidance provides advice to two types of public authority: those that are subject only to the public sector equality duty and those that are also subject to the specific duties mentioned above ('listed authorities'). The different requirements for each type of public authority are set out clearly throughout this guide.

The guide is aimed at those responsible for implementing the public sector equality duty in public authorities in Scotland. It will be of interest to staff right across public authorities, but particularly those engaged in business planning, procurement, analysis, performance management, human resources, grant making, governance and scrutiny.

The Commission has produced separate guidance on the equality duty for public authorities in England and Wales. The guidance in England also includes non-devolved public authorities in Scotland and Wales.

The guide will also assist those who have an interest in the work of public authorities such as service users and recipients, voluntary bodies, unions, equality organisations and citizens.

Content of this guide

This guide:

- Provides an overview of the public sector equality duty
- Explains what the general equality duty is, what the specific duties are, how they relate to each other and who they apply to
- Explains what public authorities will need to do to meet the requirements of the general equality duty and the specific duties
- Includes the full text of the legislation

A note on terminology

This guidance uses the term ‘equality groups’ to mean ‘persons who share a relevant protected characteristic’.

2 | The Public Sector Equality Duty

The purpose of the public sector equality duty

The purpose of the public sector equality duty is to ensure that public authorities and those carrying out a public function consider how they can positively contribute to a more equal society through advancing equality and good relations in their day-to-day business, to:

- take effective action on equality
- make the right decisions, first time around
- develop better policies and practices, based on evidence
- be more transparent, accessible and accountable
- deliver improved outcomes for all.

The public sector equality duty requires equality to be considered in all the functions of public authorities, including decision-making, in the design of internal and external policies and in the delivery of services, and for these issues to be kept under review.

The public sector equality duty is set out in sections 149–157 and schedules 18 and 19 of the Equality Act.

It replaced the previous public sector equality duties, the Race Equality Duty, introduced in 2002, the Disability Equality Duty (2006) and the Gender Equality Duty (2007).

The previous public sector equality duties shifted the onus away from an individual having to seek redress after suffering discrimination, and onto public authorities being required to take a proactive and organised approach to tackling ‘institutional discrimination’ and focusing on organisational change. These duties aimed to mainstream equality into public sector culture in practical and demonstrable ways.

These principles continue to apply to the public sector equality duty.

The public sector equality duty covers the following protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex

and sexual orientation. The public sector equality duty also covers marriage and civil partnerships, with regard to eliminating unlawful discrimination in employment.

The ban on age discrimination in services and public functions came into effect on 1 October 2012. As the ban does not extend to people under 18 this limits the scope of the duty to have due regard to the need to eliminate 'unlawful discrimination' under the first aim of the duty (although it does not limit the other two aims).

The General Equality Duty

We refer to the public sector equality duty as set out in the Equality Act 2010 as the 'general equality duty'.

The general equality duty requires public authorities, in the exercise of their functions, to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct
- Advance equality of opportunity between people who share a relevant protected characteristic and those who do not
- Foster good relations between people who share a protected characteristic and those who do not.

This guidance refers to these three elements as the three 'needs' mentioned in the general equality duty and so when we discuss the general equality duty we mean all three needs. To comply with the general equality duty, a public authority must have due regard to all three of its needs.

The Equality Act explains that the second need (advancing equality of opportunity) involves, in particular, having due regard to the need to:

- Remove or minimise disadvantage suffered by people due to their protected characteristics
- Take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people
- Encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.

The Act also sets out that:

- meeting different needs includes (among other things) taking steps to take account of disabled people's disabilities

- fostering good relations means tackling prejudice and promoting understanding between people from different groups
- meeting the general equality duty may involve treating some people more favourably than others.

Who is subject to the General Equality Duty?

The general equality duty covers all public authorities named or described (listed) in Schedule 19 – Part 3 of the Equality Act 2010 as amended by subsequent regulations.

A consolidated list of authorities can be found in our Technical Guidance on the Public Sector Equality Duty Scotland. Examples of these include local authorities, education authorities, health boards, police, fire and rescue authorities, further and higher education authorities and Scottish Ministers. It covers public authorities when carrying out their public functions as service providers, as policy makers and as employers and also covers services and functions which are contracted out.

The duty also covers all bodies carrying out a public function in relation to that function, where the 'public function' is one defined as such by the Human Rights Act 1998. This includes private and voluntary sector organisations. An example of this would be a private company running a prison on behalf of the Scottish Government. The company would, however, only be covered by the general equality duty with regard to its public functions, but not for other work, such as providing security services for a supermarket.

