

EXPLANATORY MEMORANDUM TO
THE EQUALITY ACT 2010 (SPECIFIC DUTIES) REGULATIONS 2011

2011 No. 2260

- 1.** This explanatory memorandum has been prepared by the Government Equalities Office (GEO) and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 Section 149 of the Equality Act 2010 (c. 15) (“the Act”) imposes a duty known as the public sector equality duty (“the duty”), on the public authorities listed in Schedule 19 to the Act, to have due regard to three specified matters. Those matters are the need to:

- a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

- 2.2 These Regulations exercise powers in sections 153(1) and 154(2) of the Act which enable a Minister of the Crown to impose specific duties on public authorities by regulations. The purpose of the duties is to ensure better performance by the public authorities listed in the Regulations of their duty to have due regard to the matters set out in paragraphs (a) to (c) of section 149(1).

- 2.3 These Regulations facilitate better performance by the public authorities of the duty imposed by section 149(1) of the Act by requiring them to prepare and publish objectives, setting out what they intend to achieve in order to further the aims of the duty, and to publish information demonstrating their compliance with the duty.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Sections 153(1) and 154(2) enable a Minister of the Crown to impose specific duties on a public authority specified in Parts 1 and 4 of Schedule 19 to the Act. Some additional public authorities were inserted into Parts 1 and 4 of the Schedule by the Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011 (S.I. 2011/1060). The Office for Budget Responsibility was inserted into Part 1 of Schedule 19 by Schedule 1 to the Budget Responsibility and National Audit Act 2011 (c. 4).

- 3.2. Both Welsh and Scottish Ministers have powers to impose specific duties on relevant Welsh and relevant Scottish public authorities listed in Parts 2 and 3 of the Schedule, respectively. The Welsh Ministers have exercised this power. The Scottish Ministers intend to exercise it later this year.
- 3.3 The Secretary of State may impose duties on cross-border Welsh authorities (which is what these regulations do) having met relevant procedural requirements.
- 3.4 Public authorities listed in Schedule 2 to the Regulations have been given additional time to publish information demonstrating their compliance with the duty in order to meet the spirit of a commitment given to the Merits of Statutory Instruments Committee, that schools should be given a full term to plan for and implement new regulations. This commitment was set out in a letter from Nick Gibb MP to the Chairman, on 27 October 2010¹.

4. Legislative context

- 4.1 The Act replaced and consolidated earlier anti-discrimination laws with a single Act.
- 4.2 Section 149 of the Act includes the duty, which came into force on 5 April 2011. This replaced similar, separate, public sector equality duties relating to race, gender and disability discrimination (sections 71 to 71B of the Race Relations Act 1976 (c. 74), sections 76A to 76C of the Sex Discrimination Act 1975 (c. 65) and sections 49A to 49D of the Disability Discrimination Act 1995 (c. 50)).
- 4.3 Section 149 of the Act extends coverage of the duty to the additional protected characteristics of age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment (in full). The duty only applies to the protected characteristic of marriage and civil partnership in respect of the requirement in section 149(1)(a) to eliminate conduct that is prohibited by or under the Act.
- 4.4 Sections 153(1) and 154(2) of the Act permit a Minister of the Crown to impose, by way of regulations, specific duties on public authorities specified in Parts 1 and 4 of Schedule 19 to the Act respectively. The Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011 (S.I. 2011/1060), which came into force on 4 April 2011, amended Schedule 19 to the Act. Schedule 19 was amended further by Schedule 1 to the Budget Responsibility and National Audit Act 2011 which added the Office for Budget Responsibility. The Schedules to these Regulations specify which of the public authorities in Schedule 19 (as amended) are subject to the specific duties.

¹ <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldmerit/49/4909.htm>

4.5 The purpose of specific duties is to ensure better performance by the public authorities concerned of the duty to have due regard to the matters set out in paragraphs (a) to (c) of section 149(1) of the Act.

4.6 Sections 153(4) and 154(4) of the Act require a Minister of the Crown to consult the Commission for Equality and Human Rights before making regulations imposing duties on public authorities in Parts 1 and 4 of Schedule 19 and about these regulations, and she has done so. The Secretary of State has also consulted the Welsh Ministers in accordance with section 154(3) of the Act so far as the Regulations apply to cross-border Welsh Authorities.

