



Equalities: The legal framework

This paper

1. This paper shows the legal context for today's conference and discussions. It does not have official legal standing. It does, however, aim to reflect accurately the official advice and guidance so far published by the Department for Education (DfE) and the Government Equalities Office (GEO), and the content of ministerial statements in the House of Commons and the House of Lords.
2. The contents of the paper are as follows:

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General introductory notes

Brief history

3. The Bill that preceded the Act was published on 27 April 2009 and was the latest stage in the history of anti-discrimination legislation in the UK. Earlier stages had included the equal franchise acts of 1918 and 1928, the race relations acts of 1965, 1968 and 1976, the sex discrimination act of 1975, and the disability discrimination act of 1995. The Bill received royal assent on 8 April 2010. Throughout its passage through parliament, both in the House of Commons and in the House of Lords, the vast majority of the Bill received all-party support.

Aims of the legislation

4. The basic aim, as asserted in a ministerial statement issued on 28 June 2011, is **'to support good decision-making by ensuring that public authorities understand how different people will be affected by their activities, so that services are appropriate and accessible to all, and meet different people's needs'**.

Protected characteristics

5. The Act harmonises the various pieces of anti-discrimination law that were introduced piecemeal in Britain over the previous 45 years, and in this way it simplifies and streamlines them. It replaces about 116 different acts of parliament, regulations and codes of practice, and establishes nine strands, known in legal parlance as nine **protected characteristics**. In alphabetical order, but in some instances using slightly different terms from those which appear in the Act itself, these are to do with:
 - age
 - disability
 - ethnicity and race
 - gender
 - gender identity and transgender
 - marriage and civil partnership
 - pregnancy and maternity
 - religion and belief
 - sexual identity and orientation.

Scope

6. The Act covers all aspects of school life which are to do with how a school treats its pupils and prospective pupils, and their parents and carers; how it treats its employees; and how it treats members of the local community. Similarly it covers all aspects of a local authority's work. The protected characteristics of age and marriage/civil partnership apply to schools as employers, but not with regard to the treatment of pupils and prospective pupils.

Structure

7. In a nutshell, schools and local authorities have a) **a general duty** and b) **two specific duties**. Aspects of the general duty are summarised below in paragraphs 13–23 and the specific duties are summarised in paragraphs 24–28. Government publications and ministerial statements stress that the specific duties are not additional to the general duty, but are ways of supporting its implementation.

The general duty

Three needs

8. Since 6 April 2011 all public bodies – including, of course, all local authorities and all schools and other state-funded educational settings, including academies – have been bound by what is known as **the public sector equality duty** (PSED – section 149 of the Act, and previously clause 148 of the Bill). Conceptually, this is modelled on a similar clause in the Race Relations Act 1976 and is also similar to the general duties which public bodies had in relation to disability from 1995 and gender from 1975. It has three components, known as three limbs or aims. A public authority must, it says, have **'due regard'** (this crucially important concept is explained below in paragraph 15) to the following three needs:
 - a) **eliminate discrimination**, harassment, victimisation and any other conduct that is prohibited by or under this Act
 - 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.
9. The three key terms in the public sector duty – **'discrimination'**, **'equality of opportunity'** and **'good relations'** – are explained briefly in the Act itself and the practical implications for schools are considered later in this paper. First, there are notes on the basic concept of due regard.

The concept of due regard

10. Case law relating to the concept of due regard is well summarised in *Equality Duty Toolkit*, published by the Trades Union Congress in autumn 2011 at <http://www.tuc.org.uk/equality/tuc-20159-f0.cfm>. The principles underlying the concept are sometimes known as the Brown principles, after the specific case which generated them. In brief, they are as follows:
 - **Awareness**
A decision-maker who has to take decisions which do or might affect an equality group (for example, disabled people, or persons of a particular ethnic background or gender) must be made aware of their duty to have due regard to the three aims of the Act.
 - **Timeliness**
Due regard must be fulfilled before and at the time that a particular decision is being considered. Attempts to justify a decision as being

consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not sufficient to discharge the duty.

- **Rigour**
The duty must be exercised in substance, with rigour and with an open mind and with conscious and deliberate attention to relevant

evidence, including evidence derived from consultation with staff and service-users. It is not just a question of ticking boxes.

