

The Requirements of the Equality Act 2010

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The Equality Act 2010 defines nine protected characteristics: age, gender reassignment, disability, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex and sexual orientation.

With regard to these protected characteristics the Equality Act 2010 makes provisions which include:

- Defining prohibited conduct in respect of direct discrimination, discrimination arising from disability, indirect discrimination, harassment and victimisation.
- Requiring the provision of equal pay between men and women.
- Requiring an organisation to make reasonable adjustments for disabled people
- Prohibiting other forms of conduct, including instructing a third party to discriminate against another; or helping someone discriminate against another.
- Making terms in contracts, collective agreements or rules of undertakings unenforceable or void if they result in unlawful discrimination, harassment or victimisation.
- Enabling an organisation to take positive action to overcome or minimise a disadvantage arising from people possessing particular protected characteristics

The majority of the Equality Act's provisions were enacted from 1st October 2010

The Public Sector Equality Duty: The “General Duties”

The Equality Act 2010 also established a general duty on public authorities to have due regard, when carrying out their functions, to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not and to
- Foster good relations between people who share a protected characteristic and those who do not.

The general duties under s149 of the Equality Act 2010 built on the provisions contained in the previous race, sex and disability discrimination laws. The Equality Act 2010 extended this to cover all protected characteristics from 6th April 2011. The first of the general duties applies to all the protected characteristics; the second and third apply to all except marriage and civil partnership.

An assessment of the equality implications of the recommendations made in Part 2 of the Winsor Review should therefore not be restricted to the 8 characteristics set out in the consultation document, but to the elimination of discrimination, harassment and victimisation on all nine specified grounds.

The Public Sector Equality Duty: The “Specific Duties”

To support the general duty, the Equality Act also allows for the enactment of specific duties. This is a devolved power, so the specific duties are different in England and Wales (and Scotland).

In England, the Equality Act 2010 (Specific Duties) Regulations 2011 require public authorities to publish equality objectives and information to demonstrate compliance with the general equality duty. In Wales, the specific duties are more extensive and proscriptive; for example, they contain express provisions about making and publishing equality impact assessments.

In reality the duties in England and Wales do not conflict; they both support good decision making by public authorities enabling them to understand how different people are likely to be affected by their activities and enabling them to meet different peoples’ needs.

Case law on the previous equality duties established that active consideration of the likely effects of different policies and programmes on people with relevant protected characteristics is inherent in having “due regard” to the matters set out in s149 of the Equality Act (the “general duties”). The Explanatory Notes to the Specific Duties Regulations 2011 indicates that “due regard” is likely to include details of the analysis an organisation undertook into the potential equality impact of its policies and arrangements and the information on which it was based.

Case law: Having “Due Regard”

A number of Judicial Review applications have been taken on the matter of “due regard”.

In the case of *R (Brown) v DWP* [2008] the Judge set out six principles that should be part of a public authority’s assessment of equality impact. These principles, known as “the Brown Principles” were informed by previous Court cases and have been taken into account in more recent ones.

A summary of issues raised by the Courts is set out below under the relevant principle identified in the Brown case:

1. Awareness of the statutory duties

“Those responsible for the duty to have due regard must consciously bring it to mind when considering the duty. If they don’t or if their appreciation of the duty is incomplete or mistaken, the courts will deem that due regard has not been applied”.
R (Brown) v DWP [2008]

“Promotion of equality of opportunity is not the same thing as the elimination of racial discrimination ... the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination”
R (Baker) v Secretary of State Environment [2008]

2. Undertaken at the Proper Time

“The Secretary of State has sought to rely on an EIA which was carried out in July 2010 after the decision had been made and announced. ... In any event the later EIA itself says... that "a stop now means that these prioritised groups will be inadvertently disadvantaged disproportionately" ... A major purpose of due regard before a decision is made, not after, is to avoid the "inadvertent".

R (London Borough Councils & Nottingham BC) v SoS for Education [2010]

An EIA is not a “rearguard action following a concluded decision’ but exists as an ‘essential preliminary’ to any such decision, inattention to which ‘is both unlawful and bad government’. *R (BAPIO) v SoS for Home Department & SoS for Health [2007]*

3. Analysis must be rigorous

“Mere recitation of a mantra will not by itself show a positive equality duty has been discharged, but the ‘substance and reasoning’ of the decision must be examined”.

R (Baker) v Secretary of State Environment [2008]

Once Ealing BC had “identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution”.

R (Kaur & Shah) v LB of Ealing [2008]

4 The Duty cannot be delegated

“Instead of looking at how NICE as a public body could itself promote equal opportunity, having accepted that the Guidance could have a discriminatory effect ... the approach taken was to leave it to others to sort out in the hope and expectation that they would. That, in my judgment is not good enough”. *R (Eisai) v NICE [2007]*

5 The Duty is a continuing duty

“Fifthly, (and obviously), the duty is a continuing one”. *R (Brown) v DWP [2008]*

6 Record-keeping

“The process of assessments should be recorded ... Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage. They further tend to have the beneficial effect of disciplining the policy maker to undertake the conscientious assessment of the future impact of his proposed policy, which s71 requires”.

R (Kaur & Shah) v LB of Ealing [2008]