

Equality and Diversity Forum submission in response to the Public Sector Equality Duty: Reducing Bureaucracy consultation

The Equality and Diversity Forum (EDF) is the network of national non-governmental organisations (NGOs) working on equality and human rights. The network unites some of the major national NGOs tackling discrimination on the grounds of age, disability, gender, gender identity, race, religion or belief and sexual orientation together with leading human rights organisations and advice agencies. A list of current members is attached.

Summary

The EDF is opposed to the recently announced late changes removing large elements of the proposed delegated legislation intended to give effect to the specific equality duties. This action appears to contradict the Government's stated commitment in its equality strategy-

Equality is at the heart of this Government. It is fundamental to building a strong economy and a fair society.¹

Although public authorities will still have to meet the requirements of the general equality duty in section 149 of the Equality Act 2010 legislating to reduce the specific duties to a nominal level will have a perverse effect. It will simply not provide the necessary and sufficient clarity for public authorities as to how they should meet their general equality duty; the result will be confusion at the local level and inevitably litigation.

This is even more likely as the change of position will indicate to public bodies the inaccurate impression that they do not have to do much in order to comply with the statutory equality duty. This will seriously undermine the Equality Strategy's stated goal of embedding equality into all areas of public policy.²

These risks might be reduced somewhat if:

- Ministers made clear public statements that the changes to the specific duties in no way reduce the effort and commitment that must be put into achieving the three equality duty goals of eliminating discrimination, advancing equality of opportunity and fostering good relations; and
- The Equality and Human Rights Commission published a statutory code of practice giving clear guidance based on case law as to what is involved in the future to meet the requirements of the general equality duty and that code emphasised that though there are a number of ways in which the general duty can be met, in no sense can it be met without thoroughgoing analysis at the stage of policy making.

The key test that delegated legislation on the specific duties must meet is functionality. If that legislation is not likely to be effective in supporting the

¹ *The Equality Strategy – Building a Fairer Britain*, H.M. Government, December 2010, p 5.

² *The Equality Strategy – Building a Fairer Britain*, H.M. Government, December 2010.

achievement of the general duty's aims of eliminating discrimination and harassment, advancing equality of opportunity and fostering good relations, the legislation is pointless. The delegated legislation must help public authorities identify how they can meet the general duty - to leave them without clear assistance will not be helpful.

We agree with the Government's objective:

To ensure that the specific duties which support [the general equality duty] are effective and deliver real transparency and democratic accountability.³

We recognise the value of moving to a legal framework which focuses on improving outcomes and increasing transparency but we do not think that these proposed new regulations will achieve this.

The public sector equality duty has an important role to play in helping to empower local people and communities. The duties have the potential to create a climate where residents have more power over council spending and encourage people to take an active role in their communities. Consequently we consider that it is vital that the duties do operate in a way which facilitates this objective and enables the government to 'draw on the skills and expertise of people across the country as we respond to the social, political and economic challenges Britain faces.'⁴

Public bodies are there to serve the whole community not just the most articulate or vociferous sections of it. The experience of the Northern Ireland Equality Duties showed that an assessment of the effect that policies are expected to have on all sections of the community ensures the best policy making which does not leave one section of the community behind or advance another section at the unjustifiable expense of the rest. Conducting an assessment of the impact therefore makes for better and more rational policy making.

Entrenching the discipline of analysis of the expected effects of policy by reference to the different protected characteristics is never an end in itself but is absolutely necessary to ensure a fair distribution of society's goods and to avoid creating new problems that will only have to be addressed, no doubt at greater expense, later.

Key Points

- Transparency should guide good governance; however, access to information should be timely, accessible and appropriate. If information is to be appropriate to the objective of achieving transparency that enables people to see and to challenge what is happening or decisions that are being made, it must be presented in an accessible form, not as a mountain of inaccessible raw data. Nor should it should it consist of box-ticking. If it is to be used by the people

³ *Equality Act 2010: The public sector Equality Duty: Reducing Bureaucracy*, Policy Review paper, March 2011, p1.

⁴ Building the Big Society, Cabinet Office Policy Programme 2010, available at <http://www.cabinetoffice.gov.uk/media/407789/building-big-society.pdf>

affected by decisions it will need to be accessible at the time that decisions are being made. Data provided up to a year after the decision is taken will not help people to influence any decision. Public authorities will need to publish their analysis of the information and their key conclusions about the way that equality will be affected if they are to really facilitate transparency.

- Active engagement with the recipients of services and with employees, particularly those from protected groups, is likely to lead to better and more appropriate decision making.
- Regulations should make clear that compliance with the duties should not be seen as an optional extra. The use of the phrase 'one or more objectives' in clause 2(1) suggests that it is possible to comply with the general duty in section 149 in respect of all the prohibited grounds by setting one objective. Whilst there may be very rare cases where this is appropriate they will be very unusual.
- Regulations should include a requirement to take action to achieve the objectives that have been set. To set objectives and then be under no obligation to fulfil them would be to further perpetuate a culture of processing forms rather than achieving change.

Equality objectives

The purpose of the specific duties is to give effect to the general duties in practice. The EDF is very concerned that if the new specific duties only require the setting of a single equality objective the duties will become far too narrowly focussed and could be insufficiently focussed on need.

