

# The changing legal framework

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## This paper

1. This paper provides information about the practical implications for local authorities, schools and settings of the Equality Act 2010. It was last updated in October 2011.
2. The paper 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), the Equality and Human Rights Commission (EHRC) and the Government Equalities Office (GEO), and the content of ministerial statements in the House of Commons in July 2011 and the House of Lords in September 2011.
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## **General introductory notes**

### **Timescale and key dates**

4. The requirements of the Act are being introduced gradually between October 2010 and April 2012. Schools and local authorities need to be aware of the following key dates:
  - April 2011: the **general public duty** (see paragraphs 13-14 below) came into force.

- 31 January 2012: the **specific duty to publish information showing compliance** (see paragraphs 33–35) will come into force for local authorities.
- 6 April 2012: the **specific duty to publish information showing compliance** will come into force for schools
- 6 April 2012: **the specific duty to publish objectives** (see paragraphs 36–42) will come into force for both local authorities and schools.

### **Brief history**

5. The Bill that preceded the Act was published on 27 April 2009 and 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 new legislation**

6. 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**

7. The Act harmonises the various pieces of anti-discrimination law that have been introduced piecemeal in Great Britain over the last 40 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**

8. 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 characteristic of age applies to schools as employers, but not with regard to the treatment of pupils and prospective pupils.

### **Social class**

9. The Act does not refer to inequalities relating to socio-economic circumstances (SEC), for example differences in income, wealth, housing, occupation, local neighbourhood and educational qualifications. However, such inequalities are covered at length in a key publication issued in autumn 2010 by the Equality and

Human Rights Commission entitled *How Fair is Britain?* (see paragraph 41 below for more information) and they received a very high profile in the equality impact assessment (EQUIA) issued by the Department for Education in connection with the Education Act 2011.

10. The explanatory notes issued to accompany the Education Bill 2011 state that the new Ofsted framework, starting in January 2012, includes 'consideration of how well a school provides for different groups of pupils' and indicate in this connection that such groups include not only those which are connected with disability, ethnicity and gender but also those which are connected with low household income, as reflected by eligibility for free school meals and the pupil premium. In its March 2011 consultation document Ofsted stated:

Persistent low attainment makes it harder for young people to get jobs or access further and higher education, and can have a deep and damaging impact on families and communities. It is therefore important that schools reduce differences in attainment between groups in the school, including those between looked after children, pupils from different social and ethnic groups and between boys and girls. The new inspection framework will pay particular attention to such gaps in attainment and inspectors will look at what is being done to close them.

11. At the end of September 2011, when it published its new framework and evaluation schedule for inspections from January 2012 onwards, Ofsted re-stated its intention to consider the attainment and experience at school of children and young people from low-income backgrounds. At the same time it indicated it would be considering *all* the protected characteristics in the Equality Act, plus also a few others, not disability, ethnicity and gender only.

## Structure

12. 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.

## The general duty

### Three needs

13. 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 – clause 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 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.
14. 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**

15. Case law has established that having due regard to the three aims of the general duty involves compliance with the following six principles (sometimes known as 'the Brown principles', after the specific case which generated them):

- 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.
- 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.
- 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.
- The duty cannot be delegated.
- 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.
- 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.

16. There is further information about the Brown principles of due regard at <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/guidance-and-codes-of-practice/using-the-equality-duties-to-make-fair-financial-decisions/relevant-case-law/>. They were enunciated in the first instance in a case to do with disability equality, but were explicitly extended in February 2011 to ethnicity and gender in a judgement relating to the Building Schools for the Future programme, <http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html>. The section of the judgement dealing with equalities legislation starts at paragraph 98.

### **Equality impact assessments and analysis**

17. In recent years, in certain quarters, an equality impact assessment has tended to be a rather mechanistic and unhelpful process, not – as was originally intended – a way of showing due regard. The coalition government is therefore not encouraging the use of the term. However, it is still the case that public bodies must rigorously analyse and assess their policies and practices, particularly when considering a new development or decision. In the House of Lords on 6 September 2011 the government spokesperson, Baroness Verma, made this wholly clear. She said:

Case law on the previous duties, which is still relevant, provides useful guidance as to what is required to comply with the equality duty. In brief, public bodies must ensure that they have the right information to hand about equality issues to make informed choices and decisions and to ensure that this is rigorously considered before and at the time decisions are taken.

Case law has also made clear that in some cases it will be necessary to consult relevant parties likely to be affected by a decision, such as local disability groups and women's groups. In order to demonstrate their compliance with

the equality duty, public bodies will generally need to publish information about what they have concluded will be the effect of their activities on people with different protected characteristics and the information they considered in making their decisions, including those they have consulted and involved.