- **Non-delegation**
The duty cannot be delegated.
- **Continuing**
The duty is a continuing one – namely, it cannot be exercised once and for all, but on the contrary must continually be revisited and borne in mind.
- **Record-keeping**
It is good practice to keep an adequate record showing that the equality duties have been actually considered and pondered. This disciplines decision-makers to undertake their equality duties conscientiously.

The concept of equality of opportunity

11. The principle underlying the concept of equality of opportunity is that treating people equally (i.e. not discriminating) does not necessarily involve treating them all the same. On the contrary, the legislation requires that account should be taken of people's differing experiences, needs and histories, and of the differing challenges and barriers which they may face. The Act's definition of equality of opportunity is complex in its legal terminology but in the field of education as in other fields it is of substantial and far-reaching significance:

Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

- a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
- b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
- c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low'.

Fostering good relations

12. The Act explains that having due regard to the need to foster good relations involves, in particular, bearing in mind **'the need to tackle prejudice and promote understanding'**. This clearly has implications for the curriculum and organisation of schools, and for the duty of schools to promote community cohesion. Also it has clear implications for schools' anti-bullying policies.

Specific duties

Summary

13. To help them have due regard for the three needs in the general duty (paragraph 13 above) the Equality Act requires schools and local authorities:
 - **to publish information** about their service users and any inequalities amongst them, and about the measures they have put in place to meet the general duty
 - **to prepare and publish specific and measurable objectives** which they will pursue over the coming years to meet the general duty.
14. There is further information and guidance in the explanatory memorandum mentioned above, and it is also well worth reading the speeches by government ministers when the regulations were introduced in the House of Commons and the House of Lords. The speech in the [House of Commons](#) was made by Lynne Featherstone MP on 11 July 2011 and the one in the [House of Lords](#), cited above at paragraph 17, was made by Baroness Verma on 6 September. Both speeches were followed by queries, questions and criticisms from the opposition benches, and the ministers' responses to these were additionally indicative of the government's thinking and intentions.
15. The first of the two specific duties had to be completed by local authorities by 31 January 2012, and has to be undertaken thereafter at least annually. In the case of schools, the first duty had to be completed by 6 April 2012 and thereafter annually. The second duty had to be completed by both local authorities and schools by 6 April 2012, and has to be undertaken again no more than four years later. The government stated that the gap for local authorities between publishing information on 31 January 2012 and publishing objectives by 6 April was in order to 'give people at least two clear months in which to review the data that has been published, and engage with and influence public bodies, from an informed perspective, about what their equality objectives should be'.

For schools, the Department for Education published in June 2014 an updated version of its non-statutory document entitled *Equality Act 2010: advice for school leaders, school staff, governing bodies and local authorities*. Amongst other things, this shows the DfE's understanding of how in practice schools might fulfil the specific duties. It is published at: <http://www.education.gov.uk/aboutdfe/policiesandprocedures/equalityanddiversity/a0064570/the-equality-act-2010>

The duty to publish information

16. 'Public bodies must ensure that they have the right information to hand about equality issues,' said the government spokesperson quoted above at paragraph 17, 'to make informed choices and decisions and to ensure that this is rigorously considered before and at the time decisions are taken.' She stressed that 'the regulations give public bodies flexibility to publish the information that they believe best demonstrates their compliance with the equality duty and which is most useful to their staff and service users in

holding them to account for their performance on equality. This means that public bodies will be able to publish the information that is right for their particular circumstances.' She added that the government has, though, two stipulations. The one of these affects only public bodies with 150 or more employees and is therefore not relevant to primary schools, and to only very few secondary schools.

17. The other stipulation, however, is relevant for all schools: 'Public bodies must include information relating to people who share a relevant protected characteristic who are affected by their policies and practices - their service users.' Ofsted has indicated it would be reasonable to expect that schools will accordingly need to publish information such as the following:

- the composition of the school population broken down by year group, ethnicity and gender, and by proficiency in English
- the composition of the school population broken down by types of impairment and special educational need
- differences in attainment, participation and take-up connected with disability, ethnicity and gender, and with proficiency in English

The duty to publish objectives

18. The explanatory memorandum accompanying the specific duties regulations contains the following indications of what is required. Objectives should:

- clearly illustrate the real equality improvements that the public body intends to deliver over the course of the business cycle
- focus on the key inequalities that the body is in a position to affect, as highlighted in its published information
- identify achievable, measurable improvements

19. The requirement to publish equality objectives, the memorandum explains, will 'help to ensure that the public and the voluntary and community sector organisations understand the key inequalities that public bodies are focusing on tackling and can track progress against these'.

