

The Fawcett Society, the Emergency Budget and a Judicial Review July 2010

What's the legal framework?

The 'gender equality duty' was introduced under part IV of the Equality Act 2006, which added new sections 76A and 76B to the existing Sex Discrimination Act 1975 (SDA), and came into force on 6th April 2007. The biggest change in sex equality legislation in thirty years, it came about in recognition of the need for a radical new approach to equality – one which places more responsibility with policy makers and service providers to think strategically about gender equality, rather than leaving it to individuals to challenge poor practice.

Prior to this, sex discrimination laws had been based around action that could be taken if discrimination or harassment actually took place, e.g. a woman or man could bring a claim if they had been treated less favourably because of their gender. But now, for the first time, there was a positive duty requiring all public authorities to consider the gender equality impact of their decisions before making them. Essentially, this law requires public authorities to take *proactive* steps (and it is unlawful for them not to do so), as opposed to simply not doing things that are discriminatory.

General duty

S76A SDA requires all public authorities, when carrying out their functions, to have due regard to the need (a) to eliminate unlawful discrimination and harassment; and (b) to promote equality of opportunity between men and women.

Specific duty

S76B also allows certain public authorities to be ordered to comply with specific duties, in addition to the general duty. The Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 lists Ministers and government departments (among others) as having to comply with additional specific duties including:

- to prepare and publish a gender equality scheme, reporting on it annually;
- to gather information on the effect of their policies and practices on men and women, and use that information in performance of the general duty;
- to assess the impact of their current and proposed policies and practices on gender equality;
- to consult stakeholders and take account of relevant information in order to determine their gender equality objectives.

Code of practice

A code of practice was published to give practical guidance to public authorities on how to comply. This confirms that the purpose of an impact assessment is twofold:

- To ensure that neither sex is disadvantaged by their decisions and activities
- To identify where they can promote equality of opportunity between women and men.

The code of practice sets out that where a negative impact or a missed opportunity to promote equality of opportunity is identified, in order to meet the gender equality duty, the

authority should then have due regard to the need to modify the policy or practice. The test here is how serious the adverse impact on one sex may be.

For new policies and practices, impact assessments are most effective when they are carried out early in the decision-making process, to inform the process of policy-making and enable any necessary changes to the policy or practice. The code of practice also confirms that public authorities will need to pay specific attention to developing the evidence base to ensure effective analysis of the implications for gender equality.

Equality duties for other protected groups

Similar duties also exist in relation to race equality and disability equality, although with slight variations. There are none as yet for sexual orientation, religion or belief, or age, but these are expected to be in place soon, in the form of a combined single equality duty, under the Equality Act 2010.

Case Law

Over the last few years, some legal challenges to public authorities have been brought under these equality duties. The decisions in these cases have confirmed that these duties are compelling and robust, and have also helped interpret the legislation, and explain precisely what it means. For example, case law has established that the “due regard” must be had *before* any policy decision is made,¹ at a level proportionate to the extent of the possible adverse impact,² and in a structured, transparent and documented way, as follows:³

1. ensuring equality legislation is taken into account when a decision is made;
2. where there is a risk of discrimination, asking and addressing what could be done to eliminate that risk;
3. where there are directly discriminatory effects, considering how to eliminate this in order to put men and women in an equal position; and
4. where there are indirectly discriminatory effects, ensuring that there is no less discriminatory way of going about it if they are to achieve a legitimate aim

Case law confirms that having a written policy is not enough, proper compliance with the general duty involves taking *active* steps to eliminate discrimination and promote equality of opportunity.⁴ This is not a box-ticking exercise, but must be conducted rigorously.⁵ Equality impact assessments should also be published, since a written record is expected where any significant analysis has been undertaken.⁶

¹ *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, [2006] IRLR 934

² *R (Baker and others) v Secretary of State for Local Government and others* [2008] EWCA Civ 141

³ *R (Eisai) v National Institute for Clinical Excellence & Others* [2007] EWHC (Admin) 1941

⁴ *R (E) v Jews Free School* [2008] EWHC (Admin) 1535/1536

⁵ *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC (Admin) 2026

⁶ *R (BAPIO Action Ltd & Yousaf) v Secretary of State for the Home Department and Secretary of State for Health* [2007] EWHC (QB) 199