



# Equality Act 2010: The public sector Equality Duty - Reducing Bureaucracy

April 2011

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## Introduction

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Citizens Advice welcomes the opportunity to respond to this further consultation on specific duties under the Equality Act 2010.

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:

- to provide the advice people need for the problems they face; and
- to improve the policies and practices that affect people's lives.

The Citizens Advice service is a network of nearly 400 independent advice centres that provide free, impartial advice from more than 3,000 locations in England and Wales, including GPs' surgeries, hospitals, community centres, county courts and magistrates courts, and mobile services both in rural areas and to serve particular dispersed groups.

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## General comments

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Citizens Advice supports the introduction of specific duties under the Equality Act which have an important role to play in ensuring the delivery of equal opportunities and equal treatment throughout the public sector.

Our starting point is that the specific duties should be clearly linked to obligations under the general duty and used to re-enforce the general duty's aims of eliminating discrimination and harassment, advancing equality of opportunity and fostering good relations. Responsibility for discharging the general duty rests with public bodies and the bodies covered by the duty should be encouraged to take responsibility for their own performance.

Whilst we welcome the Government's emphasis on outcomes, and agree with the underlying goal about the transformative effect of transparency, we note with disappointment that this is now the third consultation on the framing of regulations for the specific duties.<sup>1</sup> The announced late changes propose removing much of the delegated legislation intended to give effect to the specific equality duties, and suggests lack of policy clarity about the purpose of the specific duties which is unhelpful in taking the Equality Act forward.

Consequently there remains a degree of uncertainty about the role of specific duties in underpinning the performance of the single general equality duty. While we understand the overall shift in emphasis from 'process' to 'performance', we believe that the draft specific duties regulations published on 12 January 2011 struck a better balance than the current proposals between the two, and would better enable transparency and accountability.

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<sup>1</sup> *Government Equalities Office on Specific Duties: Making it Work (2009) The public sector Equality Duty Promoting equality through transparency (2010)*

In considering this further response we have sought to identify what needs to be covered by regulation and why, and what can be covered by the Code of Practice or guidance. CAB experience is that unfortunately the quality of decision-making by public bodies is often poor even where the law is clear. Where the law is clear and specific it is easier for advisers and others to challenge poor decisions.

Many people are deterred from challenging poor decisions, because of a wide range of barriers and reasons. While the specific duties cannot overcome all of those barriers, in order to progress equality of opportunity and treatment it is important not to increase the barriers. A lack of clarity on minimum standards under the law is one such barrier. Our concern is that what is being proposed does not provide enough of a clear framework for either public bodies to achieve compliance, or for people and civil society organisations like Citizens Advice Bureaux to be practically able to hold bodies to account.

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## Lighter-touch transparency requirements

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### Publishing information

The new proposed wording of the regulations would remove all requirements on public bodies to reveal publicly on any level the detail of engagement, information and analysis they have undertaken when determining their equality objectives and policies. This could leave the transparency requirements as very tokenistic processes for public bodies that do not consider that it is important to embed equality into their management, culture and operations.

We agree that the “detail” of the information requirements for meeting the specific equality duties is best set out in guidance, including sector-specific guidance: this would be the best way of minimising the risk the Government is concerned about of bodies feeling compelled to do more than is needed.

However, for these requirements to be meaningful they need to be regulatory requirements also. A requirement to publish evidence of engagement and analysis would be a minimal way of giving clarity about the basic steps expected (with the appropriate level clarified in guidance according to sector).

It is also important for them to be requirements so that they are enforceable by the EHRC as the equality regulator if necessary.

As we noted in our previous response, and is again covered in detail in the Equality and Diversity Forum’s current response which we support, the timeliness of information being available is essential.

### A requirement to engage

Engagement is at the heart of accountability and transparency, and fundamental to achieving them in practice.

Issues are more likely to be ignored or misunderstood if there is no stakeholder involvement, consultation or engagement – by which we mean active engagement with the recipients of services and with employees, particularly those from protected groups.

We have also expressed our concerns previously that the new proposed approach to implementing specific duties based only on a limited number of outcome objectives, or indeed just one objective, might encourage “cherry picking” between different equality strands, so that equality or discrimination issues not covered or targeted in the objectives can be ignored. Engagement would help public bodies minimise this risk.

We would therefore want to see reference to engagement kept in regulations. We suggest that includes a clear requirement on public bodies to involve citizens as appropriate. We think that this could be achieved without being a prescriptive process, and while giving local services the freedom to operate according to local circumstances. It could be a simple and effective way for the Government and local public bodies to put Big Society principles into the heart of local decision-making.

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## Setting equality objectives

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As a minimum we consider that regulations under the specific duty should require a process for setting ‘objectives’ with reference to the general duty, rather than ‘one or more objectives’.

For a small minority of organisations it will be appropriate to set only one objective to be achieved in four years. Guidance can make clear to that minority that they are only expected to do what is reasonable and proportionate to their size or remit.