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. What is right for a small school will be different from what is right for the Department for Education.

## **Equality of opportunity**

18. 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'.

19. It follows that the duty to have due regard for advancing equality of opportunity may entail engaging in **positive action**. There is an explanation of this concept at paragraphs 20–22 below.

## **Positive action**

20. People with protected characteristics may be disadvantaged for social or economic reasons or for reasons to do with past or present discrimination. The Act contains provisions which enable schools and local authorities to take action to tackle such disadvantages and the needs arising from them, or to address disproportionately low participation by a particular group of pupils.
21. These are known as the positive action provisions and they permit schools to take proportionate action, if they wish, to address the disadvantages faced by particular groups. The DfE and EHRC have indicated that such measures could include targeted provision or resources, or putting in place additional or bespoke provision such as:
- special catch-up classes for Roma children
  - projects to engage with boys from a specific ethnic background
  - girls-only swimming lessons for Muslim pupils, taught by a female teacher

- additional English language classes for pupils whose first language is not English
- targeting the contents of publications such as advertisements, prospectuses and information leaflets.

22. Positive action of these kinds is not the same as positive discrimination. The latter is defined as involving preferential treatment which cannot be justified as proportionate. It is relevant in this connection to note that it is never unlawful to treat disabled people more favourably than non-disabled people.

### Fostering good relations

23. 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

24. 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** which shows their compliance with the duty
- **to prepare and publish specific and measurable objectives** which they will pursue over the coming years to meet the three needs.

25. The Government Equalities Office carried out two substantial consultation exercises in 2010-11 about what the specific duties under the Equality Act should be. Section 8 of the official explanatory memorandum about the duties ([http://www.legislation.gov.uk/uksi/2011/2260/pdfs/uksiem\\_20112260\\_en.pdf](http://www.legislation.gov.uk/uksi/2011/2260/pdfs/uksiem_20112260_en.pdf)) contains a very helpful and informative account of the consultations. The legal document setting out the requirements themselves can be found at <http://www.legislation.gov.uk/uksi/2011/2260/contents/made>.

26. 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.

27. The first of the two specific duties must be completed by local authorities by 31 January 2012, and must be undertaken thereafter at least annually. In the case of schools, the first duty must be completed by 6 April 2012 and thereafter annually. The second duty must be completed by both local authorities and schools by 6 April 2012, and must be undertaken again no more than four years later. The government has stated that the gap for local authorities between publishing information on 31 January 2012 and publishing objectives by 6 April is 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'.

28. For schools, the Department for Education has published an updated version of its non-statutory document entitled *Equality Act 2010: advice for school leaders, school staff, governing bodies and local authorities*, first issued earlier in the year.

Amongst other things, the document 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>

### **Transparency and accountability**

29. 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.'
30. 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**

31. The specific duties will generally mean that it will be good practice 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. This point was emphasised in the speech by Baroness Verma cited above at paragraph 17.
32. 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, 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 in complying with the duty.'

### **The duty to publish information**

33. '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.

34. 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.’ 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.
35. In addition, it would clearly be reasonable to expect that a school will list some of the principal things it does that show it has due regard for equalities.

### **The duty to publish objectives**

36. 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
37. The memorandum cites the following example: ‘If a local authority’s data shows that very few older people access a service from which they might benefit, the authority might set an objective to increase the rate of take-up by a certain percentage within a specified period, to ensure that such services genuinely advance equality of opportunity for all.’ Similarly specific and measurable objectives can be readily formulated for schools.
38. 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’.
39. So far as is appropriate, objectives published in April 2012 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.
40. 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.
41. There is no longer a requirement that schools and local authorities should draw up equality policies and schemes. Nor are they required, as was proposed by the previous government, to take into account national priorities determined by the Secretary of State. It will still be good practice, however, to draw up and publish a

statement of overall policy and principles showing the basis on which objectives are chosen, and to be mindful of national, regional and local priorities. Publishing a policy statement is one way (though only one way) of showing due regard. So is being aware of national priorities.

42. In relation to national priorities, there is a useful overview in Chapter 10 of *How Fair is Britain?*, published by the Equality and Human Rights Commission in autumn 2010. The chapter is summarised at <http://www.equalityhumanrights.com/key-projects/triennial-review/online-summary/education/>. The full text is at [http://www.equalityhumanrights.com/uploaded\\_files/triennial\\_review/how\\_fair\\_is\\_britain\\_ch10.pdf](http://www.equalityhumanrights.com/uploaded_files/triennial_review/how_fair_is_britain_ch10.pdf).

