

Equality Act 2010: The Public Sector Equality Duty: reducing bureaucracy Policy review paper

Response of The Christian Institute

Introduction

The Christian Institute is a non-denominational charity established for the promotion of the Christian faith in the UK and elsewhere. We have almost 29,000 supporters throughout the UK, including over 3,800 churches and church ministers from almost all the Christian denominations.

We hold traditional, mainstream Christian beliefs about marriage, sexual ethics and the sanctity of human life from conception. A major focus of our work over many years has been to protect religious liberty. We frequently provide advice and assistance to Christians who have been discriminated against because of their faith.

Before beginning our main response to the consultation, we want to make it clear that we have grave reservations about the potential impact of the general Public Sector Equality Duty ('PSED') contained in the Equality Act 2010. Clearly, it has only just come into force so there has not been time to assess its actual impact. But we are concerned about the possible ramifications. For example, some would argue that the registration of marriage is a public function. Would a church minister who is serving the function of a registrar be subject to the PSED? Will the extensive social welfare work of groups like the Salvation Army be held to fall under the PSED? Will residential homes run according to a religious ethos be public bodies for the purpose of the duty? We believe that there could be extensive unforeseen consequences of the PSED, and anticipate that religious bodies will be placed under the expensive burden of seeking legal advice on their situation. Only lawyers will benefit from this scenario. We fear that experience will demonstrate that the duty is too widely drawn and will require amendment to prevent further encroachment upon the rights of religious people and organisations.

In response to the current consultation, we wish to make points about bureaucracy, equality objectives, schools and the enforcement of the duty:

- by bringing forward these regulations at all, the Government is taking the wrong approach if it really wants to tackle red tape;
- equality objectives risk distracting public bodies from their core functions and will inevitably lead to a flawed 'equality of outcomes' approach and quota setting;
- schools, especially faith-based academies, will be made more vulnerable to hostile action from anti-religious groups by the PSED and the proposed regulations;
- the enforcement of the duty and of the reporting requirements could lead to burdensome and sometimes ridiculous results, especially given the proposed role of the Equality and Human Rights Commission.

Fighting bureaucracy with more bureaucracy

On page 1, the policy review paper refers to "reducing burdens and bureaucracy" and stripping out "unnecessary process requirements". On page 4, it refers to the Government's aim of "minimising the risk that public bodies would feel compelled to do more than is needed, by following arduous and ineffective bureaucratic processes which go against the Government's drive to free the public sector from unnecessary process requirements and top-down targets".

The conclusion on page 7 refers to the Government's commitment to a "light-touch" set of specific duties. The express intention of the Government is clearly to minimise bureaucracy.

However, the problem is that the Government is choosing to implement permissive provisions of the Equality Act 2010 which are inherently bureaucratic. Implementing bureaucratic provisions in a non-bureaucratic fashion is always going to be a tall order, which perhaps in part explains why the specific duties regulations have undergone so many revisions over the last two years. By definition, the decision to use the order-making powers is adding a bureaucratic burden which the Government does not need to impose.

It is remarkable that the Government is taking this course of action at the same time as running its Red Tape Challenge, which is designed to cut back on bureaucracy. In fact, part of the Red Tape Challenge asks whether the Equality Act 2010 should be scrapped altogether.¹ If the Government acknowledges that some consider the Equality Act to be red tape, why would it be seeking to add further bureaucracy to the existing equality framework? This is especially surprising when the empowering provision, section 153 of the Equality Act, merely says the Government "may" impose specific duties by regulations, not "must". Section 149, the PSED itself, will have an enormous impact on its own, without these optional regulations.

