

## Equality and Human Rights Commission

### Specific Duties Consultation – Formal Response

<b>RESPONDENT NAME:</b> Equality & Human Rights Commission	<b>ADDRESS:</b> Equality & Human Rights Commission, 3 More London, Riverside, Tooley Street, SE1 2RG
<b>ORGANISATION:</b> Equality & Human Rights Commission	<b>DATE:</b> 30th September 2009 <b>EMAIL:</b> andrea.murray@equalityhumanrights.com

#### Introduction

This consultation response focuses on the proposed shape of the Specific Duties, however the Commission believes that in order to derive a coherent set of Specific Duties there must be greater clarity about the purpose and focus of the General Duty. The Commission shares the Government's desire to improve equality outcomes and believes that there should be clarity on the face of the Equality Bill regarding how such outcomes are defined. Specific duties should be focussed on ensuring and enabling public authorities to demonstrate the achievement of those equality outcomes, rather than processes.

#### Primacy of the General Duty – Achieving Greater Clarity & Focus

The Commission believes that the development of the new Equality Duty provides a unique opportunity to put in place a structure which will lead to a renewed and stronger focus on equality. The Commission's ambition is for a Duty which requires public authorities to address and shift the most entrenched and durable differential outcomes for a range of communities and groups. The strongest measure of success should be the degree to which public authorities are strengthening access to services and making clear progress in reducing inequalities of outcome.

The Commission is persuaded by Fredman and Spencer's call for the duty to lead to the 'progressive realisation of equality', by requiring a 'public body to

take steps to eliminate discrimination and achieve equality, rather than just pay due regard to the need to do so'.<sup>1</sup> They are clear that this requires an 'action based, goal oriented general duty', in which public authorities embark on a journey which will lead to the achievement of equality.<sup>2</sup> This means that 'the public body does not need to achieve the goals immediately, but it must take immediate action to make progress towards the goals.'<sup>3</sup> The Commission believes that this represents a sound basis for the new Equality Duty.

The Commission believes that a genuine and meaningful focus on access and outcomes can only be achieved by inserting a clear definition on the face of the Equality Bill which outlines what is required to meet the General Duty. This should clearly set out what the 'progressive realisation of equality' means and therefore what public authorities will be judged against.

Ultimately the Specific Duties should be focus on demonstrating the achievement of outcomes. Fulfilment of action is not an indication of compliance; it is the difference which these actions have made which is the true measure of compliance. The Duty must mean an ultimate focus on outcomes and delivering change. With the most durable and persistent inequalities it may take time for public authorities to achieve equality of outcomes. In such instances, the measure of compliance would be consistent, measurable progress towards this goal over a given time period. This model will more effectively enable both stakeholders and the Commission to measure the progress of public authorities in their journey toward the achievement of equality. The key measures will be:

- Are public authorities focusing on the right things, based on all available evidence? Are these the most relevant and crucial outcomes?

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<sup>1</sup> Fredman, S. & Spencer, S. Delivering Equality: Towards an Outcome- Focused Positive Duty - Submission to the Cabinet Office Equality Review and to the Discrimination Law Review, June 2006, p.9-10

<sup>2</sup> Fredman, S. & Spencer, S. Delivering Equality: Towards an Outcome- Focused Positive Duty - Submission to the Cabinet Office Equality Review and to the Discrimination Law Review, June 2006, p.9-10

<sup>3</sup> Fredman, S. & Spencer, S. Delivering Equality: Towards an Outcome- Focused Positive Duty - Submission to the Cabinet Office Equality Review and to the Discrimination Law Review, June 2006, p.9-10

- Has this led to an actual focus on effecting change through the core work of the authorities?
- Has this focus led to clear progress and an improvement in outcomes? Has this significantly moved the authority toward the achievement of genuine equality or removed the potential for discriminatory action?

The Equality Bill provides a unique opportunity to make clear what public authorities are expected to do and to ensure that they can be judged by whether they are making a difference.