For the vast majority one objective will not be sufficient, and there is a far greater risk that the use of the wording ‘one or more’ in the regulation will encourage a wide-spread and erroneous view that bodies can do the bare minimum, or even that they are meeting the letter of the law by setting only one objective.

We understand that the requirement in the 12 January draft regulations to set out how progress on objectives will be measured will not in and of itself ensure delivery of equality improvements, but it would greatly aid transparency and accountability, and for these reasons should be retained.

Finally, the regulations should include a high-level requirement to take proportionate action, to achieve the objectives that have been set. Examples of different types of proportionate action could then be a matter of guidance. The EHRC should play a crucial role in producing clear, accessible, practical guidance to assist the implementation of and reporting on the specific duties, and to lead on the involvement of key stakeholders and those affected in developing the guidance.

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## Case study

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The following case study shows how the Government’s current proposals might work in practice, and how the duties might work with the changes we are suggesting.

## The client's situation

A bureau in Wiltshire helped a Romany Gypsy who was treated poorly by the council when making an application for a disabled facilities grant. The client, who had been disabled by a stroke, was initially refused the grant because she lived in a mobile home. The council told the client that if the grant was used to update or replace a mobile home, "they would all want one". At a subsequent meeting, a council member suggested that Gypsy communities have disproportionate numbers of disabled people. With the bureau's help the client was eventually awarded the grant to purchase a new mobile home. But during the time it took for the decision to be challenged and reversed she suffered three falls due to the unsuitability of her existing home.

## How the law works in such a case

The Council has a duty under s149 Equality Act 2010 to pay due regard to the need to

- eliminate unlawful discrimination;
- promote equality of opportunity; and
- promote good relations

when they exercise their functions, including making decisions about how their services are delivered.

Three issues give rise to concern about the council compliance with the PSED here, in all three arms of the duty. The facts of this case appear to suggest that the Council policy on disabled facilities grants did not take into account any particular disadvantage to Gypsy and Traveller communities if there was a blanket policy to exclude mobile homes. The Council official's actions appeared to be unlawful harassment- it was intimidating and hostile, and also suggests a lack of training for Council staff about the general duty. The Council member's statement was a generalisation that in this context suggested that s/he was not mindful of the equality duty to pay due regard to the need to promote equality of opportunity nor to promote good relations.

## Under current Government proposals

The Council would have a specific duty to prepare and publish one or more specific and measurable objective by 6<sup>th</sup> April 2012, and at subsequent four year intervals. In this instance the Council may have prepared and published, for example, one objective in respect of advancing equality of opportunity between men and women, and have no specific and measurable objective(s) in respect of any of the arms of the general duty in respect of race.

The Council would have a specific duty to publish information to demonstrate its compliance with the general duty under s149, by 31<sup>st</sup> December 2011, and then on an annual basis. So, information to demonstrate how the Council's paid due regard to any of the three arms of the general duty would not be published until at December of each year.

The Bureau would have no specific measurable objective against which they could hold the Council to account. They would have no available or up to date published information

to consider how the Council could demonstrate its compliance with the general duty until the December publication. The specific duties would provide no effective means of holding the public body to account. The Bureau would not have to utilise other means to secure information using a Freedom of Information Act request – expensive and time consuming for the Council. Any claim for judicial review of the lawfulness of the decisions about the policy, or how it was applied in this individual case would need to be brought promptly or at the latest within three months. Any delay would prejudice the claim. The annual publication of information, would necessarily build in delay and undermine the availability of judicial review as a remedy to challenge unlawful decision making.

## Under our proposals

The Council would engage with the local bureau and other interested and relevant community groups at the time the policies were formed. That engagement would help the Council to shape their policies in order to achieve real and practical equality outcomes, and could be a source of valuable information about the impact of policies, and constructive ways of delivering equal treatment and equal opportunities. These could range from issues about the impact of a policy, how to shape it for best effect, training for staff about their duties, and how to raise awareness amongst staff and Council member about equality issues.

Timely publication of equality information would support engagement, and a proactive approach to transparency. If information was published in a timely manner then a CAB could obtain the relevant information without having to make a Freedom of Information Act request, so removing additional burdens from the Council. The CAB could assess whether any further action were needed, or whether the Council had by its engagement and timely publication of information fulfilled its duties appropriately.

Specific measurable objectives, with an explanation of how progress is to be measured, would give the bureau a clear picture of how the Council wished to measure its own progress in achieving the aims of the general duty in race, in this example, and enable the Council to be held responsible and accountable for its own objectives.

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## Matters specified by a Minister of the Crown

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We agree that on the whole equality objectives should be set at local level to reflect local needs. Ministers should not be deciding on equality objectives or targets as these could be open to political manipulation. But the requirements of the Equality Act to set objectives do risk being misinterpreted if they are too light touch, and the needs of particular unpopular groups are could be neglected or marginalised. On this basis we would support the retention of a default power by Ministers to set priorities in conjunction with the EHRC.