5. Territorial extent and application

5.1 These Regulations apply to certain public authorities operating in England, or England and Wales, and to certain public authorities operating across Great Britain in relation to non-devolved functions.

6. European Convention on Human Rights

The Secretary of State for the Home Department and Minister for Women and Equalities, the Rt Hon Theresa May, MP, has made the following statement regarding human rights:

In my view the provisions of the Equality Act 2010 (Specific Duties) Regulations 2011 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 The objective behind the duty is to ensure that consideration of equality issues forms part of the routine, day-to-day decision making and operational delivery of public authorities, and the purpose of the specific duties is to ensure better performance of the duty. The specific duties will therefore be imposed on almost all of the public authorities subject to the duty. The only exceptions are a few very small organisations for which the imposition of the specific duties would not be proportionate or sensible. These include parish meetings, local waste and drainage bodies, and some professional regulatory bodies.

7.2 Regulation 2 requires a public authority listed in the Schedules to publish information to demonstrate its compliance with the duty. A public authority listed in Schedule 1 must do this not later than 31 January 2012 and at least annually thereafter. A public authority listed in Schedule 2 must do this by 6 April 2012, and at least annually thereafter.

7.3 This additional time for public authorities listed in Schedule 2 ensures that schools will have a full term in which to prepare for and implement the new regulations. The Government is aware that the Merits Committee would

also normally want any regulations that affect schools – even those such as these which apply much more widely to virtually all public authorities – to be laid by April and to come into force from 1 September. This was the original intention with these regulations. However, as set out in paragraph 8.6 below, the Government was concerned that the proposals it put forward previously – while already significantly less burdensome than the legislation in place before – did not go far enough in reducing bureaucracy, and risked being still too onerous for public bodies to comply with. The Government has therefore taken the time to review them, removing many of the detailed publication requirements, and has rendered them significantly less bureaucratic. This will obviously benefit schools, as well as other public bodies. It should be noted also that the remaining workforce reporting requirement applies only to public bodies with over 150 staff, so all but the largest schools will be exempt from it.

- 7.4 The 31 January 2012 deadline for public authorities listed in Schedule 1 is important, as it will ensure that the public, and voluntary and community sector organisations, have the opportunity to review the data that has been published before public bodies set their equality objectives in April. This is a key element of the Government’s policy, to ensure that public bodies are transparent and accountable to the people they serve for their work on equality. The timescale for the regulations will 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.
- 7.5 Regulation 2(4) requires public authorities listed in the Schedule to publish information relating to persons who share a relevant protected characteristic who are affected by their policies and practices. Public authorities with 150 or more staff are also required to publish this information in relation to their employees.
- 7.6 Regulation 3 requires each public authority listed in the Schedules to prepare and publish one or more specific and measurable equality objectives, that it thinks it should achieve to further the aims set out in the duty. They are required to publish these objectives no later than 6 April 2012 and at least every 4 years thereafter.
- 7.7 Regulation 4 allows the information to be published as part of another document and requires it to be published in a manner that is accessible to the public.
- *Consolidation*
- 7.8 Public authorities were previously subject to three separate equality duties relating to race, disability and gender equality. Each was underpinned by further duties in secondary legislation (“specific duties”) with different features, timescales and reporting requirements.