### **Specific Duties – Supporting the General Duty**

The Commission's response to the GEO's consultation on the Specific Duties has been heavily shaped by the above considerations. The Commission has consequently sought to identify those mechanisms which will enable public authorities to demonstrate the degree to which they have made progress in ensuring access and in shifting differential outcomes, whilst simultaneously creating a framework which enables the more effective enforcement of the General Duty. The Commission is therefore proposing a set of Specific Duties which include the following:

1. The setting of national level priorities by individual Secretaries of State – based on a coherent evidence base;
2. The use of relevant evidence to set locally defined equality objectives and the wider actions necessary to meet the General Duty (this includes a consideration of national level priorities and should be undertaken as part of core business planning activities);
3. Equality Impact Assessment of existing and proposed policies;
4. Procurement measures which incorporate equality considerations at all stages of the procurement process;
5. Employment measures which include employment rate and pay gap measures (and associated actions) for gender, disability and race equality, with further consideration of the potential effectiveness of extensions to other mandate areas;

6. Triennial organisational reporting on progress on objectives and the wider actions needed to meet the General Duty;
7. Triennial reporting by Secretaries of State on the progress of relevant policy sectors in respect of the national level priorities and the Commission's Triennial Review issues;
8. Involvement of relevant stakeholders in the development of national priorities and local objectives, wider actions needed to meet the General Duty and subsequent reporting.

In a number of instances these proposals directly reflect those set out by the Government Equalities Office in its consultation document. However in other respects the Commission is calling for the GEO to go further in order to secure a set of General and Specific Duties which ensure a clear focus on outcomes which enables public authorities to effect real change, whilst integrating equality into their core activities.

### **Formal Submission**

The remainder of this submission sets out the Commission's formal responses to each of the questions set out in the GEO's consultation document.

#### **Q1: Do you think the criteria set out above are the right ones? Please give your reasons**

As has been set out in the above introduction, the Commission believes that the development of the new Equality Duty provides an excellent opportunity to focus on shifting the most durable and persistent inequalities of access and outcomes. The Commission believes that the Equality Bill should clearly set out what public authorities are expected to do and what is actually required in terms of meeting the Equality Duty. This will require a clear articulation on the face of the Bill of what compliance with the Duty looks like and specifically a focus on improving and equalising outcomes for all communities and groups. Our consideration of what would be the most effective and efficient set of Specific Duties has been guided by four questions:

- What do public authorities need to do to demonstrate progress in delivering genuine change?
- How can we ensure that equality focused activities are fully integrated into the core activities of public authorities?
- What is needed to ensure real change in the delivery of public services?
- What is needed to effectively enforce the General Duty?

The Commission suggests a number of ways in which the proposals can be strengthened to support this ambition. These are set out below in response to the relevant consultation questions. The Commission has ensured that what it is proposed can be fully integrated into the design, development and delivery of public policy, services, procurement and employment.

There is a clear business case for equality and the Commission believes that placing equality at the heart of public services will ultimately benefit all.

The Commission believes that the Government will want to strengthen its proposals in order to ensure that the Specific Duties can effectively support public authorities to meet an outcomes focused General Duty, enable the Commission and stakeholders to measure progress towards this goal and encourages real change and the delivery of better public services.

The Commission believes that the effective implementation of the General Duty should be guided by two key aspects, a sound sense of prioritisation and effective mainstreaming. The Commission's proposals seek to emphasise the importance of both.

Given the Commission's view of the overarching Equality Duty, the Commission would welcome further discussions about shape and function of the Specific Duties and their role in respect of the General Duty. The Commission's starting point is that the Specific Duties should be structured in order to enable public authorities to demonstrate that they are meeting an outcomes focused General Duty, whilst ensuring transparency and accountability.

**Q2: Are there any other criteria we should use? If so, what do you suggest?**

The Commission supports a number of the current proposals, however there are a number of instances in which the Commission believes that the proposals should be extended or clarified in order to ensure the more effective implementation of an outcomes focused General Duty. These are summarised below:

Firstly, the Commission believes the setting of a series of high level objectives may not be sufficient to require public authorities to fully integrate equalities working into their core activities. We therefore suggest that public authorities should also be required, to set out what they are going to do to meet the General Duty, as part of the same process whereby they determine their objectives. This would be most effectively done as part of an organisation's business planning process. The Commission believes that this additional measure, alongside objective setting with significantly increase transparency and accountability.

Secondly, proposals relating to objective setting (and setting out wider steps to meet the General Duty) should explicitly include a requirement to collect, analyse and act on evidence.

Thirdly, the Commission wishes to see the relevant involvement and reporting requirements extended to reflect the Commission's extended proposals (see above).

Fourthly, the Commission also wishes to see significant amendments to the current proposals relating to employment and equal pay. The detail of these changes is set out in response to the relevant questions.

