

# EQUALITY ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 11: Advancement of Equality**

##### *Chapter 1: Public sector equality duty*

##### *Section 149: Public sector equality duty*

#### **Effect**

479. This section imposes a duty, known as the public sector equality duty, on the public bodies listed in Schedule 19 to have due regard to three specified matters when exercising their functions. The three matters are:
- eliminating conduct that is prohibited by the Act, including breaches of non-discrimination rules in occupational pension schemes and equality clauses or rules which are read, respectively into a person's terms of work and into occupational pension schemes;
  - advancing equality of opportunity between people who share a protected characteristic and people who do not share it; and
  - fostering good relations between people who share a protected characteristic and people who do not share it.
480. The second and third matters apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. They do not apply to the protected characteristic of marriage and civil partnership.
481. As well as the public bodies listed in Schedule 19, the section also imposes the public sector equality duty on others that exercise public functions, but only in respect of their public functions. Section 150 explains what is meant by "public function".
482. Subsections (3), (4) and (5) expand on what it means to have due regard to the need to advance equality of opportunity and foster good relations. In particular, subsection (4) makes clear that having due regard to the need to advance equality of opportunity between disabled people and non-disabled people includes consideration of the need to take steps to take account of disabled people's disabilities. Subsection (6) makes clear that complying with the duty might mean treating some people more favourably than others, where doing so is allowed by the Act. This includes treating disabled people more favourably than non-disabled people and making reasonable adjustments for them, making use of exceptions which permit different treatment, and using the positive action provisions in Chapter 2 of this Part where they are available.
483. [Schedule 18](#) sets out persons and functions to which the equality duty does not apply.

## **Background**

484. This section replaces section 71 of the Race Relations Act 1976, section 49A of the Disability Discrimination Act 1995 and section 76A of the Sex Discrimination Act 1975. These provisions imposed similar public sector equality duties in relation to race, disability and gender (including pregnancy and maternity as an implicit part of gender, and partly covering gender reassignment) respectively. There were no equivalent public sector equality duties for age, religion or belief or sexual orientation in previous legislation. The section extends the new public sector equality duty to cover gender reassignment in full, age, religion or belief and sexual orientation.

## **Examples**

- The duty could lead a police authority to review its recruitment procedures to ensure they do not unintentionally deter applicants from ethnic minorities, with the aim of eliminating unlawful discrimination.
- The duty could lead a local authority to target training and mentoring schemes at disabled people to enable them to stand as local councillors, with the aim of advancing equality of opportunity for different groups of people who have the same disability, and in particular encouraging their participation in public life.
- The duty could lead a local authority to provide funding for a black women's refuge for victims of domestic violence, with the aim of advancing equality of opportunity for women, and in particular meeting the different needs of women from different racial groups.
- The duty could lead a large government department, in its capacity as an employer, to provide staff with education and guidance, with the aim of fostering good relations between its transsexual staff and its non-transsexual staff.
- The duty could lead a local authority to review its use of internet-only access to council services; or focus "Introduction to Information Technology" adult learning courses on older people, with the aim of advancing equality of opportunity, in particular meeting different needs, for older people.
- The duty could lead a school to review its anti-bullying strategy to ensure that it addresses the issue of homophobic bullying, with the aim of fostering good relations, and in particular tackling prejudice against gay and lesbian people.
- The duty could lead a local authority to introduce measures to facilitate understanding and conciliation between Sunni and Shi'a Muslims living in a particular area, with the aim of fostering good relations between people of different religious beliefs.

## ***Section 150: Public authorities and public functions***

### **Effect**

485. This section supplements section 149. It introduces Schedule 19 which lists the public bodies that are subject to the public sector equality duty and provides for them to be subject to this duty in respect of all of their functions unless such a body is listed only in respect of some of its functions, in which case the duty only applies to those specified functions.
486. "Public function" is given the same meaning as it has in the Human Rights Act 1998. This term is used in subsection (2) of section 149, which extends the public sector equality duty to persons not listed in Schedule 19 but who exercise public functions.

### **Background**

487. The public sector equality duties in previous legislation specified which bodies were subject to the duties in different ways. The Race Relations Act 1976 used a list, while

the Disability Discrimination Act 1995 and the Sex Discrimination Act 1975 applied the disability equality duty and the gender equality duty to those who have “functions of a public nature”. The Act combines the two approaches by including a list of public bodies subject to the duty, to provide legal certainty, and in addition applying the duty to anyone else who is exercising public functions, in respect of those functions (see subsection (2) of section 149).

