

## Government consultation on specific duties

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### Introductory note

This paper contains the replies made by the Insted consultancy, London, to questions posed by the Government Equalities Office (GEO) in autumn 2010. The GEO consultation paper is about specific duties intended to underpin the public sector general duty in the Equality Act 2010 and can be accessed at

[http://www.equalities.gov.uk/pdf/402461\\_GEO\\_EqualityAct2010ThePublicSectorEqualityDuty\\_acc.pdf](http://www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf)

Insted's replies reflect its experience over the last 10 years working with a range of different local authorities throughout England, and with the Department for Education and its predecessors.

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### **Q1: Do you have any comments on our proposals for data reporting? Does the drafting of regulation 2 accurately reflect the aims of the policy described in paragraphs 5.2 to 5.9?**

1. The proposals stress the importance of collecting and publishing a wide range of evidence in relation to all three limbs of the public sector duty; of formulating and publishing measurable outcome-focused objectives; and of conducting and publishing the results of equality impact assessments. In principle, they are excellent. However, much will in practice depend on the specific requirements to be published by the Equality and Human Rights Commission in its statutory code of practice and guidance, mentioned in paragraph 5.5, and on the inspection and evaluation frameworks developed and used by bodies such as Ofsted and Her Majesty's Inspectorate of Constabulary.
2. In recent years Ofsted has routinely evaluated how effectively a school actively promotes equal opportunity and tackles discrimination and this has been subject to a limiting judgement within the Ofsted inspection system, with the consequence that if a school is judged to be inadequate in this strand of the evaluation schedule its overall effectiveness is also likely to be judged to be inadequate. This has been extremely valuable in signalling to governing bodies and senior leadership teams that the promotion of equality is a legal requirement, not conceivably a matter of choice, or a matter of secondary importance. It will be essential that the limiting judgement system should continue to be influential in Ofsted's evaluation schedule as a whole.
3. There will need to be guidance on the concept of fine granularity (paragraph 5.3). This is particularly crucial in relation to data about ethnicity, and to data which cross-tabulates ethnicity with gender and social class. Also, the principle of fine granularity requires that national equalities data, as published by government departments and other national bodies, should be broken down by region and, if appropriate, sub-region.
4. Other matters requiring clarification by the EHRC include good practice in relation to engaging people from protected groups and good practice in assessing the impact of current practices and policies, and the likely impact of new policies that are proposed (paragraph 5.7). In the last few years the duty to consult and involve disabled people has frequently been invaluable, and consultation with relevant groups has become good practice in relation to the

other equality strands as well. Similarly the duty to conduct impact assessments, particularly of new policies whilst they are still being developed, has been invaluable. The EHRC will need to stress that these two requirements should continue.

5. Sections (b), (c) and (d) of regulation 2 – (2) of the draft statutory instruments appear sufficient to ensure that EQUIAs and engagement with relevant advocacy groups will continue to take place, and will be conducted with appropriate seriousness and rigour.
6. The proposed specific duties put a great emphasis on the importance of public bodies making themselves accountable to campaigning and advocacy groups. Such groups do not always, however, have the resources or professional expertise which are required. In any case they do not have legal powers with which to enforce change in public bodies if they consider change to be necessary. This will need to be clarified in the EHRC requirements and guidance.
7. However, it needs to be clarified that assessments of new policies are required **whenever** a major new policy is proposed, not just annually. It will be most unfortunate if the requirement to publish annually, as stated at 2 – (1) (b) of the draft statutory instruments, means that the possible impact of a major new policy development is not rigorously assessed, and if necessary modified, **before** it is implemented.
8. It will be valuable and relevant for the EHRC guidance to clarify that assessments of the likely impact of new policies and practices must consider two separate, though inter-related, basic questions, each accompanied by a follow-up question
  - **Could this policy, or does this policy, have a negative impact on one or more of the dimensions of equality – namely, could it increase inequalities that already exist?**

If so, how can we change or modify it, or minimise its impact, or justify it?
  - **Could this policy, or does this policy, have the potential to have a positive impact on equality, by reducing and removing inequalities and barriers that already exist?**

If so, how can we maximise this potential?

**Q2: Do you have any comments on our proposals for workforce transparency? Does the drafting of regulation 2 accurately reflect the aims of the policy described in paragraphs 5.10 to 5.11?**

9. It will be extremely important to stipulate, in the statutory code of practice, that the data should be broken down by grade levels.
10. Also, there should be a stipulation that data relating to ethnicity should be broken down by the principal census categories. It will seldom if ever be appropriate to use the blanket terms 'black' and 'Asian'.
11. Within the education sector, the cut-off point of 150 staff seems unnecessarily high, for it would exclude all but the largest secondary schools. A cut-off point of 100 or (preferably) 75 would be preferable.
12. With these provisos, the drafting of regulation 2 accurately reflects the aims of the policy.