We recognise that the Government has attempted to simplify some key issues. But we believe that by continuing down a path set by the previous administration it is perpetuating a failed approach. The Home Secretary has quite rightly pointed out that the word equality has become a "dirty word", associated with the "worst forms of pointless political correctness and social engineering".² Examples are easy to come by of public bodies making decisions which have been widely regarded as ridiculous and which have brought the concept of equality (which arguably has its origin in Christian teaching) into disrepute:

- North Somerset Primary Care Trust suspended nurse Caroline Petrie after she offered to pray for a patient.³
- A local authority struck a Christian foster carer off the fostering register because she allowed a 16-year-old in her care to convert to Christianity.⁴
- Salisbury Council told staff not to use the phrase "singing from the same hymn sheet" when talking to people because the religious reference might offend atheists.⁵
- In 2008, Oxford Council dropped "Christmas" from the title of the city centre's celebrations. Instead of Christmas, the city celebrated a multi-faith "Winter Light Festival".⁶
- Brighton Council withdrew £13,000 funding from a residential care home for elderly Christians because they declined to meet certain criteria, including questioning residents every three months about their sexual orientation.⁷
- Stoke-on-Trent City Council advised some schools not to run swimming lessons during Ramadan to ensure that Muslim pupils didn't break their fast by swallowing water.⁸

¹ See <http://www.redtapechallenge.cabinetoffice.gov.uk/equalities/> as at 20 April 2011

² Home Office, *Equality Strategy Speech*, 17 November 2010, see <http://www.homeoffice.gov.uk/media-centre/speeches/equality-vision> as at 20 April 2011

³ *The Sunday Telegraph*, 1 February 2009

⁴ *The Mail on Sunday*, 8 February 2009; *The Mail on Sunday*, 11 July 2010

⁵ *The Sunday Telegraph*, 9 November 2008

⁶ *Daily Mail*, 3 November 2008; *Oxford Mail*, 1 November 2008, see http://www.oxfordmail.co.uk/news/3810153.Council_set_to_axe_Christmas/ as at 9 November 2010

⁷ *The Daily Telegraph*, 29 December 2008

⁸ *BBC News Online*, 13 July 2010, see <http://www.bbc.co.uk/news/10596808> as at 10 November 2010

- Tower Hamlets Council asked all councillors to avoid eating during town hall meetings while Muslim colleagues fasted during Ramadan.⁹
- Camden Council told a Roman Catholic group that it could not advertise an event on religion and climate change in local libraries unless it removed words like 'Christian' and 'God' from the text.¹⁰
- A Sunday School teacher was told by staff at a library in Brighton that she could not advertise a church children's event at her local library because it promoted religion.¹¹
- A publicly funded housing organisation in West Yorkshire took disciplinary action against an employee for gross misconduct because he refused to remove a palm cross from his company van. The association said the cross may offend people.¹²

Sometimes these cases result from a misunderstanding of legal obligations, other times from a prevailing ideological agenda. In the current climate, the PSED, in both its general and specific duties, is bound to generate more ridiculous, and in some cases oppressive, action by public bodies – unless the Government firmly sets itself against such a culture. The Government has already indicated that "The days of the state trying to suppress Christianity and other faiths are over".¹³ But much more needs to be done by the Government to prevent these abuses. The policy review paper still leaves the door open for bureaucratic requirements to inhibit genuine equality, particularly for Christian people. The Government should make a decisive break with the past and not introduce specific duty regulations at all.

Alternatively, if the Government takes the regulations forward, it should do so in such a way as to actually meet its policy goal of reducing bureaucracy. This would involve the regulations imposing clear limits on the level of red tape that local authorities and other public bodies are permitted to create. The Government has an opportunity in the regulations to say that the PSED does not require the kind of excess that many local authorities seem inclined towards. Not only would bureaucracy thereby be capped, but it will help prevent the kind of cases outlined above that bring the concept of equality into disrepute.

So, for example, the regulations could state that public bodies cannot, expressly or implicitly, pass on responsibility for complying with the PSED to charities in receipt of grant funding. This recognises that the PSED is for public bodies to comply with, not private bodies, who may be operating under exemptions from aspects of equality law. (For example, under section 193, gay charities can limit service provision to gay people. Section 195 allows sporting bodies to discriminate on grounds of gender reassignment. And Schedule 11 contains exemptions allowing sex, religion and disability discrimination.)