### ***Section 151: Power to specify public authorities***

#### **Effect**

488. [Schedule 19](#), which lists public bodies subject to the public sector equality duty, comprises three Parts. This section enables a Minister of the Crown to make an order amending any of those Parts. The changes might consist in adding a new body or removing an existing body, or moving a body from one Part of the Schedule to another. It also enables the Welsh Ministers and the Scottish Ministers, with the consent of a Minister of the Crown, to amend Parts 2 and 3 of the Schedule respectively, which list relevant Welsh and Scottish bodies subject to the duty.
489. Relevant Welsh and Scottish bodies (as defined in section 157) cannot be added to Part 1 of the Schedule. They must be included in Parts 2 and 3 respectively. Nor can cross-border Welsh and Scottish bodies (as defined in section 157) be added to Part 1. Only a Minister of the Crown has the power to amend the Schedule in relation to cross-border Welsh and Scottish bodies. They must be added to what will become a new Part 4, which will be created when the first cross-border body is added to the Schedule.
490. The power to add to the Schedule can only be used where the person exercising the power considers that the person being added is exercising at least one public function. This means that a wholly private company could not be added unless it were carrying out what the person exercising the power considered to be a public function. Orders cannot be made under this section to apply the duty to those functions and people who are excluded from application of the duty by the provisions of Schedule 18 that relate to judicial functions, Parliament, the Scottish Parliament, the National Assembly for Wales and the General Synod.

#### **Examples**

- A Minister of the Crown may decide that a new public body which has just been created should be included in the Schedule, and add it to the appropriate Part.
- A public body might cease its devolved activities, and so a Minister of the Crown might move it to Part 1 of the Schedule from another Part of the Schedule.

### ***Section 152: Power to specify public authorities: consultation and consent***

#### **Effect**

491. This section sets out whom a Minister of the Crown must consult before exercising a power under section 151 to amend Schedule 19. On each occasion the Minister must consult the Equality and Human Rights Commission. If the Minister is modifying the Schedule in respect of a relevant Welsh body, or a cross-border Welsh body, then he or she must also consult the Welsh Ministers. And similarly, if the amendment relates to a relevant Scottish body or a cross-border Scottish body, there is a requirement to consult the Scottish Ministers.
492. The section also provides that, before the Welsh Ministers amend Part 2 of the Schedule with respect to relevant Welsh bodies, they must first consult the Equality and Human Rights Commission and obtain the consent of a Minister of the Crown. The same requirements apply to Scottish Ministers with respect to Part 3 of the Schedule and relevant Scottish bodies.

## **Background**

493. The Race Relations Act 1976 did not contain a requirement for the Lord Privy Seal to consult before amending the Schedule of bodies subject to the general race equality duty. Neither the Scottish Ministers nor the Welsh Ministers had the power to amend the Schedule. Neither the Disability Discrimination Act 1995 nor the Sex Discrimination Act 1975 adopted a list-based approach to the general duty.

### ***Section 153: Power to impose specific duties***

#### **Effect**

494. This section enables a Minister of the Crown to make regulations imposing specific duties on public bodies listed in Part 1 of Schedule 19 to enable them to carry out the public sector equality duty more effectively. The Welsh Ministers can similarly impose specific duties on relevant Welsh bodies listed in Part 2 of the Schedule, and the Scottish Ministers can impose specific duties on relevant Scottish bodies listed in Part 3 of the Schedule.
495. [Section 154](#) deals with the imposition of specific duties on public bodies listed in Part 4 of the Schedule (cross-border authorities).
496. The Equality and Human Rights Commission must be consulted before specific duties are imposed.

#### **Background**

497. This section replaces similar provisions in previous legislation for the Lord Privy Seal and the Scottish Ministers to impose specific duties for the race and gender public sector equality duties, and for the Secretary of State and the Scottish Ministers to impose specific duties for the disability public sector equality duty. The Welsh Ministers previously did not have the power to impose specific duties on Welsh bodies.
498. The pre-existing provisions have in the past been used to require listed public bodies to prepare and publish race, disability and gender equality schemes, for example.

### ***Section 154: Power to impose specific duties: cross-border authorities***

#### **Effect**

499. This section sets out the process for determining who imposes specific duties on any cross-border Welsh and Scottish bodies that may in time be added to Part 4 of the Schedule.
500. Whenever a body is listed in Part 4 of the Schedule, beside its entry will appear a letter corresponding to the procedure to be followed.
501. For all the procedures, the person imposing the specific duties must consult the Equality and Human Rights Commission.

#### **Background**

502. In respect of the previous race and gender public sector equality duties the Scottish Ministers had the power to impose specific duties on the devolved functions of cross-border Scottish bodies, subject to consultation with the Lord Privy Seal or, in the case of the disability public sector equality duty, the Secretary of State. The Lord Privy Seal in relation to the race and gender public sector equality duties, or the Secretary of State in relation to the disability public sector equality duty, had the power to impose specific duties on the non-devolved, or reserved, functions of those cross-border Scottish bodies, again subject to consultation with the Scottish Ministers. Before imposing specific duties in respect of the previous race, disability and gender public sector equality duties

which related to functions in Wales exercisable by a person who was not a Welsh public body, the Lord Privy Seal or the Secretary of State as the case may be had to consult the Welsh Ministers.

