
Review of the Equality Duty
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February 2013

The coalition government's review of the equality duty

1. Overview

The coalition government is currently undertaking a review of the public sector equality duty, a vital part of the Equality Act 2010 which requires public authorities to consider equality in all that they do.

The review was announced as part of its response to the Red Tape Challenge on equalities and it was stated that it was in line with the government's "strong desire to reduce unnecessary bureaucracy where it exists and consider alternatives to legislation".

The TUC believes this review is premature – the new equality duty only came into effect just under two years ago and the specific duties only a year ago. We have also expressed concerns about the degree of objectivity and rigour with which the review will be carried out. It is being overseen by a steering group that lacks any public service user or worker voice on it and no representation from the devolved administrations. It is being conducted in a very short timeframe. The terms of reference were only published at the end of November 2012 and the final report is due to ministers in April 2013.

The TUC General Secretary wrote twice to Equality Ministers (to Theresa May in July and Maria Millar in November) to voice our concerns about this review. The Ministers and the Government Equalities Office review team have tried to offer reassurance. In her reply, Maria Millar said she wanted to "reiterate the Government's commitment to equal treatment and equal opportunity" and the GEO review team have recently stated to union and voluntary and community sector stakeholders invited to a roundtable event that they are approaching the review "with an open mind with no pre-determined outcomes and are determined to explore the issues rigorously".¹

However, repeated government pronouncements about equality law being burdensome red tape, the declaration from the Prime Minister David Cameron at

¹ GEO 'Participant Information Sheet' for PSED Review Roundtable 1 (10 January 2013)

the CBI annual conference that this government is “calling time on Equality Impact Assessments”² and the Communities Secretary Eric Pickles’ dismissal of equality monitoring as “unnecessary and intrusive” and a waste of taxpayers’ money³ fuel our concerns about this exercise.

We are not alone either. Numerous trade unions and VCS organisations have voiced their concerns and Doreen Lawrence and Dr. Richard Stone (Macpherson Inquiry panel member) wrote, along with a number of leading race equality organisations, to political party leaders to express their fears for the future of the equality duty in November 2012.⁴ The Prime Minister and Deputy Prime Minister only responded to Mrs. Lawrence⁵ after she aired her frustrations in an interview in the Guardian.

"I think about what it was like before the inquiry, what we were going through, what people on the street were going through – the inequality, within institutions and within their work. If we don't make a stand we will go back to those days and I don't think we should."

Doreen Lawrence, the Guardian, 21 December 2012

This briefing gives an overview of what the equality duty requires, details of the process and terms of reference for the review, and trade unions’ experiences and views of working with the equality duty and with the former equality duties based on an online survey carried out by TUC and the Labour Research Department in November/December 2012.

2. What the equality duty requires

The general equality duty

The general equality duty appears in s.149 of the Equality Act 2010. It came into effect on 5 April 2011. It replaces the former race, disability and gender equality duties.

The race duty had originally been enacted in response to the findings and recommendations of the Macpherson Inquiry into the Metropolitan Police Services’ failure to properly investigate the racist murder of Stephen Lawrence. The Inquiry

² Speech to CBI annual conference (November 2012). Available at www.cbi.org.uk/media-centre/videos/2012/11/david-cameron-cbi-annual-conference-speech/

³ DCLG press release (September 2011) www.gov.uk/government/news/a-fair-deal-for-the-voluntary-and-community-sector-from-whitehall-to-town-halls

⁴ Letter available at: www.rota.org.uk/webfm_send/185

⁵ Reply from PM and DPM available at www.edf.org.uk/blog/wp-content/uploads/2012/12/copier@stephenlawrence-org-uk_20121220_151226.pdf

concluded that the failings resulted from “institutional racism” which it defined as *“the collective failure of an organisation to provide an appropriate and professional service to people because of colour, culture or ethnic origin”*.

It came into effect in 2002. The disability duty followed in 2006 and gender duty in 2007.

The current duty in s.149 of the Equality Act 2010 largely mirrors the structure of the previous general duties covering race, disability and sex but its scope was extended in the Equality Act 2010 to cover age, gender reassignment, pregnancy and maternity, religion or belief and sexual orientation as well.

S.149 requires a public authority, in carrying out its functions, to have “due regard” to the need to:

- eliminate all forms of discrimination, harassment and victimisation that are prohibited by the Equality Act; and
- advance equality of opportunity; and
- foster good relations.

Organisations that are not “public authorities” are also required to have due regard to the needs listed above whenever they carry out “public functions” (e.g. a private company with a contract to provide certain public services).

The specific duties

All the previous equality duties had sets of specific duties supporting them. These duties provided detailed guidance to public authorities on the steps they needed to take to ensure they were having due regard to equality.

They required authorities to do such things as: equal opportunities monitoring; training managers on the requirements of the duty; developing written equality schemes setting out what actions they intended to take to meet the duty, including their arrangements for assessing the impact of their policies and practices on equality; and consulting women or people from ethnic minority groups and involving disabled people in the development of their equality schemes.

The coalition government significantly weakened the specific duties for the new s.149 duty. The new duties only place two obligations on public authorities: a need to publish equality information about service users and the workforce (if over 150 employees) and a need to publish “at least one” equality objective. Compliance with the new duties was not required until 31 January 2012 (or 6 April 2012 if a school).