In regulation 2(1) in referring to the details of the objectives to be prepared by a public authority the regulations require the setting of 'one or more' objectives. Unfortunately this suggests that only one objective needs to be set. We consider that if the public authority is to have real due regard to the requirements of section 149(1) it will need to set more than one objective. It is hard to see how they can eliminate discrimination or advance equality of opportunity or foster good relations on each of the relevant grounds if they only have one objective. For the draft regulations to suggest that this is possible is to be actively unhelpful to public authorities who are trying to comply with their equality obligations.

Our experience suggests that active engagement with and involvement of the people who will be affected by a decision can lead to more appropriate decision making that is better targeted to the needs of the protected group. The Prime Minister has said the 'best ideas come from the ground up'⁵. We agree that this can be the case and suggest that better liaison with those from the protected groups can generate these ideas. The RADAR report *Lights, Camera, Action: Promoting Disability Equality in the Public Sector* reviews the utility of the public sector disability equality duty and concludes –

⁵ David Cameron speech, 18.5.10 at http://news.bbc.co.uk/1/hi/uk_politics/8688860.stm

Ensuring that both policies and procedures better promote equality is not just good for equality groups but it can significantly improve the performance of the public sector organisation and even save money!⁶

The EDF is strongly of the view that the only appropriate wording for this provision is 'Public authorities must prepare and publish objectives' and we ask for this to be restored.

Publication of information

The EDF shares the Government's concern that transparency should guide good governance. However, the EDF does not consider that ex post facto assessment will be sufficient to meet the general duty hence it is important that the regulations should make it clear that transparency should be available in advance of decision making. The Minister for Women and Equalities has confirmed⁷ that the Government's intention was that information should be available in time to influence decision making, however, the draft regulations do not make this clear.

If data is to be able to facilitate the decision making process and achieve the aims of the general duty it will also be important that it is produced in accessible form, for example, 1,000 pages of raw, unanalysed data will not help civil society in their response to proposals. While the EDF recognises the government's reluctance to be prescriptive about the detail of the method of assessing the impact on equality of relevant changes, the duty means nothing without assessment. This assessment needs to show how the authority in question reached the recommendation that they are making. If equality groups, community groups and citizens generally, particularly those from stigmatised groups, are to be able to hold public bodies to account they will need to have adequate resources to enable them to fulfil this function.

We consider that if there is no adequate system for regular, timely and appropriate publication of information those seeking information will be forced to use Freedom of Information requests to elicit information. This will be much more time consuming, costly and disruptive for public bodies.

We do not see the proposed employment reporting as onerous because any public authority, and certainly all those with over 150 employees, is likely to have a computerised payroll system producing this data, and indeed much more complex data analysed by grade or number per grade, is likely to be both easy and inexpensive as all the records will already be on the system. Additionally, public authorities are already collecting this information in order to comply with existing duties under the race and gender duties so this is not an extra bureaucratic burden for them. The benefits of producing such information would be that the public body can easily and cheaply identify areas where particular minorities are excluded or disadvantaged and they can then take remedial action.

⁶ *Lights, Camera, Action: Promoting disability equality in the Public Sector*, RADAR, 2010, page 42.

⁷ At the All Party Parliamentary Equality Group meeting on October 19th 2010.

We consider that transparency is important if the government is to give people the information that they need to create a climate that empowers local people and communities and enables them to hold their public bodies to account. However, the benefits of transparency are rendered almost completely ineffective if it takes place too long after the event. Transparency can only aid decision making if the data in question is available to those affected at the time the decisions are made so the people who are affected by the decision have the opportunity to use the data to put their point of view and to challenge any misinformation or misunderstandings. Data that is published up to a year after the decision in question will not be able to influence the decision, which will already have been put into effect; it will be more likely to set up a mechanism for confrontation and dissatisfaction between public authorities and affected groups. This does not assist good decision making. Further any judicial challenge of an administrative decision has to be brought within three months of the decision being made. This makes it essential that information is published before decisions are made, not up to a year later.

We note that page 5 of the consultation document says that:

Under the requirements of the general duty to have “due regard” to the matters set out in the Act, public bodies will need to understand the effect of their policies and practices on equality – this will involve looking at evidence, engaging with people, staff, service users and others and considering the effect of what they do on the whole community. Information to help public bodies comply with the duties and understand what constitutes good practice will be delivered through guidance, not regulation.

We consider that it is completely unhelpful to public authorities to have this information requirement removed from the specific duties even if it is to appear in the Codes of Guidance. It will confuse them and lead some to believe that less is required of them. They will have to read through more documents and, if they are to perform their duties properly, take more time to work out what action they need to take.

The EDF considers that the previous wording of ‘*Publish sufficient information to demonstrate its compliance...*’ both better and likely to be more effective and appropriate.

Matters specified by a Minister of the Crown

Although we agree that on the whole equality objectives should be set at local level to reflect local needs we believe that it can be useful to ensure that the needs of particular unpopular groups are not unjustifiably neglected.

April 20th 2011

EDF Members

Advice UK
Age UK
British Humanist Association
British Institute of Human Rights
Children's Rights Alliance for England (CRAE)
Citizens Advice
Discrimination Law Association
End Violence Against Women Campaign
Equality Challenge Unit
EREN – The English Regions Equality and Human Rights Network
Friends, Families and Travellers
Fawcett Society
JUSTICE
Law Centres Federation
Mind
National AIDS Trust
Press for Change
Race on the Agenda (ROTA)
RADAR
Refugee Council
RNIB
RNID
Runnymede Trust
Scope
Stonewall
The Age and Employment Network (TAEN)
Trades Union Congress (TUC)
UKREN (UK Race in Europe Network)
UNISON
Women's Budget Group
Women's Resource Centre