It is widely acknowledged that religious people often lose out under equality law.¹⁴ The regulations could therefore address this by stipulating that local authorities must properly balance competing rights and not use one set of rights to the detriment of another.

⁹ *The Daily Telegraph*, 29 August 2008

¹⁰ *The Daily Telegraph*, 16 September 2009; *The Evening Standard*, 16 September 2009

¹¹ *The Daily Telegraph*, 28 July 2009; *Argus Lite*, 24 July 2009

¹² *Mail Online*, 17 April 2011, see <http://www.dailymail.co.uk/news/article-1377684/Electrician-Colin-Atkinson-faces-sack-Christian-cross-van-dashboard.html> as at 20 April 2011

¹³ Department for Communities and Local Government, News, *Ministers Talk Big Society With Faith Leaders*, 19 July 2010

¹⁴ See, for example: House of Lords, Hansard, 29 March 2011, cols GC168-173; David Starkey, comments on *BBC Question Time*, 3 March 2011; Michael Portillo, comments on *BBC Moral Maze*, 26 January 2011

Equality objectives lead to quotas and 'equality of outcomes' approaches

A particular concern within the regulations is that public bodies will be required to prepare and publish specific and measurable equality objectives (Regulation 2). This requirement threatens to distract resources of public bodies from their central purpose. A school is there to teach, so the objectives they set out and publish should be focused on teaching and educational opportunities. The introduction of a requirement to set equality objectives appears to be unnecessary bureaucracy of the very kind the policy review paper says is to be rolled back. Public bodies are well known for gold-plating their legal obligations then sticking to them beyond the point of reason. It needs to be made much clearer to public bodies that they are being given great discretion in this area and not being placed under onerous legal obligations.

The requirement to set one or more "specific and measurable" objectives creates an inevitable bias towards quotas and equality of outcome approaches. Theresa May has expressly criticised this approach, stating:

"...even as we increase equality of opportunity, some people will always do better than others. And, certainly, I do not believe in a world where everybody gets the same out of life, regardless of what they put in. That is why no government should try to ensure equal outcomes for everyone."¹⁵

Objective-setting regulations like this inevitably lead to quotas and measuring outcomes. If a local authority is seeking to decide what a target should be, it is far simpler to go for a numbers-focused target that will look at equality of outcomes rather than equality of opportunity. The likely use of the objective requirement can be seen from the Equality and Human Rights Commission's guidance¹⁶ on setting equality objectives. The guidance states that not only should objectives meet the legal requirement of being specific and measurable but they should also "follow best practice" by being SMART (Specific, Measurable, Achievable, Realistic and Timed). The guidance then cites examples which are "particularly outcome focused". One such example is:

"A school identifies that boys are underachieving academically in the key subjects of English, maths and science. Average scores show that 72 per cent of girls are achieving the expected grades, while the figure for boys is 48 per cent. The school decides to set an objective to improve this figure over a four year period to 65 per cent of boys reaching the required grade."¹⁷

This example exposes the arbitrary nature of such an approach. A school should surely be seeking to provide the best education for all. Where is the target of improving the percentage of girls reaching the required grade? If resources are to be devoted to the boys in order to meet the target, surely something has to give and it may be the girls who suffer.

Equality of outcomes approaches stifle initiative, level down achievement and can be hijacked by special interest groups. Focusing on equality of outcomes can be deeply polarising between groups which are favoured and those which are not. The inclusion of a requirement to set equality objectives risks encouraging this flawed attitude to equality.

¹⁵ Home Office, *Equality Strategy Speech*, 17 November 2010, see <http://www.homeoffice.gov.uk/media-centre/speeches/equality-vision> as at 21 April 2011

¹⁶ The current version of the guidance is due to be revised in the light of the policy review now being carried out.

