

Equality Act 2010: The public sector Equality Duty: reducing bureaucracy

Response from Equality Challenge Unit

Equality Challenge Unit (ECU) works to further and support equality and diversity for staff and students in higher education across all four nations of the UK. We have over ten years experience supporting staff and students as the higher education sector's equality body.

ECU works closely with colleges of higher education and universities to seek to ensure that staff and students are not unfairly excluded, marginalised or disadvantaged because of age, disability, gender identity, marital or civil partnership status, pregnancy or maternity status, race, religion or belief, sex, sexual orientation, or through any combination of these characteristics or other unfair treatment.

This response sets out ECU's views on the proposed specific duties to meet the public sector equality duty in England, as published in the policy review paper of 17 March 2011. Our perspective is as an organisation concerned with advancing equality for individuals in higher education but this response does not represent all of the views of individual higher education institutions (HEIs) in England.

For further information about ECU please visit <http://www.ecu.ac.uk/about-us>.

General points

1. ECU agrees with the overarching aim of the Government of removing bureaucratic processes. However, the policy review paper equates equality with unnecessary bureaucratic burden which we consider misguided. The higher education sector has moved forward in its understanding of equality and diversity. The majority of institutions now see equality and diversity as a benefit to their organisations, their business and to their local communities, rather than a bureaucratic burden.
2. ECU welcomes the focus on transparency, but notes that the policy review document is largely silent on the ability of the public to hold public bodies to account. Challenges by the public, including students in higher education on the failure to meet the public sector equality duty, will usually have to be made via judicial review proceedings. These can be costly, and the most marginalised in society (that the Equality Act seeks to protect) are unlikely to be able to afford, both in terms of time and financially (notwithstanding the availability of public funding through Legal Aid; which itself is the subject of increasing financial constraints and international students would not have access).

3. ECU responded to the August 2010¹ consultation. In that consultation, we noted that regulation has been a key driver in improving equality in the higher education sector. With the relative autonomy of higher education institutions, regulation will continue to be a key driver. The purpose of the specific duties is to help public bodies to meet their obligations under the general duty. Without clear and detailed regulation there is a risk of public bodies feeling unsure of how to meet the general duty and of increasing inequality in the higher education sector.
4. ECU considers that without some level of prescription or more than the current minimal guidance there is a great risk of inertia and a regression of the equality agenda, as public bodies will not know what to do. We are mindful that the Scottish Parliament's Equal Opportunities Committee withdrew the proposed specific duties for Scotland in part because they did not provide enough prescription and that if there was an expectation to carry out certain activities (such as analysing the impact of policies on equality) then it should be detailed in regulation rather than guidance. ECU agrees with the approach of the Scottish Parliament.
5. A key aim of the Equality Act 2010 was to harmonise and consolidate anti-discrimination legislation. The National Assembly for Wales has passed much clearer and prescriptive specific duties and this approach is welcomed. It now appears that the proposed changes to the regulation will move the English specific duties further from the Welsh and Scottish ones and leave England behind in progress towards equality.
6. We note that in several cases, amendments that were made to the regulations following the public consultation (Equality Act 2010: The public sector Equality Duty – Promoting equality through transparency – A consultation) have been reversed. For transparency and accountability, full rationale should be published in instances where amendments from the public consultation have been overturned.
7. It is regrettable that the Government chose to withdraw the previous regulations less than 3 weeks before they were due to commence. Higher education institutions had already begun detailed preparation for the new duties, including developing and resourcing new policies and systems. While the work is not wholly wasted, much will have to be revisited.

The duty to publish information

8. ECU is concerned that the duty to publish information will not be sufficient for the public to hold public bodies to account.
9. Paragraph 11(d) of the policy review paper sets out a government objective that 'more freely available data will enable people to compare the performance of public bodies and hold them to account'. However, without a broad common framework of the types of data required, it will be difficult for the public to compare and interpret the data. Without a

¹ Equality Act 2010: The Public sector Equality Duty - Promoting equality through transparency: A consultation (GEO, August 2010)

common framework it will not be possible to highlight and tackle historic and continued inequalities such as the gender pay gap.