These two specific duties apply to English and non-devolved Scottish and Welsh public authorities. The Scottish and Welsh administrations have used their devolved powers to develop specific duties that are more akin to the more detailed, previous

ones. This is why it is essential that their experiences and views from stakeholders in those countries are taken into account and given proper consideration in the current review.

The Welsh Government in a recent letter to Doreen Lawrence and Dr. Richard Stone has criticised the review and explained that it did not want to be associated with it (although any changes made to the general duty that come out of the review will have repercussions for the specific duties both in Wales and Scotland).

“The Welsh Government shares your concern and agrees that it is entirely premature to review the Public Sector Equality Duty, after only 19 months since the duty came into force, particularly if the purpose is to genuinely make an objective assessment of the effectiveness of the duties. In the current economic downturn, the Public Sector Equality Duty is vital in protecting those who are most excluded and discriminated against in society. ...

The Welsh Government has distanced itself from the PSED review although we will provide a response with evidence on positive impact of the PSED within Wales.”

Carwyn Jones, First Minister of Wales (December 2012)⁶

Refusal to implement a statutory code of practice

The dilution of the specific duties by the coalition government was followed by its refusal to lay before Parliament a code of practice that the EHRC had prepared to support implementation of the duty. This further deprived public authorities, public service users and employees of any detailed statutory guidance on what was required to comply with the general duty.

This combination of factors created the impression that the equality duty regime was weaker and need not be taken as seriously as before. Trade union representatives and officers have reported that some public authorities have taken this as a signal to do less and give less priority to mainstreaming equality in their activities, for example, some have stopped doing detailed equality impact assessments while others have ceased involving disabled people in decision-making (see section 5 below).

Guidance from the courts

What counters the above, to some degree, has been the increase in guidance from the courts in recent years on what is needed to comply with the general ‘due regard’ duty. Service users and others have cited s.149 or the former equality duties with increasing frequency in judicial review cases challenging public authorities’ decision-making. (Note: as well as attacking equality impact

⁶ Available at www.edf.org.uk/blog/wp-content/uploads/2012/12/Outgoing_2.pdf

assessments, the Prime Minister in his CBI speech announced his intention to make judicial review less accessible).

This case law that has emerged from these challenges has affirmed the importance of the equality duty.

“It is the clear purpose of section 71 [the race duty] to require public bodies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.”

Arden LJ in Elias v Secretary of State for Defence [2006]

“inattention to [compliance with the equality duty] is both unlawful and bad government”

Sedley LJ in R (BAPIO) v Secretary of State for the Home Department [2007]

“Although [breach of the equality duty was] here characterised as a procedural defect, it is a defect in following a procedure that is of very substantial, and not merely technical importance”

Buxton LJ in R(C) v Secretary of State for Justice [2009]

“Even when the context of decision-making is financial resources in a tight budget, that does not excuse compliance with the PSEDs, and there is much to be said for the proposition that even in straitened times the need for clear, well informed decision-making when assessing the impacts on less advantaged members of society is as great, if not greater.”

Blake J in R (Rahman) v Birmingham City Council [2011]

The case law has also confirmed that to have due regard to equality a public authority needs to: gather sufficient information about the impact on equality; give such information proper consideration at a formative stage of decision-making; and consider whether any negative impact can be eliminated, mitigated or justified. Authorities are also advised to have some kind of audit trail to show the actions that they took to comply with the duty.⁷

It is true that the courts have never held that there is a requirement to complete a written Equality Impact Assessment or that having a written Equality Impact Assessment itself is sufficient to show compliance with the duty (especially if it has been completed with a purely ‘tick box’ or ‘form-filling’ mentality). However, the main components of a good quality, substantive EIA process is what the courts

⁷ For further information on this see TUC Equality Duty Toolkit at www.tuc.org.uk/extras/EQUALITY_TOOLKIT.pdf

have held to be necessary to have due regard to equality. Therefore, the Prime Minister and other government ministers simply dismissing EIAs as always being wasteful, bureaucratic and unnecessary exercises does not help ensure public authorities' compliance with the duty.

The duty requires proportionate action

Finally, it should be borne in mind when the government is criticising the equality duty as imposing disproportionate bureaucratic burdens on public authorities, that the very essence of the 'due regard' duty is proportionality, i.e. it requires an authority to have the degree of regard that is appropriate in all the circumstances. This means the more relevant a function is to equality the higher the degree of regard, where a function is not relevant little or no regard is needed.

There is also no sign of the courts going too far in the demands and expectations they are placing on public authorities. Recent case law has shown that, while still recognising the fundamental importance of complying with the equality duty, judges have been wary of following a "nit-picking"⁸ or "unduly onerous"⁹ approach to what is required of a public authority when analysing and considering the impact of their decisions on equality.

3. The review process and terms of reference

The review process and scope

Details of how the review will take place, including the terms of reference and steering group membership, were published by the GEO at the end of November 2012.