¹⁷ Equality and Human Rights Commission, *Equality Objectives and the Equality Duty: A Guide for Public Authorities*, January 2011, page 12

Undermining freedom and draining resources of schools

As we have consistently argued, there is a general concern about the application of the PSED – both the general duty and the specific duties – to schools. Schools should not have to be worried about publishing equality objectives when their focus needs to be on improving pupils' abilities in Maths, English, Science and other subjects. There is a real danger that schools could be overwhelmed by the impact of the PSED, especially with the specific duties.

In particular, it is unclear what effect the provision will have on the ability of faith schools to uphold their ethos. Everyone is now well aware of the repeated clashes between the equality agenda as it is currently framed by UK legislation, and the ability of faith-based organisations to practise their faith in the public square. Groups that are hostile to faith or to certain beliefs held by faith groups often use the language and mechanisms of equality law to attack them. There are therefore concerns that the PSED would give a mechanism to opponents of faith schools to make vexatious allegations against them. A church school that gives a special place to the teaching of the Christian faith might well be accused of failing in its duty to advance equality of opportunity and foster good relations with other faith groups. The application of the Specific Duties regulations would generate yet more opportunity for vexatious complaints against faith schools. Campaign groups hostile to the existence of church schools will no doubt be watching very carefully to see if one of them commits a technical breach of the detailed reporting requirements or fails to achieve one of its own targets.

Opponents of faith schools may use the PSED to challenge the existing religious exceptions in the law. Sections 58 to 60 of the School Standards and Framework Act 1998 and Schedule 22 of the Equality Act 2010 allow schools with a religious character to discriminate on religious grounds in the appointment of headteachers, for example, to help preserve their religious ethos. It may be argued that a school which relies on this exemption is failing to eliminate discrimination – and is in fact embodying it. Despite the fact that the law permits it, this may be challenged as a breach of the duty. After all, the exceptions are permissive, whereas the duty is prescriptive, and a hostile group could argue that the PSED means no public body should ever be using the exceptions because, in their view, it sets a 'poor example'.

We have suggested that it would be better for all educational institutions to be exempted from the remit of the PSED altogether, freeing them of both the general and specific duties. Allowing the PSED to apply at all to schools is, we believe, a mistake. Including schools in Schedule 19 and therefore applying the specific duties to them compounds the error. As stated above, schools should be free to teach, and set their objectives accordingly. They should not be distracted from that central purpose by a requirement to produce targets on other matters. Nor should they be made more vulnerable to anti-religious activists monitoring their compliance with their own objectives.

The inclusion of the proprietors of educational establishments such as academies in Schedule 19 of the Equality Act 2010 is particularly concerning. One of the central assets of the academies programme, leading to the broad success which the coalition Government is now encouraging through the programme's expansion, is the freedom that such schools have. Imposing the requirements of the full PSED on them, especially the specific duties, takes away a level of this freedom. Not only does this appear to be inconsistent with the Government's agenda in favour of free schools and localism, some resources which are currently devoted to teaching would undoubtedly have to be siphoned off in order to meet the requirements of the PSED.

Disproportionate impact on academies

It is important to note that the detailed reporting requirements under the PSED will place academies at a disadvantage when compared to maintained schools.

In the case of maintained schools, LEAs would provide a degree of protection in being able to publish and answer demands for data, whereas an academy would have to do all the work itself. The PSED specific duties would therefore be more onerous for an academy than a maintained school.

Enforcement

The policy review paper admits that a public body can be challenged by any member of the public over its compliance with the new duty.¹⁸ The potential for a flood of litigation is clear. Furthermore, the Equality and Human Rights Commission has asserted that it can take "legal enforcement action with authorities who are not complying with the equality duty".¹⁹ The role of the Commission is particularly concerning to Christians, whose confidence in its impartiality has been seriously undermined by its actions.