10. Further, without a broad framework of the types of information to be published, there will be a loss of trend data leading to a real risk of a reduced understanding of the extent and depth and of trends of inequality in England. An approach such as in the Race Relations Act 1976 (Statutory Duties) Order 2001 (which noted key employment areas such as training and promotion, grievances and disciplinary procedures) would provide a common framework without being overly prescriptive and also offer guidance for public authorities, who in the absence of some prescription may struggle to determine what to publish.
11. At a time when Higher education institutions are being required to publish standardised information to assist prospective students in choosing suitable courses, it would seem that clear and standardised information on their equality and diversity progress could only assist business, rather than being a burden.
12. In the summary of responses to the consultation on the public sector equality duty (January 2011), the government noted that it had considered the public consultation and amended the draft regulations so that public authorities had to publish 'sufficient' information. We are concerned that paragraph 18 of the policy review document reverses this decision with no rationale provided. While in substance, a court of law will have to determine what is sufficient and proportionate, the removal of the word 'sufficient' sends a message that the new proposed duties are less robust than the previous drafting.
13. Similarly, the policy review document notes in paragraph 19 that the duty to pay due regard will 'involve looking at evidence, engaging with people, staff, service users and others and considering the effects of what they do on the whole community'. However, the removal of the requirement to publish details of engagement, equality analysis, and information used in undertaking analysis will lead to some public bodies choosing not to undertake such work, especially if there appears to be minimal investigations into compliance.
14. If the intention of the legislation is that public bodies will be obligated to undertake such engagement and analysis, it would be more helpful for this to be reflected in the regulations rather than in guidance. The higher education sector, among others, would value clear and detailed regulations.
15. The removal of the requirements to publish details of engagement, equality analysis, and information used in undertaking analysis is likely to result in public bodies receiving an onerous amount of Freedom of Information requests, as organisations and members of the public seek to access details of the work undertaken. Contrary to the aims of the policy review, this is likely to increase bureaucracy and costs as public bodies respond to each request.

The duty to publish equality objective(s)

16. ECU is concerned over the reinsertion of phrase 'one or more' into the duty to publish objectives. In the summary of responses to the previous consultation on the specific duties (GEO, January 2011), the Government noted that it has taken account of the concerns

expressed by the public and removed the phrase. In our experience of working with the higher education sector, we do not believe that one objective would be sufficient to comply with the general duty in respect of all protected characteristics.

17. The removal of the requirement to set out how progress will be measured appears to contradict the principle of 'focusing on measurable results' as set out in paragraph 11(c). In the August 2010 consultation (paragraph 5.15), the government outlined that equality objectives should be part of a 'normal business planning process'. Any business process will have outcome measures and will also be likely to have targets and so the removal to publish and in effect demonstrate how progress will be measured goes against the principal of accountability. The public will not be able to hold public authorities to account over their equality objectives if they do not know what a 'measurable result' looks like.

Matters specified by a Minister of the Crown

18. Paragraph 26 of the policy review paper highlights that the equality 'priorities are best set by public bodies locally, not by Ministers centrally'. Whilst we agree that contextual information needs to be taken into account in setting local priorities, this removal goes against the principles established by the Macpherson Report, which noted the necessity of Ministerial national priorities (in that case for policing) in order to address inequality. Without looking at the overall national picture, persistent inequalities will endure. For example, in the higher education sector, the national picture is that black and minority ethnic students are less likely to get a good degree when compared to their white peers (see [Equality in higher education: statistical report 2010](#)) and it is only through analysing data across the sector as a whole that we know that there is a pattern of low BME attainment that is caused by unknown factors within higher education. The continued power of Ministers to set national equality priorities will encourage systemic failures in equality to be challenged. Removing the power of Ministers to set national equality priorities runs the risk of sending a message that equality is not a national priority.