Apart from the chair of the EHRC and the Director-General of the GEO, the steering group that will oversee the review is comprised of senior representatives from the public services – the very people who are meant to be held to account by the duty – a number of whom are current or former Conservative or Lib Dem politicians or advisers.¹⁰

The review's scope and parameters are ambitious, given the short timeframe. It will:

- examine evidence about the effectiveness of both the general and specific duties

⁸ Elias LJ in *The Staff Side of the Police Federation v Secretary of State for Work & Pensions* [2011]

⁹ Davis LJ in *Bailey v London Borough of Brent* [2011]

¹⁰ <http://www.homeoffice.gov.uk/equalities/equality-act/equality-duty/equality-duty-review/membership-steering-group/>

- explore the impact of the duty in terms of costs, burdens and benefits
- consider the comparative models internationally to understand the range of levers to help public bodies deliver equality of opportunity (note: the equality duty approach is unique to the Britain and Northern Ireland so this implies looking at non-legislative levers)
- consider how the duty functions in the context of the government's equality strategy, which it describes as being about transparency, devolving power to people, supporting social action, and integrating equality considerations into policy and programmes
- examine the role of support and guidance given to public bodies and how legal risk is managed within different types of public bodies
- consider what further measures could be taken to improve the duty
- take account of the different specific duties and experiences of the devolved administrations
- consider the breadth of protected characteristics within the context of the equality duty
- take account of the budgetary position facing public bodies
- consider the duties and powers conferred on the EHRC.

Engagement with trade unions

The GEO plans to hold a series of roundtables as part of the Review. The TUC has secured a couple of places for trade unions at two of the roundtables. In addition, the TUC will host a separate meeting for trade unions with the GEO review team, probably in late February or March.

The GEO have also said that they will carry out 'deep-delve' site visits of how the duty is working in practice in a variety of public service organisations. Brendan Barber in his letter to Maria Millar in November suggested that such site visits should include meetings with trade union representatives but the Minister made no response to this suggestion in her reply.

To date there has been no call for written evidence to the Review, although the TUC will make a written submission highlighting the experiences of trade unions in working with the duty.

4. Is the equality duty operating 'as intended'?

The overriding purpose of the review, as stated in the initial Red Tape Challenge announcement and the terms of reference, is to establish whether the equality duty is operating "as intended".

The intended purpose of the equality duty is relatively easy to establish. According to the notes to the Equality Act 2010, the equality duty in s.149 imposes a similar duty to the former race, disability and gender equality duties on public authorities, except that it extends to a wider range of protected characteristics. What was originally intended by the former duties can be established by reference back to the Macpherson Inquiry conclusion which influenced the creation of the race duty:

“It is incumbent upon every institution to examine their policies and the outcomes of their policies and practices to guard against disadvantaging any section of our communities”

Lord Macpherson

And by what Mike O’Brien, Parliamentary Under-Secretary of State for the Home Department, said when introducing the original race duty to parliament:

“The public services must recognise that it is no good simply paying lip-service to race equality: they must ensure that race equality is at the heart of their organisation’s considerations when providing services – it should be part of the mainstream of policy consideration...”

Mike O’Brien (HC Standing Committee D, 2 May 2000)

The duty was therefore placing a positive obligation on public authorities – those with the power and resources to address institutional discrimination and structural inequalities – to take steps to prevent discrimination arising and to advance equality of opportunity and good relations. It was a major change in the law as it moved away from the traditional approach of relying on the individual victims of discrimination to tackle the status quo who often lack the resources and resilience to bring a complaint and, even if successful, they tend to receive compensation rather than a change in organisational practice and culture.

The original specific duties legislation and the codes of practice and guidance from the various equality commissions recognised that certain steps would need to be taken to fulfil this positive, mainstreaming obligation. In particular, a public authority would need evidence and information about equality in their service provision and employment practices, they would need to engage with those from protected groups, they would have to give proper consideration to the impact of their policies and practices on different groups and make changes, if necessary, to avoid or mitigate any negative impacts.

This may sound onerous to some but as has been pointed out on numerous occasions, if done properly, it will lead to more efficient, more effective and better targeted public services and fairer employment opportunities.

“An organisation that is able to provide services to meet the diverse needs of its users should find that it carries out its core business more efficiently. A workforce

that has a more supportive working environment is more productive. Many organisations have also found it beneficial to draw on a broader range of talent to better represent the community they service. It should also result in better informed decision-making and policy development. Overall, it can lead to services that are more appropriate to the user, and services that are more effective and cost-effective. This can lead to increased satisfaction with public services."

EHRC website

Evidence of impact in the public sector

It is clear that the duty has not fully achieved its objectives. Research has found that some public authorities are not taking the necessary steps to ensure due regard is had to equality (e.g. EHRC's recent assessment of public authorities' compliance with the specific duties to publish equality information)¹¹ and some are still taking a 'tick-box' approach to compliance rather than properly turning their minds to equality impacts when making decisions or developing policies. For example, a recent EHRC report on the performance of a sample of strategic health authorities and primary care trusts concluded that "the majority of organisations in the sample focused their performance on the equality duties through equality schemes and seemed to adopt a tick box approach."¹² Some of the examples and views from trade union representatives and officers cited below reveal similar experiences too.

But there are also many examples of where the equality duty or former duties have been complied with and made a positive difference. For example, an EHRC report into the equality duties and schools concluded that "there are clear signs that the duties are having some impact on their actions and pupil outcomes".

"What [the duties do] is bring a sense of structure and [say] "Look – we know that you all think that all pupils should have equal access, but have you thought about equality in these terms?" And it's a set framework by which we were able to then look at: 'Have we provided appropriate access for our disabled students?'"

Secondary school, South East

"[The formal process informed by the equality duties] has led to a plan, a plan that we can go back to and look at and say, 'right, what can we do better next time?' It's given us a structure to build on."