Although the Commission is supposed to represent the interests of Christians as well as all other groups, Christians find it difficult to see where it is doing so. In a string of cases, the Commission has shown itself incapable of striking a fair balance between rights. The Commission's actions have often seemed inexplicable, such as its funding of an atheist group to run seminars on the place of religion and belief in public life, with prominent atheists giving keynote speeches.²⁰ The Commission intervened (unsuccessfully) in a case to extend employment discrimination law to volunteers (see *X v Mid Sussex Citizens Advice Bureau & anr*, A2/2009/2526), which could have caused problems for many religious organisations and other charities who rely on volunteers. It could have made the appointment of Sunday School teachers subject to equality law requirements, which could have crippled many churches. The Commission has also intervened against Catholic Care Roman Catholic adoption agency in its fight to maintain its religious ethos.²¹

The Commission funded the recent case of a same-sex couple who sued the Christian owners of a B&B over their double bed policy. After winning the initial case, the Commission then sought an increase in the amount of damages the Christian couple had to pay. It was forced to make a u-turn following negative publicity. The Commission described the move as an "error of judgment".²²

Also recently, the Commission had to apologise for an extraordinary remark that implied Christian moral values are like an "infection" that could harm children. It had warned that children could be infected by the moral views of Christian foster parents who oppose homosexual behaviour. The remark was published in legal paperwork prepared for a court case involving a Christian couple struggling to be approved as foster parents.²³

¹⁸ *Equality Act 2010: The Public Sector Equality Duty: Reducing Bureaucracy*, Policy Review Paper, Government Equalities Office, 17 March 2011, page 4

¹⁹ Equality and Human Rights Commission, *Enforcement*, see <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/enforcement/> as at 20 April 2011

²⁰ *The Daily Telegraph*, 26 November 2008

²¹ *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales and the Equality and Human Rights Commission* [2010] EWHC 520 (Ch)

²² Equality and Human Rights Commission, *Commission statement on Preddy and Hall legal case*, 11 March 2011, see <http://www.equalityhumanrights.com/news/2011/march/commission-statement-on-preddy-and-hall-legal-case/> as at 20 April 2011; *Daily Mail*, 11 March 2011; *Daily Mail*, 12 March 2011

²³ Equality and Human Rights Commission, *Johns v Derby City Council*, 3 March 2011, see <http://www.equalityhumanrights.com/legal-and-policy/legal-updates/johns-v-derby-city-council/> as at 20 April 2011

It is not just in regard to religion that the Commission's activities have been extraordinary. The Commission's Code of Practice on the Equality Act 2010 has been criticised for suggesting that holding parents evenings could be sexist as mothers might be at home putting their children to bed and therefore be unable to make it.²⁴ The Commission has also said that schools requiring all girls to wear skirts might be breaching the rights of girls who feel uncomfortable with their gender.²⁵ Surely these are matters for schools to decide.

We question whether the Commission, in light of its record, should be given such a significant role in enforcing the PSED.

Conclusion

The regulations will add to the already immense bureaucratic burdens on local councils. They will subject schools to excessive bureaucracy and expense, distract them from their core function and expose faith-based academies to hostility from campaign groups. Given the current climate in which equality law is often interpreted in ways hostile to religious freedom, the regulations will also increase pressure on local authorities to be unsympathetic towards manifestations of the Christian faith. As former Home Secretary Lord Waddington recently told the House of Lords, "obsession" with equality has "driven tolerance out of the door and bred in its place intolerance, injustice and unfairness."²⁶

Equality law needs amending to reverse this trend. But the new duties simply constitute more of the same. They will tie up public bodies with red tape whilst adding to the climate of hostility towards Christians and manifestations of the Christian faith. The new duties will do little to encourage Christian groups – which are very numerous – to participate in the coalition Government's "Big Society".

To be consistent with its policy goal of cutting red tape, the Government should really be withdrawing the proposed regulations altogether. Failing that, the final regulations must set out limits to the bureaucracy that should be imposed in the name of the PSED. In particular, they should steer away from equality objectives, which will simply encourage quotas and an emphasis on equality of outcomes.

The Christian Institute
21 April 2011

²⁴ *Daily Mail*, 18 October 2010

²⁵ *Daily Mail*, 22 February 2010

²⁶ House of Lords, Hansard, 29 March 2011, col. GC170