

Labour & European Law Review

**Focus on the
new public
sector equality
duty**

**Overview of the
public sector
equality duty**

Explaining the main
obligations

Pg 2

**Case law and
the public sector
equality duty**

The impact on existing
case law

Pg 6

**Trade unions and
the public sector
equality duty**

Holding public bodies
to account

Pg 9



The new public sector equality duty

Jo Seery provides an overview of the main obligations on public authorities under the public sector equality duty, setting out what they are required to do and when

AFTER SOME hesitation, the coalition government confirmed at the beginning of the year that a series of public sector equality duties would come into effect on 6 April. This article clarifies the requirement under the general duty to eliminate discrimination and the requirements to publish information and set equality objectives under the specific duties. There are different regulations setting out the specific duties that apply to Scotland and Wales.

What is the public sector equality duty?

The Equality Act, which replaced all previous anti-discrimination laws when it came into force last October, also ushers in a new public sector equality duty.

It replaces the three previous duties that applied to race, disability and gender and has

The public sector duties could be useful when challenging public sector spending cuts

extended them to cover age, sexual orientation, religion and belief, pregnancy and maternity and gender reassignment.

As with the previous requirements, the new duty imposes a positive obligation on public authorities to eliminate discrimination and advance equality by requiring them to take equality considerations into account as an integral part of the decision making process (also known as mainstreaming).

But nobody made much use of them until last year when the Fawcett Society (an equality charity) sought a judicial review of the emergency budget on the grounds that the government had failed to assess the impact of spending cuts on equality between men and women.

Although they did not succeed, the case highlighted how useful the public sector duties could be when challenging public sector spending cuts. In particular, cuts to services and loss of jobs likely to have an impact on equality.

As the statutory code of practice, which will give guidance on how the duties should be met, had not been published at the time of going to press, this article sets out the general and specific duties by reference to guidance produced by the Equality and Human Rights Commission (EHRC).

What bodies are covered?

The public bodies covered by the duty are listed in a schedule to the Act, and include organisations such as local authorities, education bodies (including schools and academies), health bodies, police, fire and transport authorities, as well as government departments. The BBC, Channel 4 and ACAS are also now included.

Most of the authorities listed will be required to comply with the general equality duty in

relation to all their functions. A number of regulatory bodies such as the Nursing and Midwifery Council will only be required to comply with the general equality duty in respect of their public functions.

Private sector companies that carry out public functions on behalf of a public authority will also be required to comply with the general duty. For example, if a security firm has a contract with a prison to transport prisoners this will be covered by the equality duty, but any security work it carries out for a supermarket will not.

A number of bodies are specifically excluded, such as The House of Commons, House of Lords, the Scottish Parliament and the National Assembly for Wales, the security services and GCHQ.

What is a public function?

To decide if a private company is carrying out public functions will depend on whether:

- it is publicly funded
- it is exercising powers covered by statute such as utility companies
- it is taking the place of central or local government such as contracted out cleaning services
- it is providing a public service that works closely with the delegating state body
- it has a close relationship with the public body.

What is the general duty?

The general duty, set out in section 149 of the Act states that a public authority must, when carrying out its functions, have due regard to the need to:



- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Equality Act
 - advance equality of opportunity between those who share a protected characteristic and those who do not
 - foster good relations between people who share a protected characteristic and those who do not by tackling prejudice and promoting understanding.
- These are known as the “three aims”.

The overall aim of the general duty is to make sure that public bodies take equalities into account as part of their decision making process.

In relation to advancing equality, “due regard” means to:

- remove or minimise disadvantages suffered by anyone with a protected characteristic
 - take steps to meet the needs of people who share a protected characteristic that is different from those who do not have it
 - encourage people with a protected characteristic to participate in public life or other activities where their participation is low.
- There is a separate provision which makes clear that, in terms of disability, public bodies must consider the need to make reasonable adjustments.

What are the specific duties?