- 7.9 Section 71(2) and (3) of the Race Relations Act 1976 empowered the Secretary of State to make orders imposing specific duties on bodies subject to the race duty and four such orders were made: The Race Relations Act 1976 (Statutory Duties) Order 2001 (S.I. 2001/3458); The Race Relations Act 1976 (Statutory Duties) Order 2003 (S.I. 2003/3006); The Race Relations Act 1976 (Statutory Duties) Order 2004 (S.I. 2004/3125); and The Race Relations Act 1976 (Statutory Duties) Order 2006 (S.I. 2006/2470).
- 7.10 The Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 (S.I. 2006/2930) imposed specific duties on bodies subject to the gender duty and was made by the Secretary of State under section 76B(1) and (2) of the Sex Discrimination Act 1975.
- 7.11 Section 49D(1) and (2) of the Disability Discrimination Act 1995 empowered the Secretary of State to make orders imposing specific duties on bodies subject to the disability duty and the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (S.I. 2005/2966) (as amended by S.I. 2007/618 and S.I. 2008/641) was made using those powers.
- 7.12 Section 149 of the Act, which came into force on 5 April 2011, consolidated and harmonised the race, gender and disability duties into one and extended coverage of the duty to the additional protected characteristics (age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment (in full)). Therefore only one set of specific duties (the Equality Act 2010 (Specific Duties) Regulations 2011) is required to assist public bodies in better performance of the duty.

8. Consultation outcome

- 8.1 The Regulations were subject to a formal consultation procedure in 2010, and also to a public policy review process in 2011. The chronology of this is set out below.
- 8.2 In August 2010, the draft Regulations, together with a full explanation of the policy and supporting Regulatory and Equality Impact Assessments, were published in GEO's consultation document "*Equality Act 2010: The public sector Equality Duty. Promoting equality through transparency. A consultation*".² The consultation appeared prominently on the GEO's website. Over 500 interested parties were contacted directly to alert them to the consultation and to invite them to comment on the proposals, including a number of key equality groups and representatives of the public, private and voluntary sectors.
- 8.3 In addition, GEO consulted its established wide network of contacts that were involved in the development of the Act; other Government Departments; and public bodies that would be subject to the duties. The Secretary of State consulted the Commission for Equality and Human

² http://www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf

Rights in accordance with sections 153(4) and 154(4) of the Act, and they submitted a detailed response. The Secretary of State also consulted the Welsh Ministers in accordance with section 154(3) of the Act so far as the Regulations apply to cross-border Welsh Authorities.

- 8.4 The consultation ran from 19th August 2010 to 10th November 2010. During this period, 373 responses were received, of which approximately 62% were from the public sector, 18% from the voluntary sector, 7% from the private sector and 13% from other types of organisation or individuals. The majority of respondents were in favour of greater transparency and democratic accountability; however, there was a mixed response on whether the draft Regulations published with the consultation reflected the policy intention set out in the consultation document. The consultation document and responses are available on line:

http://www.equalities.gov.uk/publications_and_research/consultation_responses_2010.aspx

- 8.5 In January 2011, the Government published a response to that consultation, and a revised draft of the regulations. (This is available on line via the link above.)

- 8.6 The Government quickly formed the view, however, that these revised regulations risked being inappropriately onerous for public bodies to comply with. So a further draft of the regulations was prepared, and these were published for comments in a policy review paper *The Equality Act 2010: The public sector Equality Duty: reducing bureaucracy*. This is available on line:

<http://www.equalities.gov.uk/PDF/110317%20Public%20sector%20Equality%20Duty%20-%20Policy%20review%20paper.pdf>

- 8.7 The revised regulations introduced much greater flexibility to the earlier proposals. In particular, the earlier proposals included a number of prescriptive publication requirements, which were deemed by Ministers to be unduly onerous. Public bodies would have been required to publish all the details of their engagement with interested parties in determining their policies and their equality objectives; the equality analysis they had done in determining their policies; and the information they had considered when undertaking that analysis.

- 8.8 The revised regulations will simply require public bodies to publish their equality objectives, and information to demonstrate their compliance with the duty. This information is likely to encompass some of the information set out above, but the revised regulations will give public bodies much greater freedom and flexibility in meeting this requirement. This is in line with the Government's broader approach to the public sector – to reduce bureaucracy and increase transparency.

