

A guide to regulation of the Public Sector Equality Duty in England, Scotland and Wales

Introduction

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006 and is accredited by the UN as an 'A status' National Human Rights Institution.¹ The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and it regulates the public sector equality duty ('the duty').² This guide summarises our approach to this regulatory role. It is consistent with our general Compliance and Enforcement Policy,³ and reflects the requirements of the Regulators' Code.⁴ The guide aims to set out for public authorities and other interested parties how, in any particular situation, we promote compliance with the duty.

The Commission's legal powers and duties

The Commission's remit is set out in the Equality Act 2006. Under Section 8, the Commission has a duty to encourage good practice in relation to equality and diversity, promote equality of opportunity, and promote awareness and understanding of rights under the Equality Act 2010, as well as enforcing the 2010 Act. To further these duties, under Section 13 of the 2006 Act we may publish information, undertake research or give advice and guidance. Section 14 gives us the power to issue codes of practice,⁵ which must be taken into account by courts and tribunals in relevant cases.

Sections 20 to 32 of the 2006 Act give the Commission formal enforcement powers, which may be used in connection with the public sector equality duty. These powers are explained below.

¹ In Scotland, the Commission shares its human rights remit with the Scottish Human Rights Commission.

² Under Section 149 Equality Act 2010

³ http://www.equalityhumanrights.com/uploaded_files/compliance_and_enforcement_policy_final.doc

⁴ published by the Department for Business Innovation and Skills:

<https://www.gov.uk/government/publications/regulators-code>

⁵ Once approved by Parliament, a code of practice issued by the Commission becomes a statutory document

1. The public sector equality duty

- 1.1. From April 2011, Section 149 of the Equality Act 2010 introduced a single, integrated public sector equality duty to replace the separate statutory duties for race, disability and gender. The duty covers all the characteristics protected by the 2010 Act.⁶
- 1.2. The duty is an important governance tool to improve the quality of decision-making by public authorities in relation to the impact of their decisions on people sharing protected characteristics. The duty applies to over 40,000 public authorities across Great Britain and it applies to all their decisions, including policy formation, budget setting, procurement, service delivery and employment. Private and third sector organisations are also subject to the duty when they perform public functions.
- 1.3. The duty has two elements: the general duty and the specific duties. The general duty applies in relation to England, Scotland and Wales. It requires public authorities, in all their functions, to have due regard to the need to:
 - a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
 - 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.
- 1.4. These are known as the three aims of the general duty and they set out the overarching goal of the legislation. It should be noted that the general duty does not prevent public authorities from taking particular decisions. However, **it requires them to consider at the formative stage the potential consequences of the decision for people who share protected characteristics and to take these consequences into account before the decision is finalised.** A public authority must be able to show that there has been proper consideration of all three aims of the duty within the decision-making process.

⁶ The characteristic of marriage and civil partnership is covered only with respect to having due regard to the need to eliminate discrimination.

- 1.5. The specific duties, which are set out in regulations,⁷ are designed as a supporting mechanism to help performance of the general duty. There are important differences between the specific duties in England, Scotland and Wales. In summary, the English specific duties require a listed public authority:
- a) to publish information, updated annually, to demonstrate compliance with the duty;
 - b) to publish at least every four years one or more objectives which will help it to achieve the aims of the duty and which are specific and measurable.
- 1.6. In summary, the specific duties in Scotland require listed public authorities:
- a) to publish every two years a report on the progress it has made to make the general duty integral to the exercise of its functions;
 - b) to publish every four years outcomes which will enable it to perform the general duty more effectively;
 - c) to assess the impact of a policy or practice against the requirements of the general duty, taking into consideration relevant evidence relating to people who share a protected characteristic;
 - d) to gather information on the composition of its employees, and use this to perform the general duty more effectively;
 - e) every two years to publish information (for bodies with over 150 employees) on the pay gap between men's and women's average hourly pay (excluding overtime);
 - f) every four years to publish a statement (for bodies with 150 employees) on equal pay;
 - g) in relation to public procurement, to have due regard to whether its award criteria should include considerations of any relevant impact on groups sharing protected characteristics;
 - h) Scottish Ministers must every four years publish proposals for activity to enable a listed authority to perform the general duty more effectively.