In this guide, when we refer to public authorities subject to the general equality duty, this includes listed authorities as well as public authorities who are covered when they carry out public functions.

Exceptions

Schedule 18 of the Equality Act sets out limited exceptions to the application of the general equality duty. These relate to certain functions, such as immigration (in relation to race, religion, age and the advancement of equality) and to judicial functions.

A small number of bodies that would otherwise be covered by the duty because they carry out public functions are specifically excluded from being subject to the duty. This includes the Scottish Parliament.

The general duty in relation to age does not apply in relation to education and service provision in schools or in relation to children's homes. The Government has the power to vary the exceptions in Schedule 18.

Implementing the general duty

The following principles are drawn from case law on the public sector equality duty. In order to meet the general duty, a public authority must keep in mind that:

- Those who exercise its functions must be aware of the general equality duty's requirements. Compliance with the general equality duty involves a conscious approach and state of mind. General regard to the issue of equality is not enough to comply.
- The duty places equality considerations, where they arise, at the centre of policy formulation, side by side with all other pressing circumstances (such as financial constraints), however important these might be.
- The duty is on the decision maker personally in terms of what he or she knew and took into account. A decision maker cannot be assumed to know what was in the minds of his or her officials giving advice on the decision.
- Each need of the duty must be considered. The requirement to have due regard to the need to advance equality of opportunity is a separate obligation, in addition to the need to avoid unlawful discrimination.
- The general equality duty must be complied with before and at the time a particular policy is under consideration, as well as at the time a decision is taken. A public authority subject to the general equality duty cannot satisfy the general equality duty by justifying a decision after it has been taken.
- A public authority must consciously think about the need to do the things set out in the general equality duty as an integral part of the decision-making process. Having due regard is not a matter of box ticking. The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision. There should be evidence of a structured attempt to focus on the details of equality issues.
- A public authority must have sufficient evidence on which to base consideration of the impact of a policy or decision. It will need to consider whether it has sufficient

information about the effects of the policy, or the way a function is being carried out, on the needs set out in the general equality duty.

- A public authority must take responsibility for complying with the general equality duty in relation to all functions to which the general equality duty applies. Responsibility for the general equality duty cannot be delegated to external organisations that are carrying out functions on its behalf.
- A public authority must consciously consider the need to comply with the general equality duty, not only when a policy is developed and decided upon, but also when it is being implemented. The general equality duty is a continuing one, so public authorities may need to review policies or decisions in light of the general equality duty, for example if the make-up of service users changes.
- Although a public authority is not legally required to keep records of its consideration of the needs of the general equality duty in making decisions, it is good practice to do so and it encourages transparency. If it is challenged it will be difficult to demonstrate that it has had due regard to the needs of the general equality duty if records are not kept.

The general equality duty applies to the exercise of all public functions. The duty applies to all of the decisions made in the course of exercising public functions, not just to policy development and high-level decision-making. To ensure compliance with that the duty at all levels of decision-making (including in an individual case), there must be arrangements to integrate it properly into the day- to-day activities of those bodies to which it applies.

Who needs to be aware of the General Equality Duty and Specific Duties?

It is important for people throughout public bodies to be aware of the general equality duty so that it is considered in their work where relevant. Examples may include:

- **Board members** – in how they set strategic direction, review performance and ensure good governance of the organisation
- **Senior managers** – in how they oversee the design, delivery, quality and effectiveness of the organisation's functions
- **Equality and diversity staff** – in how they raise awareness and build capacity about the general equality duty and specific duties within the organisation and how they support staff to deliver on their responsibilities

- **Human resources staff** – in how they build equality considerations into employment policies and procedures
- **Policy makers** – in how they build equality considerations into all stages of the policy making process including review and evaluation
- **Communications staff** – in how they ensure relevant equality information is available and accessible
- **Analysts** – in how they support the organisation to understand the effect of its policies and practices on people from equality groups
- **Frontline staff** – in how they meet the needs of people from equality groups
- **Procurement and commissioning staff** – in how they build equality considerations into the organisation’s relationships with suppliers.

3 | The Specific Duties

The specific duties were created by secondary legislation in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These specific duties came into force on 27 May 2012 and were subsequently amended by:

- The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2015
- The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016

The purpose of the Specific Duties

The purpose of the specific duties in Scotland is to help those authorities listed in the Regulations in their performance of the general equality duty.

Who is subject to the Specific Duties?