Finally, the Commission is calling for a number of clarifications and minor amendments to the proposals for a procurement focused Specific Duty.

**Q3: Do you agree that public bodies should have a specific Duty to publish equality objectives with reference to the relevant evidence and their wider general Equality Duty obligations?**

The Commission strongly supports the inclusion of an objective-setting specific duty. Prioritisation and objective setting have proved to be a crucial aspect of the existing Disability and Gender Equality Duties.

The Commission believes that the proposed twin focus on national and locally set objectives can help underpin the move toward a more outcome focused Duty. This will ensure that public authorities continue to focus on the most important aspects of what they do in order to maximise impact. The Commission welcomes the implicit emphasis on considering relevant evidence in respect of all mandate areas, as a primary part of the objective setting process. The initial list of questions on page 27 offers a helpful indication of the type of evidence that public authorities should consider when setting equality objectives. This list will be developed and expanded as part of the development of the Code of Practice. However, the Commission believes that this commitment should be made more explicit by extending the proposals in two key respects. Firstly, by explicitly requiring public authorities to collect, analyse and act on evidence. Secondly, by requiring public authorities to set out how they will meet the General Duty. These twin extensions are outlined in further detail below.

The Commission believes that evidence gathering should form one of the central pillars of the new Equality Duty. Sound evidence gathering is the foundation which enables public authorities to measure their progress in respect of an outcome focused General Duty. The absence of such a requirement would significantly hamper the ability of public authorities to monitor progress. This would require public authorities to adopt consistent, organisation-wide approaches to evidence gathering (both quantitative and qualitative). This would ensure improved internal monitoring as well as greater transparency. The Commission believes that that this should require public authorities to collect, analyse and act on relevant evidence. This should include both quantitative and qualitative data sources, including material garnered from relevant involvement activities. This can be best achieved by explicit reference to evidence gathering in the text which sets out the requirements of the Specific Duties.

The Commission would also like the Government to go further and require public authorities to outline the wider actions they will take to meet the General Duty. The Commission has mapped the potential impact of the current proposals and has concluded that the reliance on objectives alone would not be sufficient to move the work of embedding equality into the heart

of public services on to the next level. It is vital that we ensure that public authorities are thinking about the equality impacts of their work across all of their relevant functions. The Commission has therefore concluded that it is necessary to require public authorities to set out what they are going to meet the General Duty for the following reasons.

Firstly, a sole reliance on objective setting may risk over-emphasising the role of the specific duties and underplaying the primacy of the General Duty. We may simply replace the current 'administrative obsession' with Equality Schemes with an over-emphasis on objectives, to the detriment of wider delivery.

Secondly, the three legacy Commission found that public authorities tend to concentrate on those things they perceive to be the tasks that they are obliged to complete. This is arguably why Equality Schemes became the focus of so much attention.

Thirdly, public authorities will expect greater direction. The Specific Duties are intended to help public authorities to meet the general duties – they are effectively the building blocks of compliance.

Finally, there remains the question of transparency. A reliance on objective setting alone would make it difficult for stakeholders and the Commission to monitor the performance of public authorities in respect of all of their relevant functions. A less prescriptive approach may work for the most effective and progressive public authorities, but would do little to develop practice within those organisations which are considered 'laggards'. There is a risk that the latter may be inclined to do less and that this would make it harder for stakeholders to hold authorities to account. This may significantly impact on their ability to address the most important differential outcomes. For example, an education college setting objectives to improve disabled parking, but avoiding major issues like disability related bullying of students.

We believe that the combination of objective setting, plus the integration of actions which will enable public authorities to meet the General Duty is most likely to achieve this goal. Public authorities should specifically: Set out the actions they will take to meet the General Duty.

It is proposed that this would be done as part of an organisation's business planning process or, if the public authority thinks appropriate, as part of a

separate document. This approach would ensure that public authorities clearly set out what they are proposing to do to address a range of access issues and differential outcomes over a three-year period. These measures should of course be set out clearly and published in a form, which is accessible to all groups, including different impairment groups. This would further underpin the principles of accountability which are at the heart of the wider Bill.

The Commission does not believe that its proposal would lead to any additional 'burdens' upon public authorities as the most effective public authorities, prompted by the Code of Practice and guidance will look to integrate this requirement into the same process as their objective setting, as part of wider business planning process.