⁷ The Equality Act 2010 (Specific Duties) Regulations 2011; The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011; The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012

- 1.7. In summary, the specific duties in Wales require listed public authorities:
- a) to prepare and publish at least every four years objectives which will assist them to achieve the aims of the duty;
 - b) to have due regard to the need to have objectives covering all of the protected characteristics and to address the causes of any pay differences related to protected characteristics;
 - c) to involve people it considers representative of the protected groups and others with an interest in how it carries out its functions;
 - d) to assess the likely impact on its ability to comply with the general duty of proposed policies or revisions to policies and practices and to publish reports of their assessments (where they show a substantial impact);
 - e) to ensure it identifies and publishes on an annual basis information which demonstrates compliance with the duty (including on pay), and identifies and collects information it does not have.
 - f) to collect and publish employment information on an annual basis;
 - g) to promote amongst its employees knowledge and understanding of the general duty and specific duties
 - h) to draw up and publish a Strategic Equality Plan;
 - i) to have due regard to whether it is appropriate for award criteria for contracts to include considerations to meet the general duty or to stipulate conditions relating to contract performance to meet the general duty.
 - j) to produce an annual report by 31 March each year.
 - k) for Welsh Ministers, to publish a report on how devolved public authorities in Wales are meeting the general duty. They need to publish a report every four years and an interim report every two years;

- l) to take steps to ensure published documents or information appear in a form that is accessible to people from protected groups.

2. Principles underpinning the Commission's approach

2.1. In regulating the public sector equality duty, the Commission has regard to the Legislative and Regulatory Reform Act 2006 and to the Regulators' Code. Our approach is underpinned by the following principles:

a) Proportionality - based on risk

We use evidence to assess risk, and all decisions to take action are based on this assessment. Any action taken will be proportionate to the gravity and nature of non-compliance and the impact on affected individuals and groups.

b) Accountability and transparency

We recognise we are accountable to the public for decisions relating to our role in regulating the duty. This guide helps us to ensure that organisations and individuals know what to expect from us. If enforcement action is taken, we will publish a record of our action, wherever confidentiality requirements permit.

c) Consistency - applying a similar approach

In fulfilling our role as regulator of the duty, we strive for consistency in our approach. This means that we will normally take a similar (although not necessarily identical) approach within and across sectors. Where we target a particular sector for support, we will be transparent about our reasons for this decision.

2.2. We ensure that our staff members involved in regulating the duty are familiar with the principles set out in this guide, along with the Regulators' Code and the statutory principles of good regulation.

3. Our approach to regulating the public sector equality duty

3.1. In relation to the public sector equality duty, our regulatory work has five elements. A number of these are inter-related:

- **Information** – providing information and guidance

- **Promotion** – promoting compliance with the duty, including through case studies
- **Monitoring** – gathering and analysing evidence about implementation and compliance by public authorities, including through research
- **Pre-enforcement/enforcement** – where appropriate, taking pre-enforcement action (ie, action short of using formal enforcement measures) or, as a last resort, formal enforcement action using our legal powers
- **Evaluation** – assessing the effectiveness of the duty legislation (including our enforcement powers).

3.2. By using this range of tools, the Commission promotes compliance with the duty with the aim of ensuring the purpose of the duty is being achieved. This means that we emphasise the need for public authorities to have due regard to the aims of the general duty, rather than focusing only on compliance with the processes required by the specific duties.

3.3. The following sections explain how the Commission approaches the different areas of its regulatory work.

Information

3.4. Under the Regulators' Code, we provide information and guidance to assist those we regulate. This complements our duty under Equality Act 2006 to promote understanding of the importance of, and good practice in relation to, equality.

Non-statutory guidance

3.5. The Commission produces guidance for public authorities, to support their understanding and effective performance of the public sector equality duty. Separate guidance is published for England, Scotland and Wales.⁸ The guidance materials illustrate examples of effective practice, and they are reviewed regularly to ensure they are up to date. Case studies from a range of public authorities are published on our website, together with FAQs and links to useful resources on the duty.