Many of the authorities that are subject to the general duty are also covered by the specific duties. These listed authorities are named or described in the Schedule to the Regulations and subsequent regulations. The most up to date list of bodies subject to the specific duties can be found at:

<http://www.equalityhumanrights.com/about-us/devolved-authorities/commission-scotland/public-sector-equality-duty-scotland> .

The Specific Duties in summary

Each listed authority is required to:

- report on mainstreaming the equality duty
- publish equality outcomes and report progress
- assess and review policies and practices
- gather and use employee information
- use information on members or board members gathered by the Scottish

Ministers

- publish gender pay gap information (where they have at least 20 employees)
- publish statements on equal pay (where they have at least 20 employees)
- consider award criteria and conditions in relation to public procurement
- publish in a manner that is accessible.

A number of listed authorities must also publish the number of men and women who have been members of the authority (or board of management), and report on the steps they have taken, and intend to take towards ensuring diversity in relation to the protected characteristics of those members. The listed authorities subject to this duty are set out in www.equalityhumanrights.com/en/publication-download/public-authorities-scotland-who-covered-specific-duties

Additionally, there is a requirement for a listed authority to consider other matters which may be specified by the Scottish Ministers and a duty for the Scottish Ministers to publish proposals for activity to enable listed authorities to better perform the general equality duty.

The reporting cycle for the Specific Duties

Many of the specific duties require information to be reported upon and published on a reporting cycle of either two or four years. As listed authorities have become subject to the specific duties at different times, the cycles on which they report are different. Listed authorities should, as far as possible, publish information through the public performance reporting system appropriate to that authority. However, most listed authorities still report on their specific duties information separately. For the details of the reporting cycle appropriate to any particular listed authority, please see www.equalityhumanrights.com/en/publication-download/public-authorities-scotland-who-covered-specific-duties

What the Specific Duties require

Duty to report on mainstreaming the equality duty

A listed authority is required to publish a report on the progress it has made to make the general equality duty integral to the exercise of its functions, so as to better perform that duty. These should be published at intervals of not more than two years.

These reports must include (if not published previously): an annual breakdown of the information the authority has gathered under its duty to gather and use employee information and details of the progress that it has made in using that information to enable the authority to better perform the general equality duty. Since May 2016, a number of listed authorities must also publish the number of men and women who have been members of the authority (or board of management), and report on the steps they have taken, and intend to take, towards ensuring diversity in relation to the protected characteristics of those members.

Please see our guide *Mainstreaming the Equality Duty*.

Duty to publish equality outcomes and report progress

A listed authority is required to publish a set of equality outcomes which it considers will enable it to better perform the general equality duty. It must publish a fresh set of equality outcomes within four years of publishing its previous set.

In preparing a set of equality outcomes, the authority must take reasonable steps to involve people who share a relevant protected characteristic and anyone who appears to the authority to represent the interests of those people.

The authority must also consider relevant evidence relating to people who share a relevant protected characteristic.

If an authority's set of outcomes does not further the needs of the general equality duty in relation to every relevant protected characteristic, it must publish the reasons for this. An authority must publish a report on the progress made to achieve its' equality outcomes every two years.

Please see our guides *Equality Outcomes and the Public Sector Equality Duty*, *Evidence and the Public Sector Equality Duty* and *Involvement and the Public Sector Equality Duty* for more information.

Duty to assess and review policies and practices

A listed authority is required to assess the impact of applying a proposed new or revised policy or practice, against the needs of the general equality duty, in so far as is needed to meet the general equality duty.

In making the assessment, an authority must consider relevant evidence relating to people who share a protected characteristic (including any evidence received from those people).

In developing a policy or practice, an authority must take account of the results of their assessment of that policy or practice.

If an authority decides to apply the policy or practice in question, it must publish the results of the assessment, within a reasonable time.

An authority must also make arrangements to review and, where necessary, revise any existing policies or practices.

An authority's consideration of whether or not an assessment of impact is needed cannot be treated as an assessment itself.

Please see our guide *Assessing Impact and the Public Sector Equality Duty* for more information.

Duty to gather and use employee information

A listed authority is required to take steps to gather information on the composition of its employees (if any); as well as annual information on the recruitment, development and retention of employees with respect to the number and relevant protected characteristics of employees.

Importantly, the authority must use this information to better perform the general equality duty.

An authority's mainstreaming report (see above) must include an annual breakdown of the information gathered. It must also include details of the progress that the authority has made in gathering and using the information to enable it to better perform the general equality duty.

Mainstreaming reports must be published at intervals of no more than two years.

Please see our guide *Employee Information and the Public Sector Equality Duty* for more information.