**Q3: Do you have any comments on our proposals for transparency in public service provision? Does the drafting of regulation 2 accurately reflect the aims of the policy described in paragraphs 5.12 to 5.14?**

13. The proposals for transparency are clear. Regulation 2 accurately reflects the aims of the policy.
14. The practical guidance and statutory code of practice will presumably indicate that small public bodies (for example, most primary schools) may reasonably choose not to publish data they consider sensitive, even though relevant. Such data would include performance in public examinations and assessments if publication would permit individual pupils to be identified. It would also, very probably, include data about levels of prejudice-related bullying.

**Q4: Do you have any comments on our proposals for setting equality objectives to achieve transparency about impact on equality? Does the drafting of regulation 3 accurately reflect the aims of the policy described in paragraphs 5.15 and 5.16?**

15. It is valuable to concentrate on outcome objectives as distinct from process objectives. However, certain process objectives are extremely relevant and important and for this reason public bodies should be expected to formulate not only outcome objectives but process objectives as well. For example, capacity-building objectives such as 'to raise staff awareness and understanding of their legal duties in relation to equalities through the provision of continuing professional development (CPD)' are invaluable. So are objectives such as 'to improve the quality of data'.
16. In the education sector, the operations of local authorities and of Ofsted include the provision of advice, support and challenge to schools. Strictly speaking, these are process objectives, not outcome objectives, in relation to the overall goal of eliminating discrimination, providing equal opportunities and fostering good relations. They are nevertheless extremely important. It is crucial that this should be clear, both in the statutory regulations and in EHRC guidance.
17. The practical guidance to be published by the EHRC will need to distinguish between quantitative and qualitative evidence and, within these two broad categories, various sub-categories. Further, it will need to emphasise that some of the most important outcome-focused objectives are not easily measurable but that this is not a reason for ignoring them. It would be unfortunate if the requirement to formulate measurable objectives were to result in objectives which are relatively trivial or banal.

**Q5: Do you have any comments on these proposed changes [namely those set out in paragraphs 5.17–5.24]?**

**Reducing burdens on public organisations (paragraph 5.17)**

18. In the short term, the draft regulations may put substantial demands on many public bodies, for they require the publication of data that has not previously been published, and according to specifications with which public bodies may not yet be familiar.
19. However, the regulations are reasonable. Once the data has been published for the first time in April 2011, keeping it updated ought not to be burdensome.

### **National priorities (paragraphs 5.18–5.19)**

20. The description of the last government's approach is inaccurate, for it was envisaged only that public bodies should **consider** priorities specified by a minister of the crown, not that they should necessarily adopt them. It could have happened under the previous proposals, but would not have necessarily happened, that local decision-making would be skewed.
21. The danger in the proposed new system is that not all public bodies may be sufficiently aware of the issues and possibilities they should be considering. For example, not all schools will necessarily be aware of the level of prejudice-based bullying at their school, or of the extent to which exclusions affect pupils disproportionately from an equalities point of view, or of disparities in the attainment at 16+ of girls and boys in certain subjects. These points are all vividly illustrated in the EHRC's recent triennial review. In view of the possibility that not all public bodies will be sufficiently aware of certain key issues, it is valuable that, as indicated in Draft Regulation 2–(3), a minister of the crown will from time to time specify matters of national importance that should be widely considered.

### **Procurement (paragraphs 5.20–5.21)**

22. The proposal seems reasonable. However, it clearly needs to be kept under review. In any case it would be invaluable, on this topic as on many others, if the EHRC were to issue guidance on good practice. This would assist citizens to hold public bodies to account.

### **Action planning (paragraph 5.22)**

23. The creation of action plans is as much a part of the normal business planning process as the setting of objectives. It does not follow that action plans should be published. Particularly in the case of larger public bodies, however, they need to be open to public scrutiny.

### **Secretary of State reporting duty on disability (paragraphs 5.23–5.24)**

24. In several government departments the reporting duty on disability has been invaluable in raising staff awareness and, even more importantly, in providing a focus for disabled people and their representatives to hold a government department to account. If the duty to report is discontinued it will nevertheless be essential for these two aspects of major progress to be retained, and indeed reinforced.

### **Q6: Do you have any comments on our proposals for transition from the existing duties relating to race, disability and gender to the new public sector Equality Duty, as described in paragraphs 6.1 and 6.2?**

25. There are few if any public bodies which will need a complete year to prepare and publish at least one objective on the basis of the data that they publish on 4 April 2011. It would be entirely reasonable to expect public bodies to formulate and publish objectives, minimally in indicative or consultative form, by 1 June 2011. Momentum will be lost or seriously diminished if no action in the light of the new public sector duties is required before April 2012.