⁸ The Commission's guidance materials on the public sector equality duty in England, Scotland and Wales can be found on: <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>

- 3.6. The Commission produces guidance in a range of ways (e.g. an easyread guide to the duty, covering England, Scotland and Wales); issue-based guidance (e.g. on public procurement) and/or sector specific guidance (e.g. for schools). Publications of this type may be developed in partnership with other agencies, such as sector regulators.

Codes of practice and technical guidance

- 3.7. The Commission has published Technical Guidance on the public sector equality duty. This provides an authoritative, comprehensive and technical guide to the detail of the law. Different versions are available for England, Scotland and Wales. Under Section 14 of the Equality Act 2006 we have the power to issue statutory Codes of Practice, subject to the approval of Parliament, and it is the Commission's aim to replace the Technical Guidance with a statutory Code of Practice in due course.

Responding to queries from public authorities and businesses

- 3.8. Many, possibly most queries about the duty should be answered by the guidance and advice the Commission publishes. However, when the Commission receives specific queries about the duty from public authorities, private and third sector organisations or individuals, it will send an acknowledgment within five working days, confirming receipt and explaining whether, and if so when, a fuller response will follow. From this date, a twenty working day timeframe applies for completing and sending the substantive response.

Responding to telephone queries from individuals

- 3.9. The Commission no longer operates a Helpline service, but telephone queries are directed to the Equality Advisory and Support Service, run by the Government, which gives free telephone advice, information and guidance to individuals on equality, discrimination and human rights issues (including the public sector equality duty).⁹

⁹ The EASS can be contacted on 0808 800 0082. For more information about the service, see <http://www.equalityhumanrights.com/about-us/equality-advisory-support-service/>

Promotion

- 3.10. We support compliance with the public sector equality duty by actively promoting awareness and understanding of its positive value through the information and guidance available on our website and our work with public sector organisations.

Working with other organisations

- 3.11. To maximise the impact of our work, we prioritise engagement and partnership with public sector organisations that have wider influence, such as government departments, regulators, inspectorates and ombudsmen (RIOs) and umbrella bodies.¹⁰ RIOs are particularly important, because public authorities tend to focus their resources on areas where they will be externally assessed. We engage actively with RIOs to discuss how they can best integrate awareness of the duty into their work.
- 3.12. Where appropriate, we may enter into collaborative agreements with key national bodies. For example, we have a Memorandum of Understanding with the Care Quality Commission, which sets out areas for potential joint working including the exchange of information, training, research and external communications, together with some specific joint projects relating to equality and human rights within the health and social care sector.

Focusing on particular sectors

- 3.13. The Commission may undertake promotional work focusing on particular sectors where there is evidence of poor compliance with the duty. This could involve holding seminars or events, developing training packages, producing targeted guidance, or engaging with leading bodies in relevant sectors.

Communications work

- 3.14. We undertake a range of activities to communicate messages about the duty to public sector leaders, media, key stakeholders, parliamentarians and others. These include:

¹⁰ Examples of umbrella bodies include the Local Government Association (in England) and the Convention of Scottish Local Authorities (in Scotland).

- Speaking about the duty at seminars and conferences, prioritising requests which reach the largest number of organisations at a national or regional level, and/or sectors where compliance with the duty has the greatest potential impact on people who share particular protected characteristics, such as health and social care, education, or criminal justice.
- Briefing parliamentarians on the duty and the implications for legislation and for accountability and transparency in the public sector.
- Promoting awareness about our guidance and information resources.

Monitoring

3.15. The Commission needs to understand how well public authorities are implementing the public sector equality duty, in order to be able to promote a better understanding of its benefits and to promote compliance. While focussing on the aims of the general duty, we also recognise that compliance with the specific duties provides useful indicators about performance of the general duty.

3.16. We seek to achieve a balance between the two main approaches to our monitoring role:

- Proactive approach: we monitor the implementation of and compliance with aspects of the duty, including in relation to specific sectors and in relation to systemic issues of inequality between people sharing protected characteristics.¹¹
- Responsive approach: we assess individual complaints that come to our attention, particularly where these indicate a pattern (for example, in particular sector(s) and/or certain protected characteristics) and consider any strategic significance.