The specific duties are far from specific and simply require public authorities to:

- publish sufficient information to show they have complied with the general duty by 31 July this year (31 December for schools)

- prepare and publish equality objectives by 6 April next year.
- These duties are much weaker than they used to be. In particular, public authorities no longer have an obligation to carry out equality impact assessments (EIAs), nor do they have to have equality schemes in place.

This is disappointing to say the least, as all the research shows that EIAs had driven progress as regards public authorities meeting their general duty.

Unlike EIAs the regulations do not say what information must be published nor how it should be maintained.

Duty to publish information

Public authorities must publish the following information by 31 July 2011 (31 December for schools) and at least annually thereafter:

- details of the effect that the public authority’s policies and practices have had on employees (only applicable to authorities with 150 employees or more), service users and others affected by its policies and practices
- evidence of the analysis undertaken to establish whether the policies and practices will further or have furthered the aims of the general equality duty
- details of the information used in that analysis and
- details of engagement with people with an interest in the aims of the duty.

The EHRC points out in its guidance that, although there is no duty on public authorities with fewer than 150 employees to publish

information about the effect of their policies on employees, they will still need to gather workforce information to meet the obligation to analyse their policies and practices and set equality objectives.

The duty to publish details of how public authorities have engaged with anyone who has an interest in furthering the three aims under the general duty must also include how they have engaged with unions and service users (among others).

The duty to provide information is central to the duty to publish and prepare equality objectives and meet the duty to undertake equality analysis of employment policies and practices.

Sufficient information

This requirement is not defined nor does the legislation set out what data public authorities have to publish.

The EHRC says it would expect public authorities with 150 employees or more to provide information about:

- the race, disability, gender and age breakdown and distribution of the workforce
- an indication of likely representation on sexual orientation and religion or belief (provided that no-one can be identified as a result)
- an indication of any issues for transsexual staff based on engagement with transsexual staff or voluntary groups
- gender pay gap information
- grievance and dismissal.

➤ Gender pay gap information

Although there is no specific duty that requires a public authority to produce gender pay gap information, the EHRC recommends that the most effective way of meeting the general equality duty to eliminate discrimination is to undertake an equal pay audit.

It also suggests that a failure to address gender pay discrimination could leave public authorities open to further claims. According to a 2008 Equal Pay Review survey, 40 per cent of public bodies have already audited their pay systems for sex. In light of the guidance from the EHRC, public authorities should continue to carry out such audits.

Sensitive information

When collecting information on sensitive issues, such as sexual orientation, religion or belief and transsexuals, the EHRC reminds public authorities of their obligations under the Data Protection Act and Gender Recognition Act (GRA).

Under the GRA, for instance, it is a criminal offence to disclose the fact that someone with a gender recognition certificate has changed their sex.

Equality objectives

Although public authorities no longer have to produce equality schemes, they now have to prepare and publish equality objectives by 6 April 2011 and at least every four years thereafter. These should further one or more of the three aims under the general duty.

In order to set these objectives, the authority must take into account the equality information, including an equality analysis of the effects of their policies and practices.

The EHRC guidance suggests that, when setting objectives, authorities should take account of:

- internal information
- publicly available statistics from sources such as the Office for National Statistics and the Labour Force Survey
- the views of those who have an interest in furthering the three aims such as trade unions. Senior management and board members should also be involved at the early stages of setting objectives.

The guidance also recommends that objectives should not only be specific and measurable, but should set out how progress towards those objectives will be measured. Objectives such as: “We would like to have more employees who have a disability” or: “We should give more attention to

transsexual issues” will not meet this legal requirement.

Examples of objectives in the EHRC’s guidance include setting targets, such as increasing the participation of disabled people using adult learning services by 40 per cent over a four-year period.

Objectives can also be qualitative. For example, if staff surveys show black minority ethnic employees are dissatisfied with the way their grievances are resolved, an objective could be publishing details of grievances, the time it took to resolve them and the outcome.

