



The public sector Equality Duty: reducing bureaucracy

TUC response to GEO policy review paper

About the TUC

The TUC represents 58 affiliated unions with a total 6.5 million members, working in a wide range of organisations, sectors and occupations. Our affiliates regularly represent workers suffering discrimination or harassment, and they work with employers in raising awareness of equality issues in the workplace and in developing policies and practices to stop discrimination occurring. In addition, our affiliates representing public service workers have a keen interest, not only in the employment aspects of the public sector duty, but also in ensuring public services are delivered in an equal and inclusive way. These unions have played an active role in holding public bodies to account on the former public sector equality duties and intend to do so under the new single equality duty.

Introduction

The TUC is dismayed by the Government's decision to reverse the improvements it made to the draft specific duties Regulations following the consultation on its original proposals in November 2010.

It appears with this policy review that a political decision has been taken within Government to strip the specific duties down to the point that they will provide little support for stakeholders seeking to hold public bodies to account and provide little guidance to public bodies on how to meet the general equality duty.

This review was announced just a month before the general duty was due to take effect and after many organisations, including the TUC and public service unions, had spent time preparing for what the new framework was going to require based on the amended draft Regulations published in January 2011.

This review disregards the concerns raised by the TUC and other stakeholders in response to last year's consultation. The suggestions that were previously taken on board by the Government to make its new transparency and accountability approach to the specific duties more effective are completely ignored in this latest version of the draft Regulations. In our view this version is even more problematic than the original we commented on in November 2010.

In this response, we will repeat many of the points we made when we responded to the original consultation and we recommend that it is considered alongside our earlier response.

Comments on the new approach

We welcome the Government's decision to bring the general equality duty into effect as planned on 5 April 2011. We recognise that ultimately it is the general duty that public bodies and those carrying out public functions are held to account on and that there is case law arising out of enforcement actions brought under the race, disability and gender duties which sets out what public bodies should be doing in order to demonstrate they have shown due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations.

However, we believe that many organisations will not be aware of this case law and the principles arising out of it as they have looked primarily to the specific duties to guide them in the fulfilment of the general duty. This is because, as stated in the policy review paper, the whole purpose of the specific duties has been to support better performance of the general equality duty and thus provide that guidance.

Therefore, with this recent policy review and the stripping back of the specific duties requirements, many organisations will be given the misleading impression that much of what they were previously doing to meet the general duty is unnecessary, particularly given the language used in the policy review paper with the earlier specific duties being referring to as "unnecessary process requirements" and "arduous and ineffective bureaucratic processes".

If the Government does not listen to stakeholders' concerns and implements the draft specific duties Regulations as set out in the policy review paper, it is imperative that EHRC produces a strong statutory Code of Practice that clearly states the principles derived from case law and sets out good practice on what should be done to fulfil the general duty.

Lighter touch transparency requirements

The Government has stated that its new approach to the specific duties is about improving transparency and democratic accountability.

In our response to the earlier consultation, we were supportive of the stated objective of encouraging more open decision making. In particular, we supported the Government's Public Data Principles that were repeatedly cited in the consultation paper as underpinning the new approach to the specific duties (although we did not think that the draft Regulations as originally drafted met them). These principles called for the timely release of information and for the kind of information that is released to be driven by the public who want and use it. We note that references to these principles are absent from the policy review paper.

Along with other stakeholders, we made a number of constructive suggestions to improve the wording of the original draft Regulations to ensure that the transparency requirements and information that is released could be effectively used by members of the public and organisations like trade unions to hold public bodies to account. We were pleased to see some of these taken on board when the revised draft Regulations were published in January 2011.

While the policy review paper still talks about "challenge from the public [being] the key means of holding public bodies to account on their performance on equality", we believe the "lighter- touch transparency requirements" that are proposed in the paper will make holding public bodies to account an arduous, bureaucratic and lengthy task. The necessary information will not be readily available, so instead members of the public, trade unions and voluntary and community sector organisations will have to fall back on issuing freedom of information requests and waiting for responses.