The Commission has been quite clear that Equality Schemes have not been the most effective markers of compliance, but in the move away from Schemes, it is important that there is a requirement for public authorities to set out their wider actions. This will aid internal monitoring, ensure greater transparency and enable the public and the Commission to more effectively hold public authorities to account. The Commission has noted that there is significant stakeholder concern that a reliance on objective setting alone would not be sufficient. The combination of objective setting and the suggested extension would effectively retain the most effective aspects of the previous arrangement, whilst jettisoning the less efficient aspects.

As a footnote, it will also be important that the Commission and GEO reinforce the central messages about the need for proportionate approaches by different sized organisations, whilst balancing the need to consider evidence in all mandate areas.

In addition, the Commission and the Government should work together over the coming months to send out a clear message that those public authorities which have not already done so should begin putting in place systems to collect key data in relation to the new mandate areas. This will enable them to ensure that they are in the strongest position possible to begin work towards meeting the Duty from day one.

**Q4: Do you agree that public bodies should set out the steps they intend to take to achieve their equality objectives?**

The Commission welcomes the requirement for public authorities to 'set out the steps they will take towards achieving the equality objectives' on the proviso that this clearly takes account of accurate evidence and focuses on the most crucial and persistent differences of access and outcome. It is important that public authorities clearly set out the actions they will undertake in order to meet their stated objectives. This will enable both stakeholders and the Commission to understand what authorities are committing to do and increase accountability and transparency.

The Commission wishes to ensure that the 'steps they intend to take' relates to specific actions and activities, which the individual public authority is committed to undertaking. We wish to avoid a replication of earlier concerns about the Race Equality Duty which appeared to simply require public authorities to set out their 'arrangements' – the overarching approaches which would enable them to achieve equality or address discrimination. We must retain a clear link between specific actions and the achievement of stated equality objectives, which will ultimately mean an improvement in outcomes for different communities.

As noted above, the Commission wishes to see this requirement extended to require public authorities to set out the wider actions they will undertake in order to meet the General Duty. Again, we believe that a greater clarity about what individual and groups of authorities are committed to doing will aid mainstreaming, increase transparency and improve accountability.

**Q5: Do you agree that public bodies should be required to implement the steps they have set out for themselves within the business cycle period unless it would be unreasonable or impractical to do so?**

The Commission believes that this particular Specific Duty should be worded so as to ensure that public authorities are best placed to determine how to meet the requirements. It is our belief that public authorities are ultimately best placed to decide how to integrate their Duty focused working into their core business practices.

The Commission's clear preference is for public authorities to fully integrate equalities into their mainstream business and thus avoid unnecessary and inefficient duplication of efforts. The most appropriate and effective approach is for public authorities to integrate objective setting and the actions they will undertake to meet the General Duty as part of the mainstream business planning processes. This would mean that authorities do not need to undertake additional exercises, but merely modify their existing business planning processes to include a consideration of relevant equality evidence and focus and strengthen existing action planning. As has been set out above, the Commission believes that both objective setting and identification of wider actions required to meet the General Duty can be undertaken as part of the same scoping exercise which public authorities undertake in developing their core business plan.

For a number of sectors it may be appropriate to incorporate objective setting and General Duty planning into mainstream plans other than a business plan. For example, schools may wish to integrate this in to School Improvement Plans. The proposals must be structured so as to meet the needs of smaller, as well as larger organisations, so as to avoid unnecessary duplication of effort and ensure the effective use of limited resources. This approach will ensure that equality sits at the heart of public service delivery.

It is important that careful consideration is given to the potential inclusion of the term 'unless it would be unreasonable or impractical to do so'. As a minimum, the Code of Practice should provide a clear explanation of what this means. This should reflect the helpful guidance which is provided by the Disability Equality Duty and Gender Equality Duty Codes of Practice.

**Q6: Do you agree that public bodies should be required to review their objectives every three years? If not, what time-period do you suggest instead?**

The Commission agrees that public authorities should be required to review their objectives on a triennial basis. This should be supplemented by annual progress reports as part of a public authority's business planning reporting processes. This will help ensure transparency and enable public authorities to embark on a continuous cycle of improvement. It will be important that the

Code of Practice and relevant guidance provides clear advice about how this can be best achieved.