3.17. The focus of our proactive monitoring work is determined through our Business Planning process, where our decisions are informed by evidence, including the findings of our statutory periodic review

¹¹ For example, the assessments of the English specific duties to publish equality information and set equality objectives, available from <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/monitoring-and-enforcement/>. In Scotland the 'Measuring Up?' series of assessments of public authorities' performance of the specific duties is available from <http://www.equalityhumanrights.com/scotland/public-sector-equality-duty/monitoring-and-enforcement/>.

of progress on equality and human rights,¹² and our measurement framework briefing papers,¹³ where relevant.

Enforcement

- 3.18. From time to time the Commission receives information regarding public authorities' alleged non-compliance with the public sector equality duty. This comes from many sources, including letters, emails and telephone calls from individuals and organisations (including through the Equality and Advisory Support Service); concerns raised by other regulatory bodies, parliamentarians, trade unions; referrals and/or evidence from the legal and advice community; information in the public domain, such as decisions pending in courts and tribunals, publications and media reports. Our own monitoring work may also identify instances of apparent non-compliance with the duty.
- 3.19. Although our formal legal powers can be an important lever to secure co-operation with public authorities, we recognise that legal enforcement is not always the most effective way of addressing compliance. In our experience, most organisations are willing to co-operate with us to resolve issues without formal legal action.
- 3.20. Our approach to enforcement of the duty is set out in our general Compliance and Enforcement Policy that applies to all aspects of our legal work. This states that the Commission will choose the approach that best fulfils its duties and effects change, only resorting to formal enforcement powers as a last resort.

Criteria for taking enforcement action

- 3.21. When we have reason to believe that a public authority may not have complied with the duty, we will generally need to obtain more information by writing to them. Once any additional information has been obtained, we will then assess what steps to take. In reaching a decision, the factors we will consider include, but are not limited to:

¹² How fair is Britain? Equality, human rights and good relations in 2010 – the first Triennial Review. Available from <http://www.equalityhumanrights.com/key-projects/how-fair-is-britain/full-report-and-evidence-downloads/>. See also Human Rights Review 2012. Available from

<http://www.equalityhumanrights.com/human-rights/our-human-rights-work/human-rights-review/>

¹³ <http://www.equalityhumanrights.com/key-projects/our-measurement-framework/-briefing-papers-and-data/>

- Evidence of the extent and severity of any breach of legislation and the reasons given for such a breach.
- The extent and severity of any departure from Codes of Practice and whether this was deliberate or reckless.
- The impact, likelihood and severity of impact on the affected group or individual.
- The size and resources of the organisation involved.
- The financial burden of enforcement action on an organisation.
- The likelihood of co-operation by the public authority, based on the outcome of any previous communication from us expressing our concerns.
- Steps taken or agreements made to remedy the breach and to reduce the risks of recurrence.
- Any other relevant considerations.

3.22. The weight given to these factors will be dependent on all the circumstances of the particular case. In all cases we will take into account the wider public benefit¹⁴ of any action, including value for money. We will also consider whether the action would accord with the priorities in our annual Business Plan.

Informal approaches to ensuring compliance

3.23. The Commission may decide to work with a public authority to agree a programme of action. Where there is evidence that the issue is a common or emerging one in that sector, we may also engage with the relevant parent department, umbrella body, regulator or inspectorate to discuss whether guidance, information or other support is needed across the sector in order to raise standards.

Formal enforcement measures

3.24. If the relevant public authority is not co-operating with informal approaches within a reasonable timescale, we will consider using our legal powers in order to secure co-operation. We will decide which of our legal powers, used individually or in combination, may be the most appropriate to secure change.