When setting objectives, the EHRC states that it is not the number of people who are affected that is important but the significance of the issue. An issue that affects a small number of people seriously may be more of a priority (such as how grievances are dealt with) than one that affects a larger group less significantly.

In addition, public authorities should aim to set objectives that tackle ingrained issues, not just easy targets. Objectives that are too narrow in scope may not address the significant equality issues and the authority could run the risk of not meeting its obligation to have due regard to the three aims.

Measuring objectives

The regulations do not set out how public authorities should measure their objectives, but the EHRC guidance suggests that a failure to do so may be evidence of a failure to meet the general duty.

An example of a measure to improve the representation of disabled employees at a certain grade could be having regular six-monthly reviews with unions. And improving the working environment of transsexuals could be measured through feedback from focus groups or confidential surveys.

In view of the significant changes that are likely in the public sector over the next few years, the EHRC guidance recommends that equality objectives should be reviewed more regularly to make sure they are relevant during this period of change. Details of the equality objectives including where they have been reviewed should be published in an accessible format.

Equality analysis

It is clear that unless the information and equality analysis is sound, equality objectives may be neither relevant nor adequate.

Under the previous duties relating to race,

disability and sex, public authorities had to carry out equality impact assessments, but the new duty changes the focus to look at the effects on equality. This is to focus attention on the quality of the analysis and how it is used in actual decision making rather than the process.

The Commission says in its guidance, “Equality Analysis and the Equality Duty: A guide for Public Authorities”, that equality analysis should not be an administrative task but a core part of policy making. As such, those involved in policy making, business planning and corporate decision making should be trained to ensure that it is an integral part of what they do.

It also warns against outsourcing equality analysis on the grounds that it should be conducted in partnership with stakeholders such as unions and community groups.

The guidance provides a step-by-step guide to equality analysis and suggests the following approach:

- Identify who is responsible for the equality analysis
- Establish its relevance to equality both in terms of current and proposed policies
- Scope the equality analysis – that is examine how the aims of the policy relate to equality and which aspects are of particular importance to equality
- Analyse the equality information
- Monitor and review
- Document and publish the analysis.

It is a legal requirement for public authorities to publish their analysis, and details of the information they have taken into account as well as details of whom they engage with and how.

The EHRC gives the example of a public authority that undertakes an equality analysis of its policy on staff leadership skills. The purpose of the policy is to ensure that all staff gain appropriate training.

When it looks at the policy aims, the public authority decides to amend them to include addressing the lack of women in senior management and to implement targeted management training for women staff.

This example shows that the equality analysis must meet the three aims in terms of advancing equality, eliminating discrimination and by targeting policy. And in this way a public authority is also fostering good relations between protected groups.

The quality of the equality analysis very much depends on the information that the public authority obtains. A lack of information is not an excuse for not carrying out an analysis on equality and public authorities will be expected to gather evidence through engagement and consultation with trade unions.



Engagement

Engagement seems to be the new word for consultation and is central to the public authority’s duty to publish information.

In particular, public authorities must publish information about the engagement they have undertaken with those who have an interest in furthering the three aims of the general duty and in developing their objectives. This information must be published annually.

While the specific duties do not set out how or when engagement should be undertaken, the EHRC guidance on engagement suggests that this should take place at each stage of the process, such as:

- at the beginning of the decision-making process to gather opinions, evidence and ideas on the policy
- at the point of developing options and making decisions
- when implementing decisions such as the development of action plans or implementation strategies
- following implementation, to review and evaluate whether the information and objectives are meeting the three aims.

It also recommends that public authorities engage with those who have an interest in how they carry out their work generally or on a

particular policy, including staff equality groups and trade unions, equality organisations and the wider community.

The EHRC guidance suggests that public authorities will need to give particular attention to those who have faced barriers to participation in the past, such as people with mental health conditions, learning difficulties and those with disabilities.