- 8.9 The policy review paper, setting out these revised proposals, was published on 17 March 2011, and was open for comments for five weeks. (A full formal 12-week consultation was not considered appropriate or necessary, given that this was simply a further iteration of regulations which had already been subject to a full consultation.) The Government's statutory commitment to consult the Commission for Equality and Human Rights was met, and they submitted a detailed response. The Secretary of State also consulted the Welsh Ministers, as required.
- 8.10 There were 189 responses to the paper. Of these, 46% came from public bodies and their representative bodies; 32% came from the voluntary and community sector, including equality campaign groups, charities, and religious groups; and 22% came from others, including individuals, equality practitioners, trade unions, advisory/consultancy organisations, legal firms, and training organisations.
- 8.11 Virtually all of the respondents supported the stated aims of reducing unnecessary processes and bureaucracy, and promoting greater transparency and accountability. There was also widespread agreement that the revised regulations would achieve the first of these aims. In particular, some parts of the public sector, especially some smaller local authorities, welcomed the greater flexibility in the revised regulations about what to publish. They had feared that complying with the earlier proposals would have been too onerous and expensive.
- 8.12 There was much less agreement as to whether the revised regulations would achieve greater transparency and accountability. In particular, a number of voluntary and community organisations were concerned that removing the requirement to publish details of equality analysis, information, and engagement would mean that such analysis and engagement would simply not happen.
- 8.13 The Government has noted this view, but does not share it, and strongly believes that the case law from the previous equality duties supports this position.
- 8.14 The duty requires public authorities to have due regard to the matters set out in section 149(1) of the Act and it is implicit that when exercising their functions they will need to consider any impact on people with relevant protected characteristics. Case law on the previous equality duties established that active consideration of the likely effects of different policies and programmes on people with relevant protected characteristics is inherent in having 'due regard' to the matters set out in section 149(1); and that in some cases this may require some evidence gathering, and engagement or consultation with people affected by its decisions
- 8.15 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 in complying with the duty. But the Government did not wish to impose a burden on public authorities to publish details of every single meeting that it has with its staff and members of the public, and every single document that it considers during the exercise of a function. Public authorities should be able to decide what information would be proportionate to disclose for this purpose and the public should be free to challenge authorities if they require more or for it to be presented differently. They simply signal flexibility to public bodies, in how they demonstrate their compliance with the regulations. The Government believes this is the right approach.

- 8.16 In addition, the Government will ensure that advice and guidance on how to comply with the duties is made available through the Commission for Equality and Human Rights' statutory Code of Practice on the Equality Duty, and in non-statutory guidance. The Code of Practice and non-statutory guidance will also make clear that public bodies will not be required to publish any personal information which would contravene the Data Protection Act 1998.
- 8.17 The Government will review how the specific duties are working in practice in two years time.
- 8.18 The Government is making arrangements to publish the responses from organisations to the recent policy review paper on line at:

www.equalities.gov.uk

9. Guidance

- 9.1 Section 149 of the Act and the Equality Act 2010 (Specific Duties) Regulations 2011 will be supported by a statutory Code of Practice, which is being prepared by the Commission for Equality and Human Rights. The Government Equalities Office has published non-statutory guidance for Section 149 of the Act and will publish further guidance to help support implementation of the regulations. A suite of non-statutory guidance will also be published by the Commission for Equality and Human Rights to support the duty.

10. Impact

- 10.1 The legislation does not apply to small business.
- 10.2 As the duty applies only to the public sector, there will be no cost implications for businesses, charities and voluntary bodies.
- 10.3 Section 149 of the Act brings three existing duties together, bringing important efficiency savings. These new specific duties cut down on unnecessary bureaucracy for public authorities and focus on achieving real equality outcomes and public services that take account of the needs of citizens.

10.4 It is estimated that the new specific duties will result in a net benefit to the public sector of between £4m and £18m (mid point estimate £11m) in year one, and a net benefit of between £14m and £25m (mid point estimate £19m) from year two onwards compared to the cost of complying with the current three separate duties. Over a ten year period the net benefit is expected to be in the region of around £110m to £205m (net present value terms) compared to the cost of the current duties. A copy of the impact assessment is attached.

11. Regulating small business

11.1 These Regulations do not apply to small business.

12. Monitoring and review

12.1 The Government is committed to reviewing the operation of these particular Regulations in 2013. This is in addition to the ongoing monitoring and review of the whole Equality Act, which the GEO and the Commission for Equality and Human Rights is doing.

13. Contacts

Tim Morgan, Paul Howarth or Harshbir Sangha at the GEO can answer any questions regarding these Regulations.

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