## Further information and guidance

### Guidance documents

43. On 28 September 2011 the Department for Education published an updated version of its non-statutory document entitled *Equality Act 2010: advice for school leaders, school staff, governing bodies and local authorities*, first published on 17 January 2011. The document shows the DfE's understanding of legal requirements, for example its understanding of how schools might fulfil the specific duties to publish information and objectives.  
<http://www.education.gov.uk/aboutdfe/policiesandprocedures/equalityanddiversity/a0064570/the-equality-act-2010>
44. Detailed guidance on the employment provisions of the Act can be found at <http://www.acas.org.uk/index.aspx?articleid=3017>. The statutory code of practice on employment is at <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>.
45. There is general advice and guidance available from the Equality and Human Rights Commission (EHRC) in five clearly-written documents, and there are links to these at <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/>.
- The essential guide to the public sector equality duty
  - Equality analysis and the equality duty
  - Engagement and the equality duty
  - Equality objectives and the equality duty
  - Equality information and the equality duty
46. These five papers do not refer specifically to schools, other than in passing. They will presumably be revised and updated in the light of the specific duties which became law on 10 September 2011. But in the meanwhile they are well worth consulting. So is the draft code of practice for schools published by the EHRC. It contains many practical examples of what the law requires or permits. It is available at [http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/draft\\_code\\_of\\_practice\\_schools\\_eng\\_wales.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/draft_code_of_practice_schools_eng_wales.pdf).
47. The National Association of Headteachers (NAHT) has published **Quick Guide to the Equality Act 2010** at <http://www.naht.org.uk/welcome/resources/key-topics/equality-opportunities/quick-guide-to-the-equality-act-2010/>
48. A number of local authorities have produced, or are producing, guidance documents for governing bodies. One of the most substantial documents so far produced is from Northamptonshire:  
<http://www.northamptonshire.gov.uk/en/councilservices/EducationandLearning/services/equalities/Pages/default.aspx>

## Curriculum planning and general school organisation

49. With regard to curriculum planning and general school organisation, there are many practical suggestions and ideas in ***Holding Together: equalities, difference and cohesion***, a handbook for school improvement planning published by Trentham Books for Derbyshire County Council in 2009. There are publication details at [http://www.trentham-books.co.uk/acatalog/Holding\\_Together\\_-\\_equalities\\_\\_difference\\_and\\_cohesion.html](http://www.trentham-books.co.uk/acatalog/Holding_Together_-_equalities__difference_and_cohesion.html)
50. Some of the ideas and [suggestions](http://www.insted.co.uk/equalities.html) in ***Holding Together*** are reprinted at <http://www.insted.co.uk/equalities.html>. At this same web address there are several other papers intended for schools.
51. In summer 2011 the Equality and Human Rights Commission published 12 useful and illuminating case-studies at [http://www.equalityhumanrights.com/uploaded\\_files/PSD/equality\\_duty\\_and\\_schools\\_case\\_studies.doc](http://www.equalityhumanrights.com/uploaded_files/PSD/equality_duty_and_schools_case_studies.doc). The titles are as follows:

### ***Secondary schools***

1. Tackling under-achievement among ethnic minority boys.
2. Tackling racially motivated incidents.
3. Developing new equality schemes and action plans in consultation with pupils.
4. Tackling gender stereotyping both within the curriculum, including sport, and in out-of-school activities.
5. Providing intensive English language support to improve the learning experience of Roma pupils.
6. Increasing pupil achievement and participation by tackling prejudice-related bullying.

### ***Primary schools***

7. Adapting learning resources and teaching practices to enhance the learning experience of pupils with learning and physical disabilities.
8. Using evidence and monitoring tools to track pupil achievement and participation in school activities, and developing new ways of engaging with parents of ethnic minority pupils to address low levels of participation in PE lessons.

### ***Special schools***

9. Providing extra academic and social opportunities.
  10. Tackling stereotyping in disabled pupils' learning.
  11. Developing a faith garden which helps to address racial tension and improve understanding of disability within the school and local community.
  12. Developing an equality action plan and using this to identify new ways of improving communication among children with speech impairments.
52. The case-studies are intended to illustrate a research report and policy paper at [http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/research-on-the-duties/#The\\_equality\\_duties\\_and\\_schools\\_report](http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/research-on-the-duties/#The_equality_duties_and_schools_report)
  53. In September 2011 the Equality and Human Rights Commission published a set of detailed lesson plans and materials for teaching at key stage 3 about racism, gender discrimination and disability-related bullying. *Entitled Equal Rights, Equal Respect*, the plans and materials include three short films and are at <http://www.equalityhumanrights.com/advice-and-guidance/equal-rights-equal-respect/>.
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