Public authorities are required to publish the result of any engagement. The EHRC guidance suggests that authorities should document the organisations and individuals they engaged with, as well as giving a summary of the key points discussed and how these have been incorporated, or if they have not been incorporated, why not.

Where the engagement involves a formal process, minutes should be published in a format accessible to the public.

The guidance emphasises that engaging and working with trade unions can lead to higher participation and better outcomes.

Is procurement included?

When the Labour government announced the introduction of the Equality Bill, it indicated that it would require all public authorities to set

equality criteria as part of their procurement procedure.

However, while there is no duty that applies to procurement specifically in the Equality Act, the general equality duty applies to all procurement.

The EHRC guidance recommends that equality considerations should be built into “appropriate stages” of commissioning and procurement, including contracts let under the private finance initiative.

This should include analysis of the effects that procurement and commissioning policies have on meeting the three aims, and engaging with interested parties such as trade unions and potential service users about the effect that procurement may have on the protected characteristics.

In light of the specific obligation to publish information, the guidance suggests that, where a function is contracted out, contractors should be required to include equality information in the tender information.

For example, where a health service is contracted out, tender information should include details of the effect on those with a disability or, where ante-natal services are contracted out, the tender information should include the effect this will have on pregnant women.

As a minimum, the EHRC guidance recommends the following contract conditions:

- prohibiting contractors from discriminating under the Equality Act
- requiring that all reasonable steps are taken to ensure staff, suppliers and subcontractors meet their Equality Act obligations.

How can the duties be enforced?

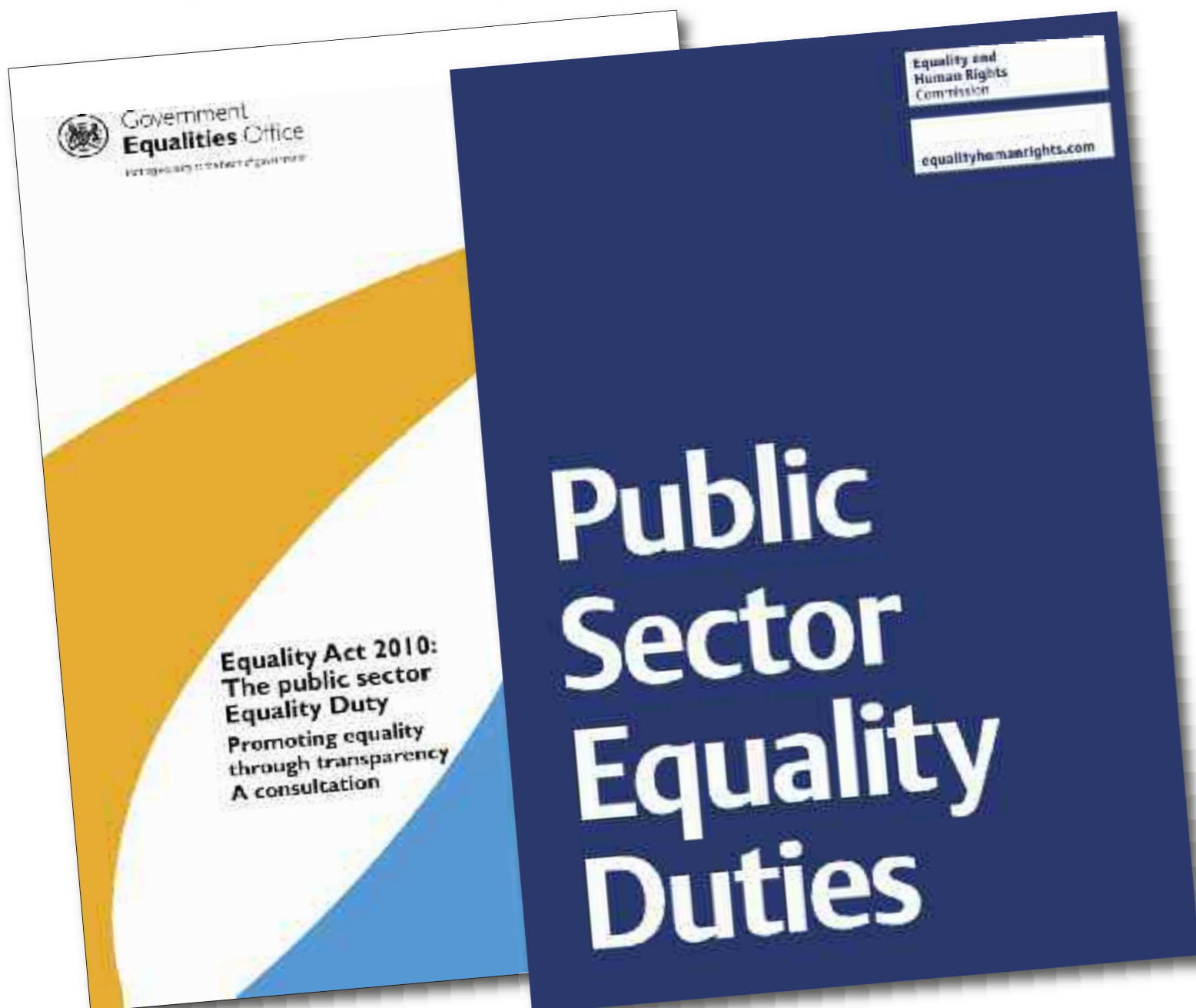
The EHRC has a statutory power to enforce the general and specific duties.