Primary school, South East¹³

¹¹ www.equalityhumanrights.com/uploaded_files/PSD/publishing_equality_information_final.pdf

¹² www.equalityhumanrights.com/uploaded_files/research/psed_health.pdf

¹³ www.equalityhumanrights.com/uploaded_files/research/rr70_equality_duties_and_schools.pdf

Research across a range of public sector organisations, carried out for the GEO in 2008,¹⁴ on the effectiveness and costs of the former specific duties under the race, disability and gender duties found that:

- 97% of respondents had seen ‘significant’ or ‘some improvements’ in at least one specific outcome (either in relation to service provision, employment or community relations)
- Over 80% reported that they had seen improvements in the way that their organisations made decisions or allocated resources
- Only between 17% and 33% felt that any of the activities required by the equality duties required greater resources than the value they could deliver and over half rated each of the activities as ‘very effective’ or ‘effective’.

Joint union-employer initiative to improve outcomes

In 2008, the Cabinet Office published *Equality Duties at Work - A Quick-Start Guide* which was produced by an equality and diversity task group of the Public Services Forum (a joint public service union-employer forum). Its purpose was to encourage those within the public sector to better understand how the equality duties could help them deliver more efficient and effective public services, learning from others’ experiences, and to tackle the tick-box approach some had adopted.

It was developed through workshops with practitioners and union representatives from within the public sector and included helpful tips and case studies from different organisations of improved equality outcomes. It was intended to be an online tool that would be kept up-to-date with current legislation and the experiences of various public sector organisations. However, since the coalition government came to power it has not been available on any government websites.

In identifying the lessons learned from organisations that had made progress in preventing discrimination, advancing equality and fostering good relations, the Guide concluded there were two key over-riding issues:

- The role leaders need to play in driving and shaping the change
- The role good quality data plays in enabling organisations to identify needs, monitor progress and create accountability.

¹⁴www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/geo_schneider_ross_research_2009.pdf

Government undermining the duty

Recent statements from coalition government ministers show a lack of leadership in driving change and a failure to recognise the importance of good quality information on equality for policy formation and progress monitoring.

David Cameron's speech to the CBI annual conference suggested a remarkable degree of complacency about the degree to which equality is naturally mainstreamed in policy-making.

"We have smart people in Whitehall who consider equalities issues while they're making the policy. We don't need all this extra tick-box stuff... So I can tell you today, we are calling time on Equality Impact Assessments. You no longer have to do them if these issues have been properly considered."

Prime Minister David Cameron

(Note that in the past two years there has been a decline in diversity among these "smart people in Whitehall" – the proportion of women holding the top civil service jobs has fallen from two-fifths to one-fifth.)¹⁵

In a recent blog for LibDem Voice, BIS and Equality Minister, Jo Swinson seems to imply that the duty has actually held policymakers back from properly considering equality.

"As Liberal Democrats we don't think equalities should be about ticking-boxes and regulatory hoops – it's too important to be relegated to an administrative duty. Advancing LGBT, gender, disability and race equality will only be achieved by putting equalities at the heart of every department."

*BIS and Equality Minister Jo Swinson*¹⁶

But she did not suggest how equalities would be put at the heart of the agenda in the absence of such a statutory duty.

Communities Secretary Eric Pickles made the following comments about equality monitoring in September 2011 when DCLG revised its Best Value Guidance to discourage it:

"At a time when taxpayers are watching their pennies, the last thing councils should be doing is sending out unnecessary and intrusive questionnaires..."

¹⁵ www.instituteforgovernment.org.uk/blog/5313/bridesmaids-revisited/?source=rss&utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+PublicSectorBlogs+%28PublicSectorBlogs%29&CMP=EMCSOCEML657

¹⁶ www.libdemvoice.org/jo-swinson-mp-writesequality-is-about-more-than-ticking-boxes-32672.html

Clamping down on such town hall activity will save taxpayers' money and protect the privacy of residents of all backgrounds."

Communities Secretary, Eric Pickles¹⁷

In December 2012, following on from David Cameron's CBI speech, Brandon Lewis, Secretary of State for Local Government, wrote to all leaders and chief executives of local authorities urging them to stop doing monitoring and EIAs.

"Equality Impact Assessments are not and have never been a legal requirement. Indeed, they can be resource intensive and take staff away from planning and delivering important public services.

... Local councils should be able to use their judgment to pay due regard to equality without resorting to time consuming, bureaucratic, tick-box exercises at the end of the decision-making process. The key is to take a proportionate, timely approach to assessing equality and that this is properly considered from the outset with a simple audit trail.

This approach builds on our Best Value guidance released in September 2011 in which councils are asked to ensure that their policies and services are efficient, effective, appropriate and accessible to all – without resorting to unnecessary lifestyle or 'diversity' questionnaires of their local residents and suppliers."

Secretary of State for Local Government, Brandon Lewis¹⁸

There has also been a letter from the Cabinet Office to the Whitehall departments calling for a halt in the production of Equality Impact Assessments – it says this *"sets an example for the whole of the public sector, which we would like to see follow suit"*.

These attacks on the duty and the building blocks for a mainstreaming approach to equality seem to be undermining the duty (see section 5 below), placing more obstacles in the way of those trying to bring about positive change within public sector organisations and making it harder for stakeholders to use the duty to press for action. This is at a time when many of those individuals whom the duty was intended to assist are being hit disproportionately by public service cuts and job losses.