20. So far as is appropriate, objectives should reflect SMART principles – they should be not only **s**pecific and **m**easurable, as required explicitly by regulations, but also **a**chievable, **r**elevant and **t**ime-bound.

21. The letter of the law specifies that a single objective is sufficient. However, if a school or local authority were to decide on only one objective it would probably be open to legal challenge on the grounds that it had not shown

due regard – the key idea in legislation that is defined above at paragraph 15.

Transparency and accountability

22. The basic principle underlying the new specific duties is that of transparency. 'Our proposals,' the Government Equalities Office (GEO) states, 'use the power of transparency to help public bodies to fulfil the aims

of the Equality Duty to eliminate discrimination, advance equality of opportunity and foster good relations between different groups. This means that public bodies will be judged by citizens on the basis of clear information about the equality results they achieve, rather than on whether they have completed a tick-box list of processes. Transparency means public bodies being open about the information on which they base their decisions, about what they are seeking to achieve and about their results.'

23. Publication of information and objectives must be done in a way that is open and freely available to third parties, for example community groups and equality campaigners. 'This will give the public a powerful tool to hold organisations to account,' the GEO continues, 'and enable third parties to analyse, interrogate and manipulate the data so it is easier for citizens to use.' The information is likely to come from a range of sources, including raw data, routine monitoring data, surveys of attitudes and perceptions, and statistics collected by external bodies. The ministerial statement issued on 28 June 2011 explained:

The publication of this information will ensure that public authorities are transparent about their performance on equality. This transparency will drive the better performance of the equality duty without burdening public authorities with unnecessary bureaucratic processes, or the production of superfluous documents. Public authorities will have flexibility in deciding what information to publish, and will be held to account by the people they serve.

Engagement, consultation and involvement

24. The duty to have due regard (see paragraphs 15–16) means that it is good practice, when considering equality issues, for schools to engage with people who have a legitimate interest – including staff (both teaching and administrative), parents, carers and pupils, and local groups, organisations and individuals as appropriate.
25. The same point was emphasised in a document issued by the Government Equalities Office on 17 March 2011. 'Under the requirements of the general duty to have due regard,' it said, '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** [emphasis added], and considering the effect of what they do on the whole community'. The explanatory memorandum accompanying the specific duties regulations states: 'The specific duties will require a public authority to publish information to demonstrate its compliance with the duty. This is likely to include details of the analysis it undertook and the information on which it was based. It is also likely to **include details of any engagement or consultation that it undertook** [emphasis added] in complying with the duty.'

Further information and guidance

The law and legal principles

26. For an academic and authoritative account of legal history since the 1960s, see 'The New Single Equality Act in Britain' by Bob Hepple QC, *The Equality*

Rights Review, volume 5, 2010:

<http://www.equalrightstrust.org/ertdocumentbank/bob%20hepple.pdf>

27. There is a full list of significant case law in the period 2008–12, with hyperlinks to the texts of the actual court judgements, on the website of the Equality and Diversity Forum at <http://www.edf.org.uk/blog/?p=17719>
28. Case law up to 2011 is well summarised in *Equality Duty Toolkit*, published by the Trades Union Congress in autumn 2011 at <http://www.tuc.org.uk/equality/tuc-20159-f0.cfm>
29. The explanatory memorandum accompanying the Equality Act regulations on specific duties includes a useful brief summary of government thinking, and (see section 8 in particular) how it developed in 2010–11: http://www.legislation.gov.uk/uksi/2011/2260/pdfs/uksiem_20112260_en.pdf
30. Ministerial statements in 2011 in the House of Commons and the House of Lords contained authoritative indications of the government's intentions:
- Lynn Featherstone MP - <http://www.publications.parliament.uk/pa/cm/cmtoday/cmstand/output/d eleg/dg02110711-01.htm>
 - Baroness Verma - <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110906-0001.htm>

Department for Education

31. Advice for schools, last updated in June 2014, is at: <https://www.gov.uk/government/publications/equality-act-2010-advice-for-schools>

Equality and Human Rights Commission

32. Advice and guidance for education providers is at: <http://www.equalityhumanrights.com/advice-and-guidance/education-providers-schools-guidance>
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