This includes:

- undertaking assessments as to the extent to which a public authority has complied with the equality duties
- issuing compliance notices where a public authority has failed to comply with the general equality duty or the specific duty, which require a public authority to provide information and the steps it will take to comply
- entering into an agreement with an organisation to develop and implement an action plan to address any breaches and prevent any future breaches.

Finally, if a public authority does not comply with the general equality duty, then the EHRC can apply for judicial review, as can trade unions.

Case law and the public sector equality duty



Rakesh Patel looks at existing case law and assesses its relevance to and impact on the public sector duties being introduced under the Equality Act 2010

SINCE THE first public sector equality duty (on race) came into effect over ten years ago with sex and disability following a few years later, an increasing number of cases have made it to the courtroom under the current law.

What are the new duties under the Act?

The new duties will replace the three existing public sector equality duties to cover all eight protected characteristics and will require the relevant public bodies, when exercising their functions, to have due regard to:

- the need to eliminate discrimination
- advance equality of opportunity
- foster good relations between people who share the relevant characteristic and those who don't.

What is “due regard”?

Current legislation does not provide much information about what is meant by the phrase “due regard” and nor does the Equality Act.

Section 149(3) of the Act just states in general terms that having “due regard” to advancing equality of opportunity involves having due regard to:

- the need to remove or minimise disadvantages
- taking steps to meet the needs of people from protected groups
- encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

As a result of the general nature of the clauses, the responsibility of defining “due regard” has fallen to the courts.

Brown -v- DWP

One of the leading cases, **Brown -v- Secretary of State for Work and Pensions (2008)** set out some general principles.

Mrs Brown was disabled and lived with her husband in Sussex. She could not stand or walk for long periods without acute pain. In late 2007, she discovered that the

government was proposing to shut down a number of post offices in Sussex, including the branch in her village. Because of her disability, this would make it very difficult for her to access another post office further away.

In a legal challenge to the decision, Mrs Brown claimed that the government had failed to comply with its duties under the Disability Discrimination Act 2005, in particular its duty to pay due regard to the equality duties as it had not carried out a disability equality impact assessment of the closure proposal. She was unsuccessful.