¹⁷ www.gov.uk/government/news/a-fair-deal-for-the-voluntary-and-community-sector-from-whitehall-to-town-halls

¹⁸ www.gov.uk/government/uploads/system/uploads/attachment_data/file/42041/Draft_Reducing_Statutory_Burdens.pdf

Roll-back on national equality standards and supervision

Since, the coalition government came to power there has been a roll-back in some parts of the public sector on national equality standards and supervision.

In 2010, the Fire Minister said he would no longer be enforcing national equality and diversity recruitment, promotion and progression targets. The press release said *“This is an area where leadership and commitment should come from within the Service. The Service should choose to challenge itself.”*

In schools, a suite of documents developed in conjunction with education unions, employers and other stakeholders entitled *Safe to Learn: Embedding Anti-Bullying Work in Schools* has been removed by the DfE from its website, as has guidance on strategies for protecting school staff from cyberbullying. In addition, the Ofsted inspection framework has been changed so that inspectors no longer make separate judgements about a school’s work on equality and community cohesion. According to NASUWT, anecdotal evidence suggests that inspectors are now viewing equality as a relatively minor consideration.

“Teachers desperately need help and support for ensuring there is a whole-school/community approach to advancing equality. Guidance materials such as the popular ‘Safe to Learn’ online resource for schools provided a necessary gateway to guidance for headteachers, governors and school representatives. The removal of this necessary resource by the Department for Education will undoubtedly undermine and turn the clock back on tackling inequalities.”

NASUWT officer

Better guidance on the equality duty was also something mentioned by 49 per cent of schools responding to the EHRC research into the performance of the equality duties within schools.¹⁹

Local government and NHS employers’ mainstreaming tools

In local government there is a new, more ‘light touch’ Equality Framework (which is entirely based on self-assessment but nevertheless provides guidance on all the key steps for mainstreaming equality) and in the NHS a new Equality Delivery System has recently been rolled out by NHS Employers. Interestingly, both these tools are held up by the employer organisations as being ways of helping organisations comply with the equality duty, which suggests that having that statutory underpinning helps in getting take-up from public authorities.

The importance of specific duties, guidance and enforcement

Before the race equality duty, which was the forerunner of the current equality duty, came into existence following the Macpherson Inquiry, there was a duty in

¹⁹ www.equalityhumanrights.com/uploaded_files/research/rr70_equality_duties_and_schools.pdf

the original Race Relations Act 1976 which required every local authority “to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity, and good relations, between persons of different racial groups”.

However, this duty was largely ignored and very few people seemed even to be aware of it. This is because there were no specific duties and no statutory guidance explaining what steps public authorities needed to take to comply with it and no compliance or enforcement framework like the powers that the current EHRC has in relation to the s.149 duty (see s.23, s.31 and s.32 Equality Act 2006).

5. Trade unions’ experience of the equality duties

In November/December 2012 the TUC together with the Labour Research Department published an online questionnaire to seek examples and views from trade union workplace representatives and trade union officers on the effectiveness of the former equality duties or the current equality duty in s.149 of the Equality Act 2010. Presented below is an overview of the responses we received.

Information gathering and equality analysis

On the whole there were positive comments and examples about the impact of the equality duty on gathering equality information, creating greater transparency and accountability, a sense of fairness and a basis for action to challenge policies or decisions (which is what the coalition government’s equality strategy is said to be based on). There were also examples of how better equality data and analysis had led to improvements in employment practices and service delivery as a result.

“We used the public sector duty to develop alongside the MOD a Diversity Dashboard which gives us quarterly information on how the MOD is achieving (or not in some cases) its equality and diversity objectives. This shows welcome progress in some areas, e.g. gender equality (as does a recent pay audit which we are currently analysing) but significant failure in others e.g. race equality. At least it gives us a target to point to in equality discussions with the MOD. The Diversity Information is used now as a ‘model’ which many divisions of the MOD use as an equality monitoring tool.”

Prospect, Equality Officer

“Being able to ask for equality impact assessments has been very helpful as part of the various change programmes. On occasions, this has actually led to the employer deciding not to close an office, or to manage the closure and transfer in a different way. There used to be an annual award in the civil service for ‘transformative equality impact assessments’, which recognised that these needn’t and shouldn’t be a tick-box exercise. In fact, the FDA sponsored this award. The

award was quietly removed from the list once the coalition government came in, which was hugely disappointing!”

FDA National Officer and Equality Officer

“Yes... our employer asks its workers for information on ‘protected characteristics’, with an option ‘prefer not to say’. Employer was able to supply me with details of those granted or refused voluntary redundancy based on protected characteristics listed in my request.”

UNISON representative, Welsh public authority

“UCU Wales recently had an issue with an EIA in relation to a redundancy exercise. In challenging the EIA, UCU Wales worked directly with the Diversity and Equality Manager to create a process and guidelines on the completion of EIAs... When the EIA was re-considered a number of issues in relation to modules was identified, including the discovery that the modules that were considered for closure were mainly chosen by female students, whilst those that were ‘safe’ traditionally recruited mainly male students. Once this was identified steps were taken to ensure that there was not a disproportionate effect on one gender.”

UCU Wales Support Official, example from Welsh university.

“...it has allowed us to request suitable adjustments to ensure [disabled] people perform at their best in a recent departmental refit”

PCS representative, civil service department

There were, nevertheless, some complaints from trade unions that public authorities were not undertaking adequate equality monitoring or proper equality analysis. For example:

“They do Equality Impact Assessments... but the assessments are done very badly.”