Duty to use information on the protected characteristics of members

Scottish Ministers are required, from time to time, to gather information on the protected characteristics of the members (or board of management) of listed authorities and will provide the information they gather to that listed authority. Each listed authority must then use the information to better perform their general equality duty.

A “relevant listed authority” must then publish number of men and women who have been members of the authority and demonstrate how they have used, and intend to use, the information to ensure diversity in relation to the protected characteristics of those members. This information must be included in the relevant listed authorities’ two yearly mainstreaming reports.

A “relevant listed authority” is one which has at least one appointed member.

Information about which listed authorities must meet the publishing part of the duty can be found here www.equalityhumanrights.com/en/publication-download/public-authorities-scotland-who-covered-specific-duties

Duty to publish gender pay gap information

A listed authority is required to publish information every two years on the percentage difference, among its employees, between men’s average hourly pay (excluding overtime) and women’s average hourly pay (excluding overtime).

The information published must be based on the most recent data available for a date when the authority had at least 20 employees. No publication is necessary if the authority has not had 20 employees at any point since these regulations came into force or since publication was last due.

The threshold for this duty changed from 150 to 20 in April 2016, affecting most listed authorities at that time. A small number of listed authorities are subject to the threshold change on different dates. Information about the effective dates for each listed authority can be found here. www.equalityhumanrights.com/en/publication-download/public-authorities-scotland-who-covered-specific-duties

Duty to publish statements on equal pay, etc.

A listed authority is required to publish a statement on equal pay every four years. The information published must be based on the most recent data available for a date when the authority had at least 20 employees. No publication is necessary if the authority has not had 20 employees at any point since these regulations came into force or since publication was last due.

The threshold for this duty changed from 150 to 20 in April 2016, affecting most listed authorities at that time. A small number of listed authorities are subject to the threshold change on different dates. Information about the effective dates for each listed authority can be found here. www.equalityhumanrights.com/en/publication-download/public-authorities-scotland-who-covered-specific-duties

An equal pay statement must contain the authority's policy on equal pay, as well as information on occupational segregation (the concentration of groups in particular grades and in particular occupations).

The first report published by each listed authority needs to contain information relating to women and men only. However, the second and subsequent reports must also contain equal pay information in relation to people who are disabled and people who are not, and people who are members of a minority racial group and people who are not.

Duty to consider award criteria and conditions in relation to public procurement

Where a listed authority is carrying out a public procurement exercise, it must have due regard to whether its award criteria should include equality considerations which will help it to better perform the equality duty.

Where it proposes to stipulate performance conditions in its procurement agreement, it must have due regard to whether the conditions should include equality considerations which will help it to better perform the equality duty.

Duty to publish in a manner that is accessible, etc.

If it has existing public performance reporting systems a listed authority is required to use these, as far as practicable, to publish its:

- report on mainstreaming the equality duty
- set of equality outcomes and report on progress made to achieve these outcomes
- gender pay gap information
- statement on equal pay and occupational segregation.

The reports must also be accessible to the public.

Duty of the Scottish Ministers to publish proposals to enable better performance

Scottish Ministers must publish proposals for activity to enable a listed authority to better perform the general equality duty. The first report needed to be published not later than 31 December 2013 with subsequent reports published every four years.

This timing allows Scottish Ministers to take account of the information published by Scottish listed authorities in their mainstreaming reports, equality outcomes, gender pay gap information and statements on equal pay and occupational segregation.

Scottish Ministers must also publish a report on progress in relation to this activity not later than 31 December 2015 and subsequently every four years.

Appendix 1 |

Section 149 of Equality Act 2010 Public sector equality duty

- 1) A public authority must, in the exercise of its functions, have due regard to the need to:
 - a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
- 3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
 - a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
 - c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- 4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

- 5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
 - a) tackle prejudice, and
 - b) promote understanding.
- 6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
- 7) The relevant protected characteristics are – age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.
- 8) A reference to conduct that is prohibited by or under this Act includes a reference to:
 - a) a breach of an equality clause or rule;
 - b) a breach of a non-discrimination rule.
- 9) Schedule 18 (exceptions) has effect.

Contacts

This publication and related equality and human rights resources are available from the Commission's website: www.equalityhumanrights.com

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

Website www.equalityadvisoryservice.com

Telephone 0808 800 0082

Textphone 0808 800 0084

Hours 09:00 to 20:00 (Monday to Friday)
10:00 to 14:00 (Saturday)

Post FREEPOST Equality Advisory Support Service FPN4431

Questions and comments regarding this publication may be addressed to: scotland@equalityhumanrights.com. The Commission welcomes your feedback.

Alternative formats

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