¹⁴ This would include considering any potential public detriment

3.25. Under the Equality Act 2006, in relation to the public sector equality duty the legal options available to the Commission include:

- Entering into an agreement with a public authority, putting in place an action plan to ensure compliance with the duty.¹⁵ As part of the agreement, the Commission undertakes not to issue a compliance notice.
- Conducting an assessment of whether a body has complied with the general duty,¹⁶ after first consulting with the body in question and then publishing terms of reference.
- Following an assessment, issuing a compliance notice setting out steps to be taken within 28 days to comply with the general duty.¹⁷ The notice can be enforced by court order, if necessary.
- Without first conducting an assessment, issuing a compliance notice to a listed authority that has not complied with the specific duties.
- Conducting an inquiry into any matter that relates to equality and diversity or human rights.¹⁸
- Bringing a claim for judicial review against a public authority that has not complied with the general duty.¹⁹
- Applying to the court for permission to intervene in an existing claim being brought by a third party. The purpose of an intervention is to assist the court by providing legal and policy guidance, rather than to support or defend the claim itself.²⁰

¹⁵ Under Section 23 Equality Act 2006

¹⁶ Under Section 31 Equality Act 2006. An example of our use of these powers is the assessment of HM Treasury's 2010 Spending Review, leading to the report 'Making fair financial decisions' (May 2012) <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/section-31-assessment-of-hm-treasury/the-assessment-final-report/>

¹⁷ Under Section 32 Equality Act 2006

¹⁸ Under Section 16 Equality Act 2006. For example, using these powers the Commission conducted an inquiry into disability harassment, leading to the report 'Hidden in plain sight' (2011) <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/hidden-in-plain-sight-the-inquiry-final-report/>

¹⁹ Under Section 30 Equality Act 2006.

²⁰ Under Section 30 Equality Act 2006. For example, the Commission intervened in the landmark case of *Stuart Bracking and Others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, in which the Court of Appeal clarified the duties of public authorities under the public sector equality duty.

3.26. More information about our enforcement powers can be found in our Compliance and Enforcement Policy.

Confidentiality

3.27. The Commission is prohibited from disclosing information acquired in the course of an assessment, inquiry or investigation²¹. For this reason, it is in most cases not possible for us to keep third parties informed about the progress of any ongoing enforcement action.

3.28. At the stage when we are taking pre-enforcement steps (ie, action falling short of using our formal enforcement powers), we are rarely in a position to disclose the work we are undertaking. This is in order to avoid appearing to have prejudged the issue and to avoid threats of litigation against the Commission. In addition, confidentiality enhances the prospect of resolving a problem through negotiation and agreement.

Different national contexts

3.29. The Commission's role as regulator of the public sector equality duty is GB-wide, but our approach to this role is adapted to the different contexts in England, Scotland and Wales. This includes taking account of differences between how public services are organised and delivered, particularly differences in:

- government structures in Whitehall, the Scottish Government and the Welsh Government;
- the different specific duties in each nation;
- which bodies are subject to the specific duties in each nation;
- the number of public authorities in Scotland and Wales;
- approaches to regulation and inspection in each nation.

Evaluation - overall effectiveness of legislation

3.30. Under Section 11 of the Equality Act 2006, the Commission has a duty to monitor the effectiveness of equality and human rights legislation, including the public sector equality duty. We have the power to advise central government on the duty's effectiveness

²¹ Under Section 6 Equality Act 2006 (except for the purposes of the exercise of its functions, in a report, pursuant to court action, with consent, or on an anonymous basis)

and to recommend amendments. We have in the past made recommendations to the Westminster government on the design of the general duty and the English specific duties, and to the Welsh and Scottish Governments on the design of their specific duties.

- 3.31. In 2012, the Government set up an Independent Steering Group to conduct a review of the public sector equality duty. The review report, which was published in September 2013,²² concluded that it was too early to make a final judgement about the impact of the duty and recommended a formal evaluation in three years' time. In response, the Government agreed that a full evaluation of the duty should take place in 2016. To support this review, we will engage closely with the Government Equalities Office and provide evidence on the impact of the general and specific equality duties in England, Scotland and Wales.

Equality and Human Rights Commission

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²² <https://www.gov.uk/government/publications/the-independent-steering-groups-report-of-the-public-sector-equality-duty-psed-review-and-government-response>