UNISON representative, local authority

“The EQIA is done after the policy has been developed.”

PCS Branch Secretary

However, despite complaints that the duty was not always properly complied with a number pointed out that the existence of the statutory obligation gave them an important lever for challenging public sector bodies on their poor practice and outcomes for different groups. For example:

“The use of the Equality Impact Assessment has been repeatedly raised with the employer by PCS in order to ensure that the effects on disabled and minority groups is considered prior to implementation. Had the PSED not been in place it is likely that significant detriment would have been imposed on some groups.”

PCS representative, civil service department

“Proper monitoring of the process has been required by the trade unions. The legal framework as well as an agreed process has enabled the unions to circumvent any poor practices and/or attempts to evade the duties.”

PCS representative, civil service department

An NASUWT representative, recently interviewed for a TUC/Runnymede Trust project, explained how they had used the duty and the equality information the LEAs were required to gather to hold them to account over the impact of cuts on the diversity of teachers and service users. At one point she explains the importance of equality monitoring and how it need not be a complicated exercise:

“I think we’ve got something that’s concrete to help us to evidence our arguments and our discussions... Our LEAs... made a very simple, straightforward document – there is a template that can be easily adapted for any... service provider.”

A Unite Branch Secretary in Lambeth, interviewed for the same project, explained how with each phase of job cuts they had checked to see whether there had been a disproportionate impact on different groups and had found that women, especially BME women, and the disabled had been particularly badly hit, and the union’s ‘policing’ of the duty had led to engagement with the employer in a joint union-employer equality workshop to discuss the best way forward. She comments:

“When we ‘police’, we find that there is a discrepancy in things we need to address and that is what we are going to go forward and address”

The full interviews are available at: <http://www.runnymedetrust.org/projects-and-publications/projects/employment-2/in-this-together/section-5---how-to-use-the-information-to-hold-your-employer-to-account.html>

Finally, in response to the TUC/LRD online survey, some noted that they were finding it harder to access information and to hold public bodies to account, because the equality duty framework had been undermined or was seen to have been weakened by the coalition government, for example:

“I deal with a number of employers and they are quick to point out that EqIAs are no longer a lawful requirement.”

PCS, Assistant Branch Secretary

An NASUWT officer explained the specific impact of not implementing the statutory code of practice:

“What the coalition ignores is that these provisions were introduced for a reason. They have produced no evidence to justify their removal and this decision is a blow to the equality duties biting and will give employers a green light to discriminate.”

NASUWT officer

Better engagement

In the TUC Equality Duty Toolkit²⁰ we explain that one of the advantages of the equality duty is that it requires public authorities to listen with an open mind to the voices of the most vulnerable and historically disadvantaged at a formative stage of decision-making or policy review. In response to the online survey, a good number of trade union representatives were able to give positive examples of public authorities taking steps to engage in this way as a result of the duty. For example:

“Yes, when it comes to contracts affecting disabled people, our disability network, unions and others have had the opportunity to voice their concerns”

PCS representative, civil service department

“More engagement with LGBT community [a new group covered by the equality duty in the Equality Act 2010], and formation of new LGBT staff and student groups”

UCU representative, FE College

“The Equality Duty has over the period helped the Council to improve its interaction with minority groups within its administrative area.”

UNISON representative, Scottish local authority.

However, some mentioned a recent deterioration in engagement and involvement following the weakening of the specific duties and pressure to make cuts:

“The previous duties led to better engagement with employees and service users from protected groups than the current duties... This has led to some people not being as involved as they were previously. The specific duty to involve disabled people that was in the Disability Equality Duty was particularly important for making sure some of the most excluded people in society were able to fully participate in consultation and engagement processes. Although both the employers where I represent people are still committed to doing this, the cuts to the public sector and reduced duty means it is not always carried out as effectively as previously. This means that the most educated, articulate and vocal in society are now having a disproportionate influence in how, when and where services are provided and employee support is available.”

UNISON Disabled Members Officer

“There was an improvement, but when the need to impact assess things ended, the department reverted back to its old ways more or less instantaneously, and now engagement is worse, if anything.”

PCS representative, civil service

²⁰ <https://www.tuc.org.uk/publications/viewPub.cfm?frmPubID=636>

One union officer said the equality duty had led to some improvement in engagement but commented there was still much more that could be done and this would only come about if the duty had more teeth:

"I agree the duties have led to better engagement with employees but still a long way to go. All this will only be effective if departments are accountable to someone, and if they have not adhered to the PSED, then there are penalties or consequences."

PCS, Branch Secretary

Improved employment outcomes

Union representatives and officers had some examples of improved employment outcomes for protected groups as a direct result of the equality duties. However, a number commented that in the current climate of cuts and a perceived weakening of the equality duty framework they thought things were worsening for protected groups. A few also noted that, in their opinion, it was too early to say if the duties had led to significant outcomes as it would take time to improve things or the employer was not gathering the necessary data to monitor progress.

Among the examples of improved employment outcomes were:

"An example of how we have used equality monitoring to help compliance with the equality duties is our work on the Redeployment Pool. We receive information every quarter on its operation.... and we monitor by equality and diversity categories. In recent years, this has shown that contrary to MOD policy and the public sector duty requirements MOD disabled employees are twice as likely as others to find themselves in the RDP. In fact when we started digging it became apparent that disabled employees were not more likely to be placed in the RDP but it was taking longer for them to be redeployed than other staff. This was because of the way the cost of reasonable adjustments fell entirely on the new employing division. It was agreed that these costs would be better shared and where necessary covered by a central pool to encourage better employment opportunities for disabled people within MOD."