We urge the Government to reconsider the changes it has made to the transparency requirements in the draft specific duties Regulations. In particular:

- the word "sufficient" should be reinstated prior to "information" in the requirement to publish information to demonstrate compliance with the general duty. Otherwise, there is no standard against which public bodies can be held to account.
- the wording of the second requirement which states that public bodies must publish information "relating to persons who share a protected characteristic" should revert to the more specific requirement to publish information "on the effect

its policies and practices have had on persons who share a relevant protected characteristic". This will aid the EHRC in producing guidance on what kind of information public bodies are expected to produce and, in particular, it will enable it to make clear that gender pay gap information is expected (as the Government has repeatedly stated). Without this change public bodies are likely to just produce some minimal information on workforce composition for a few of the protected characteristics where information is already gathered.

- the requirement to publish evidence of equality analysis must be reinstated as one of the basic transparency requirements. The Government recognises in the policy review paper that evidence of equality analysis is a necessary part of showing due regard to equality. In addition, requesting equality impact assessments (or an equivalent form of equality analysis) is the most common starting point for those seeking to establish whether public bodies have paid due regard to equality. Without this requirement in the Regulations, public bodies could be inundated with freedom of information requests seeking this analysis.

Engagement

Another concern we voiced in response to the earlier consultation was the need to ensure public bodies engage with stakeholders like trade unions in a constructive way and at a formative stage of decision-making. We expressed concern that the framework for democratic accountability that was being proposed seemed to rely on stakeholders holding public bodies to account after the event. Such reactive accountability is counter to the whole purpose of the 'due regard' duty and is potentially a more costly and ineffective way of operating, as issues fail to be addressed at a formative stage and policies end up having to be reversed once resources have been committed to a particular course of action.

We are disappointed that after placing more emphasis on engagement in the draft Regulations, the Government has now decided to completely remove all references to engagement from them. The policy review paper states that engagement is an integral part of showing due regard, in which case the Regulations should include requirements in relation to it.

If the draft Regulations are not amended then the statutory Code and any guidance from Government must make clear the need for engagement in order to fulfil the general duty and also make clear the positive benefits of early engagement in terms of more effective policy making.

Equality objectives

In response to the earlier consultation, we registered our concern that requiring “one or more” equality objectives to be published at least every four years (as was the case in the original version of the draft Regulations) gave the misleading impression that just one objective would be sufficient to meet the requirements of the general duty, which applies to eight protected characteristics and has three elements to it (eliminating discrimination, advancing equality of opportunity and fostering good relations). The Government addressed these concerns by deleting the words “one or more” when it published revised Regulations in January. But in the current draft Regulations this wording has been reinserted. The policy review paper explains that this is because the Government now believes this to be a “proportionate approach which takes into account the size and role of the public authorities..., [and] in some circumstances a single objective could be appropriate”.

We do not believe this is a proportionate approach as in the vast majority of cases a single objective will not be appropriate. Most public authorities to which the specific duties Regulations will apply are medium to large-sized organisations carrying out a range of public functions. Even where small organisations, such as a school employing 20 staff are concerned, the role of these organisations is such that how they carry out their functions has the potential to significantly impact on equality of opportunity for their staff, potential staff, service users and others in the local community in a range of ways.

The phrase “one or more” should be deleted again. The Regulations should simply state that a public body must prepare and publish equality objectives it thinks it should achieve to meet the general duty. This avoids the risk that a large number of public bodies may be encouraged to think that setting a single equality objective for a four year period is sufficient, while also

allowing for the very rare instances where a single objective may be sufficient.

Measuring progress

Finally, removing the requirement to set out how a public body intends to measure progress against its equality objectives will make it difficult for members of the public and stakeholders like trade unions to hold public bodies to account against their published objectives. There will be no transparent indicator or measure against which to assess the public body's performance.