### ***Section 155: Power to impose specific duties: supplementary***

#### **Effect**

503. This section provides that a specific duty imposed using the powers in sections 153 and 154 may require public bodies to consider matters set out elsewhere by a Minister of the Crown, or the Welsh or Scottish Ministers.
504. This section also makes clear that a Minister of the Crown or the Welsh or Scottish Ministers may impose specific duties on public bodies listed in Schedule 19 that are also contracting authorities for public procurement purposes in relation to their public procurement functions, for example when buying goods and services from private firms. “Public procurement functions” are those activities that fall within the European law public procurement regime. The provisions on public procurement do not affect the extent of any other provision that may be made using the powers in sections 153 and 154 outside this field.
505. This section also provides that a Minister of the Crown and the Welsh and Scottish Ministers may modify or remove duties that they have imposed. A duty imposed by one Minister of the Crown may be modified by a different Minister of the Crown.

#### **Background**

506. The previous public sector equality duties did not provide for the imposition of specific duties which required public bodies to take into account matters set out elsewhere. It was inherent, but not explicit, in those duties that duties could be imposed which apply to a body’s public procurement functions.

#### **Examples**

- A person exercising the power may decide to impose a specific duty that requires specified public bodies to take into account particular national priorities set out in a Public Service Agreement when setting their equality objectives.
- A person exercising the power may decide to impose a specific duty which requires contracting authorities to set out how they will use their procurement functions to better meet the requirements of the public sector equality duty.

### ***Section 156: Enforcement***

#### **Effect**

507. This section is designed to make it clear that the duties imposed by or under Chapter 1 of Part 11 do not create any private law rights for individuals. These duties are, however, enforceable by way of judicial review.

#### **Background**

508. This section is new, but it reflects the position under previous legislation.

#### **Example**

- A local council fails to give due regard to the requirements of the public sector equality duty when deciding to stop funding a local women’s refuge. An individual would not be able to sue the local council as a result and claim compensation. She would need to consider whether to pursue judicial review proceedings.

## **Section 157: Interpretation**

### **Effect**

509. This section defines the terms used in this Chapter to refer to devolved issues.
510. The other sections in this Chapter refer to relevant Welsh and Scottish bodies, cross-border Welsh and Scottish bodies and devolved Welsh and Scottish functions. This section explains what all those terms mean.

## **Chapter 2: Positive action**

### **Section 158: Positive action: general**

#### **Effect**

511. This section provides that the Act does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, and meet their particular needs. It will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs. Any such measures must be a proportionate way of achieving the relevant aim.
512. The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them. This provision will need to be interpreted in accordance with European law which limits the extent to which the kind of action it permits will be allowed.
513. To provide greater legal certainty about what action is proportionate in particular circumstances, the section contains a power to make regulations setting out action which is not permitted under it.
514. If positive action measures are taken in recruitment or promotion under section 159(3) or the selection of political candidates under section 104, those provisions will apply rather than this section.
515. Should the provision allowing single-sex shortlists for the selection of political candidates (section 104(7)) be repealed, this section will not permit action to be taken similar to that permissible under that provision.
516. This section does not allow any action to be taken that would be prohibited by other legislation.

#### **Background**

517. This section is new. There were positive action provisions in previous legislation, but these applied to different protected characteristics in different ways and in some cases were specific about the types of action they permitted. This section extends what is possible to the extent permitted by European law, and applies in relation to all protected characteristics.

#### **Examples**

- Having identified that its white male pupils are underperforming at maths, a school could run supplementary maths classes exclusively for them.
- An NHS Primary Care Trust identifies that lesbians are less likely to be aware that they are at risk of cervical cancer and less likely to access health services such as national screening programmes. It is also aware that those who do not have children do not know that they

are at an increased risk of breast cancer. Knowing this it could decide to establish local awareness campaigns for lesbians on the importance of cancer screening.

### ***Section 159: Positive action: recruitment and promotion***

#### **Effect**

518. This section permits an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. This can be done only where the candidates are as qualified as each other. The question of whether one person is as qualified as another is not a matter only of academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job which could include matters such as suitability, competence and professional performance. The section does not allow employers to have a policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not have it in these circumstances; each case must be considered on its merits. Any action taken must be a proportionate means of addressing such disadvantage or under-representation.
519. The section defines recruitment broadly, so that for example offers of partnership or pupillage, or tenancy in barristers' chambers, are included.
520. The section is intended to allow the maximum extent of flexibility to address disadvantage and under-representation where candidates are as good as each other, within the confines of European law.

#### **Background**

521. This section is new. While previous legislation allowed employers to undertake a variety of positive action measures, for instance offering training and encouragement for certain forms of work, it did not allow employers to take any form of positive action at the actual point of recruitment or promotion. This section extends what is possible to the extent permitted by European law, and applies in relation to all protected characteristics.

#### **Examples**

- A police service which employs disproportionately low numbers of people from an ethnic minority background identifies a number of candidates who are as qualified as each other for recruitment to a post, including a candidate from an under-represented ethnic minority background. It would not be unlawful to give preferential treatment to that candidate, provided the comparative merits of other candidates were also taken into consideration.
- An employer offers a job to a woman on the basis that women are under-represented in the company's workforce when there was a male candidate who was more qualified. This would be unlawful direct discrimination.