Prospect, Equality Officer

"A small example – recently, the Ministry of Defence decided, as part of its green initiative, to shut down two of their banks of lifts in the headquarters building, and to reduce the time over which these lift were operating. The unions challenged this, as part of the PSED, and pointed out the impact this would have on disabled members of staff, as a result of which the policy was reversed."

FDA, National Officer and Equality Officer

"Part-time contracts have been secured in higher proportions than previously benefiting women more (as they are more likely to have caring responsibilities)"

PCS representative, civil service department

Again, a number commented that at least with the duty in place they had greater leverage to ensure outcomes were improved or at least the position of protected groups was not worsened. The following was typical:

“Management action still discriminates but the framework allows the union to raise and address issues more quickly in order to get them resolved.”

PCS representative, civil service department

Among the comments suggesting that things were worsening in the current climate and under the new duty framework were:

“The original equality duties led to improved outcomes... [X] Council provided support for staff groups with protected characteristics including a dedicated HR Adviser for disabled employees. This role is vital to disabled employees who need advice on reasonable adjustments and workplace practices. It also helps managers understand their responsibilities and reduces the level of complaints being made. This role is now at risk as the equality duty relating to disabled people has been weakened and public sector cuts are being implemented.”

UNISON, Disabled Members Officer

“People with disabilities actively being targeted on capability and attendance management”

PCS representative

Finally, the following show how slow progress can be in some public authorities or the lack of data on outcomes (which should exist if the duty was being properly complied with):

“UCU has supported and assisted the employer to draw up a reasonable adjustment policy in April 2011 but it has taken the employer 18 months to implement”

UCU representative, FE College

“Not enough data at present to assess if changes have led to improved outcomes.”

PCS representative, government agency

Improved service delivery outcomes

There was a similar picture in terms of what trade union representatives and officers had to say on the equality duty and improved service delivery outcomes – although a greater number of respondents felt less able to comment as they lacked information on the service delivery side.

Among the positive examples received were:

"On balance the legislation has improved outcomes for service users ... the Council works very closely with transport providers to improve accessibility and services."

UNISON representative, Scottish local authority

"Disabled access and audio loops have been installed in all public buildings"

Prospect representative, Scottish public authority

"Improved antisocial behaviour policies, improved services to disabled tenants who may need rehousing for reasons relating to their disability, increased awareness of issues for all groups and improved community cohesion..."

UNISON, Disabled Members Officer

"Raising awareness across the organisation of minority groups and equality does challenge stereotypes, and will mean some service users have a more positive experience as a result"

UNISON representative, Welsh NHS Trust

Again, the following comments illustrate the impact of the changed political climate in some authorities:

"Yes - there is a good level of discussion regarding outcomes for service users in the protected groups. But the relaxing of equality laws in relation to our outward roles means that there is also an equal level of discussion from management on not taking action when impact is identified as 'it would be overstepping our roles as a light-touch organisation'"

PCS representative, government agency

Little impact on procurement

One area where there were hardly any examples from trade unions of the equality duty having an impact was public procurement. As a function of public authorities, public procurement is covered by the equality duty. However, it has been an uphill struggle to get this message out to all public authorities and to ensure due regard is had to equality throughout the procurement process. As a result, the TUC, along with others, had pressed for there to be a specific duty on procurement in the new duty framework and in s.155(2) of the Equality Act 2010 powers were taken to impose specific duties in relation to procurement.

The coalition government, however, chose not to impose any specific requirement on public authorities in relation to procurement despite stating in its original consultation on the specific duties that public authorities spend around £220bn a year on contracts for works, goods, services and that "The need to deliver value for money can go hand in hand with delivering wider benefits such as equality, because taking action to tackle disadvantage early and providing services appropriate to diverse users can save money in the longer run".

One positive example of the equality duty resulting in equality considerations being built into the procurement process came from a union representative in a Scottish local authority – and there is a specific duty on procurement in the Scottish specific duties legislation.

“The Council’s Procurement Section is very much aware of the Equality Duty. To date any contractor doing work on behalf of the Council should comply with the Duty when carrying out work.

Unison representative, Scottish local authority

What if the statutory duty did not exist?

One GEO official stated at a meeting in autumn 2012 that the key question the review was seeking to answer was: “What would the world look like if the duty did not exist?”

Trade unions were asked for their views on what would happen if the equality duty were repealed or replaced by a non-statutory scheme. The vast majority of respondents said they would see this as a significant backwards step for equality which would make it even harder for practical improvements to be made. Even those who felt that the duty had led to little significant improvement within their own public authorities tended to believe the situation would worsen further still if the duty were repealed or replaced by a voluntary scheme. Below is a selection of these comments.

“This would be an entirely negative step putting the equality agenda back decades. In the current climate protected groups are the most affected by the cuts agenda so a voluntary scheme is highly likely to make matters worse.”