The court set out the following principles:

- Those responsible for the duty to have due regard must consciously bring it to mind when considering the duty. If they don't or if their appreciation of the duty is incomplete or mistaken, the courts will deem that due regard has not been applied.
- The due regard duty must be fulfilled before and at the time that a particular policy is being considered. Compliance with the duty should not be treated as a rearguard action after a decision to implement the policy in question.
- It must be exercised with rigour and with an open mind. Due regard involves more than a tick box exercise. The “substance and reasoning” of the decision must be examined. However, a failure to make explicit reference to the relevant positive equality duty will not, of itself, be fatal to a decision.
- It is good practice for public authorities to keep an adequate record showing that

they had actually considered their equality duties and pondered relevant questions.

- The due regard duty cannot be delegated to a third party by the public authority charged with it.
- The duty is ongoing.
- When applying the “due regard” test, the public authority must take into account whatever countervailing factors are relevant in the circumstances.

Kaur -v- London Borough of Ealing

This case dealt with the issue of whether a race impact assessment should have been carried out before the council decided to cut funding to a voluntary organisation, Southall Black Sisters (SBS). It provided services to Asian and Afro-Caribbean women who experience domestic abuse.

In 2007-2008 they were partly funded by Ealing Borough Council. The council decided in September 2007 that it would only fund borough-wide services provided to everyone experiencing domestic violence irrespective of gender, sexual orientation, race, faith, age, or disability.

SBS said that this would have a disproportionate adverse impact on black and minority ethnic (BME) women and pointed out that the council had not done a race equality impact assessment.

The council then undertook a “draft equality impact assessment”, which indicated that the impact on BME women would be monitored when the new arrangements were in place.

However, it did not carry out a full equality impact assessment. A few months later, the council confirmed its earlier decision to fund a single borough-wide service provider. The claimants, service users of SBS, successfully applied to judicially review this decision.

The court quashed the council's decision and reiterated the importance of undertaking an equality impact assessment, and also the importance of carrying out an impact assessment before formulating policy.

Other cases

There are a number of other examples of successful cases that have resulted in the courts' quashing the decisions of public authorities. ➤

The court quashed the council's decision and reiterated the importance of undertaking an equality impact assessment

➤ These include:

- cutting the funding of voluntary organizations in **Chavda -v- Harrow LBC**
- refusing to allow a Sikh girl to wear a kara through the rigid application of a school uniform policy in **Watkins-Singh -v- Governing Body of Aberdare Girls High School**
- refusing to license a particular model of taxi for use as a hackney cab despite disabled groups making representations that many wheelchair users could not travel safely in **Lunt and another -v- Liverpool City Council**
- approving planning permission for a development of chain stores and luxury flats on a site overwhelmingly occupied by BME businesses and tenants in **Harris -v- London Borough of Haringey**.

Conclusion

It's worth remembering that the whole point of enacting the public sector duties in the first place was to eliminate

The promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination

institutional discrimination.

The race equality duty, the first to be enacted, was a response to the recommendations of the Macpherson inquiry into Stephen Lawrence's murder, highlighting the need for organisations to eliminate institutional racism.

The duties do not create rights for individuals.

Nor are they concerned with the avoidance of discrimination.

Instead, as the Court of Appeal said in **Baker -v- Secretary of State for the**

Environment, the "promotion of equality of opportunity ... will be assisted by but is not the same thing as the elimination of ... discrimination ... the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination..."

The established principles within the case law reflect this and will be as relevant to the new duties under the new legislation as they were to the previous ones.



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Unions and the public sector equality duty

Richard Arthur takes a look at what authorities have to do to stay within the law and suggests ways trade unions can engage with public bodies and hold them to account

ALTHOUGH THE Equality Act 2010 requires public authorities to comply with a new general duty to combat discrimination, it does not specify what they have to do to meet that obligation.

It does, however, stipulate certain steps that they have to take in order to comply with a series of "specific duties" also required under the Act.

What is required under the "specific duties"?

By 31 July 2011 (or 31 December for schools) and annually after that, public authorities must publish "sufficient information" to demonstrate compliance with the general duty, including:

- information on the effect that their policies and practices have had on employees, service users and others from protected groups
- evidence of the analysis undertaken to establish whether their policies and practices will (or have) furthered the three equality aims in the general duty
- details of the information used in that analysis
- details of engagement with people with an interest in the aims of the duty.