PCS representative, MOD

“Standards are dropping already, and basically, much that is in place is simply paying lip service to equality. If PSED were repealed this would be a huge backward step, and many of the improvement we have seen would vanish”

PCS representative, government agency

“Higher levels of discrimination which can only be addressed by going through the tribunal system, which is going to be much harder to access, given the changes that are being implemented [e.g. tribunal fees and abolition of statutory discrimination questionnaires]... the workplace will become a much unfairer place”

PCS representative, civil service department

“I think that a voluntary scheme would risk being used only where it’s easy and unchallenging. Whereas, of course, the value of the PSED is where it makes employers confront problems”

Prospect representative, government agency

"We'd have even less leverage to protect our members from protected groups"

UCU representative, FE college

"Catastrophic for both users and staff. A step back to the dark ages with students and staff being unprotected by the wider community."

UCU representative, FE college

"[It would] undermine the good work that is being done and has been done to ensure that workplaces and society do not discriminate either directly or indirectly. It is not possible to have a 'quick win' when it comes to challenging systemic discrimination and therefore any duties should have an appropriate period of time to create the required cultural change around discrimination. Equality should be a central process that underpins all other work, it should not be a voluntary or peripheral add on to the everyday work that an organization undertakes."

UCU Wales Support Official

"I fear that particularly given the cuts for local government it would have massive consequences for different equalities groups because a voluntary scheme would lead to councils not taking equality issues into account when faced with such massive cuts to their funding... If anything the equality duties need to be strengthened"

UNISON representative, local authority

"Disaster. With the changes in the law we have already seen a reverse in attitude to tackling equality issues in the workplace and for LA residents. Trying to bring documents that say they are committed to equalities to practical and real life are hard enough without it being voluntary."

UNISON representative, local authority

"We are already seeing a rise of far right groups which target people from protected groups and this is likely to rise if the public sector are not promoting equality. The consequences of this would lead to more people being in crisis and the need for additional community safety and policing resources in communities."

UNISON Disabled Members Officer

"I don't believe that would help. I think that the PSED should be strengthened by better enforcement and a more rigorous regime. It seems that employers can rarely be brought to account."

UNISON Branch Secretary

6. Key points and recommendations

- The review of the equality duty was announced as part of the deregulatory Red Tape Challenge agenda and in a political context in which government ministers have repeatedly dismissed some of the key measures for ensuring equality is mainstreamed.
- The review of the equality duty is premature as the new duty framework, including the new specific duties have only been in place for about a year. It would make more sense to review the effectiveness of the new duty in 2016 to fit with the review by public authorities of their equality objectives set under the specific duties legislation.
- Trade unions and VCS organisations have expressed a lack of confidence in the objectivity and rigour of this review, especially as the steering group overseeing it consists of those the duty is meant to hold to account. It also has a very short timeframe, particularly given its broad scope and parameters.
- If such a post-legislative review is going to take place of such a significant piece of equality law, it should be some years after implementation, over a longer period of time, and be a cross-party parliamentary process with opportunities to hear in public from the different organisations and individuals affected by the duty (e.g. the post-legislative review by the Justice Committee of the Freedom of Information Act)
- The experiences of the devolved Scottish and Welsh public authorities and trade unions and VCS organisations need to be properly taken account of and the impact of any recommendations from this review on Scotland and Wales properly considered.
- The intention of the equality duty is to tackle institutional discrimination and mainstream equality to ensure that our public services meet the needs of all in our communities. The roots of it lie in the Macpherson Inquiry's findings and recommendations into the Metropolitan Police Service's failure to properly investigate and prosecute the racist murder of Stephen Lawrence which was linked to his race.
- The equality duty is a proportionate duty – 'due regard' means the appropriate degree of regard given the circumstances. It does not impose disproportionate, bureaucratic burdens on public authorities.
- It is a procedural duty and it does require certain steps to be taken to ensure equality is mainstreamed (e.g. the gathering of information on equality impact, proper consideration of it at a formative stage, and the need to avoid or mitigate any negative impacts). But if the duty is properly complied with it should lead to better outcomes – better targeted and more effective and efficient public services and a more representative and engaged public service workforce. Trade unions' experience shows this is the case in some parts of the public sector but that the equality duty is not operating as intended in all public authorities.
- To improve compliance with the duty and to ensure better service delivery outcomes and employment opportunities for all in our society, the TUC believes the following issues need to be addressed:
 - The implementation of a statutory code of practice and a detailed review of

the impact of the different specific duties legislation in English and non-devolved authorities compared to their devolved Scottish and Welsh counterparts

- Stronger political leadership on the need for change to ensure equality is mainstreamed in our public services, including political support for the key building blocks for that to happen – the collection of good quality information on equality, engagement with those who have been traditionally disadvantaged or under-represented and the need to consider impact on equality at a formative stage of decision-making in a structured and transparent way (i.e. something akin to a properly conducted equality impact assessment).
- A properly resourced and independent EHRC, willing to use its powers and to work with other regulators and stakeholders to support compliance with the duty and to take action against those who fail to meet it.
- Trade unions' experience in some public authorities reveal the negative impact of the coalition government's actions have already had on compliance with the duty – with less engagement taking place, less data collection and less consideration concern shown for the impact their policies and practices have on services or employment opportunities for the most disadvantaged.
- Most trade union responses to the TUC/LRD online survey expressed the view that if the equality duty framework were to be weakened in any way as a result of the current review, it would mean a further backward step for equality in the public sector. Critically, it would mean less leverage for those seeking to hold public authorities to account on their ability to deliver more inclusive public services and more equal public sector employment opportunities.