By 6 April 2012, and at least every four years after that, public authorities must also prepare and publish equality objectives.

The Equality and Human Rights Commission (EHRC) has published five guides for implementing the public sector equality duties, and will publish a statutory code of practice later in the year.

"The essential guide to the public sector equality duty" for public authorities stipulates the standards to which public authorities can be held in relation to the various categories of information, including information that has to be published by 31 July.

What can trade unions do?

Trade unions should identify as many public authority functions as possible that relate to the equality duty, and press for any information relevant to those functions to be published.

Where they know that the authority has more information, or are aware of oversights or errors in any information that has been published, they should require the authority to make whatever revisions are necessary.

They should retain and save all the information made available to them, whether formally published or not, in case it's needed at a later stage.

In particular, unions should ask for evidence of any analyses that the authority has undertaken about their policies and practices to establish whether they further the three equality aims of the general duty (see article on page 2).

They can then use that information in any subsequent legal proceedings or bargaining arrangements.

And they should be actively engaged in setting equality objectives and determining how success (or otherwise) will be measured. Senior managers and board members should also be involved at the early stages of objective setting.

Objectives may include not only specific quantifiable targets, but also qualitative objectives such as addressing levels of dissatisfaction amongst protected groups. The more objectives that can be framed as concrete steps to be taken, the better.

Unions should rely on the EHRC's standards of engagement, which require authorities to ensure adequate resourcing, accessibility, influence and transparency, and long-term collaborative engagement when working to achieve the aims of the public sector equality duty.

What is required under the general duty?

The extent to which public authorities comply with their specific duties has a direct knock-on effect on the extent to which they comply with their general duty.

The general duty applies to all functions, so that it applies each time a public authority initiates or implements a policy or practice. It also applies to the public functions exercised by service providers on their behalf.

In considering each policy or practice, trade unions should require public authorities to adhere to the following standards endorsed by the EHRC:

Objectives may include not only specific quantifiable targets, but also qualitative objectives such as addressing levels of dissatisfaction



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- ● Those who exercise [its] functions (for example, its staff and leadership) are aware of the requirements of the equality duties. Compliance involves “a conscious approach and state of mind”. This means that decision-makers must be fully aware of the implications of the duty when making decisions about their policies and practices.
- The duty is complied with before and at the time that a particular policy is under consideration and a decision is taken. A public authority cannot satisfy the duty by justifying a decision after it has been taken.
- Consideration of the need to advance equality forms an integral part of the decision-making process. The duty must be exercised in such a way that it influences the final decision.
- Any third party exercising public functions on its behalf are required to comply with the duty, and must do so in practice. This is because the duty rests with the public authority even if they have delegated any functions to a third party.
- Regard is given to the need to advance equality when a policy is advanced or reviewed.

How are the equality duties enforced?

The EHRC has statutory powers to enforce both the general and specific duties, which allows it to undertake assessments under section 31 of the Equality Act as to whether a public authority has complied with them.

It can also issue compliance notices and enter into agreements under section 23 of the Act to develop and implement an action plan.

Unions may be able to challenge a public authority if it fails to comply with either equality duty by way of judicial review in the High Court. However, these challenges are likely to be very expensive and require specific authorisation from those with responsibility for legal budgets.

The time limits for making a judicial review application are also extremely onerous. An application has to be made as soon as is practicable and, in any event, within three months of the date of the decision complained of.

It is also worth bearing in mind that a union supporting a member's individual claim for discrimination can rely on information published by a public authority as part of its compliance with the equality duties.

Conclusion

Trade unions have a prominent role to play in ensuring that the aims of the equality duties are achieved.

They should assert that prominence through existing bargaining procedures and hold public authorities to account, using the standards set by the EHRC.

Although not legally as powerful as the public sector equality duties they replace, the new duties may still give rise to opportunities for legal challenge.

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