**Q7: Do you agree that public bodies should set equality objectives taking into account priority areas set by the relevant Secretary of State?**

The Commission supports the proposals for a requirement for public authorities to take account of national level priorities as identified by individual Secretaries of State. We believe that this will play a fundamental role in ensuring that different parts of the public sector are focusing on the most important and durable issues relating to access and outcomes.

It is important that in setting national priorities that relevant Secretaries of State in setting their priorities take account of all relevant evidence and their own Departmental need to meet the requirements of the General Duty.

This will provide a sound basis upon which public authorities can establish their own equality priorities and objectives, as part of their local focus on inequalities of access and outcomes. This process should be based on accurate and up to date evidence. It is therefore vital that there is a clear requirement for public authorities to routinely collect, analyse and act on relevant and appropriate evidence, including quantitative and qualitative data.

The Commission's full proposals in respect of an explicit link between the role of the Secretary of State and objective setting across individual sectors is set out in response to the final consultation question. The Commission believes that this process should form the backbone of the Secretary of State's triennial report, which would effectively provide a detailed update on the progress of individual policy sectors in respect of these priorities and those set out by the EHRC's Triennial Review.

**Q8: Do you agree that public bodies should not be required to set equality objectives in respect of each protected characteristic?**

The Commission believes that it is vitally important that public authorities consider all relevant evidence in respect of all mandate areas and then make informed decisions regarding priorities on the basis of need, outcome and considerations of proportionality. The consultation document itself is clear that public authorities will be expected to consider evidence in respect of all

mandate areas. Where public authorities do not intend to set objectives in respect of one or more mandate area they should be required to set out clear evidence to support such a view. This will then enable the Commission and relevant stakeholders to understand, and if necessary, challenge such assertions.

The introductory document, which accompanies the Consultation document, appears to suggest that it is acceptable for public authorities to set just two or three objectives. This appears to contradict the stated approach in the main consultation document. The Commission's view is that, whilst such an approach may help to achieve a strong focus in the nominated areas, this may be problematic (except for the smallest public authorities) given the relevance of the Duty for so much of what public authorities do and the extension of the Duty to new mandate areas. There is the potential risk of the creation of a false hierarchy of equality, which runs counter to the overriding ambition of the wider Bill. A primary concern is that having extended the Duty to the new mandate areas that a large number of authorities may decide not to set objectives in these areas, thus effectively undermining the potential value of the extension.

For the majority of public authorities, the Commission anticipates that it will be appropriate to set objectives in respect of all or most mandate areas. We must avoid a situation in which public authorities think that they can simply concentrate on those things which they are most comfortable with, or which are perceived to be easily achievable. The new Equality Duty must encourage public authorities to be ambitious in the work they undertake in respect of equality. The Commission believes that there is a wealth of experience amongst the most effective public authorities of working on the new mandates areas and/or sufficient time for other public authorities to put themselves in the strongest position possible to meet the new Duty.

The Commission believes that the Code of Practice can be used to underline that public authorities must consider relevant evidence in respect of all mandate areas, and based on these assessments, as well as considerations of proportionality, set objectives in all appropriate areas. It is also important to underline that, in line with the Commission's suggested approach, authorities must also be clear how their objectives help them to meet the

General Duty. The Commission should also use the Code of Practice to make clear that a single objective can relate to more than one ground, in order to ensure cross-cutting and overarching approaches.

**Q9: Do you agree that public bodies should be required to report annually on progress against their equality objectives, but that the means by which they do so should not be prescribed in legislation?**

The Commission supports a requirement for public authorities to report on progress against organisational equality objectives, but that the precise format should not be legally prescribed.

The commitment to annual reporting will ensure increased transparency and enable to the Commission, Whitehall departments and stakeholders to identify those public authorities which are faltering or failing to address core differential outcomes adequately.

The Commission assumes that public authorities will be required to publish reports in formats, which are clear and accessible to different impairment groups. This should adhere to the clear guidelines as previously produced by the Disability Rights Commission.

In line with its wider proposals for the Specific Duties, the Commission believes that the Government should extend its current proposals to require public authorities to provide updates on their progress in addressing the General Duty. This would mean that organisational annual reports and the triennial reports could be used to report on progress against their organisational objectives and wider progress towards meeting the General Duty. This wider approach will ensure that there remains a clear focus on improving outcomes and meeting the General Duty across relevant aspects of the authority's work.

The Commission is aware that a number of stakeholder organisations support the need for greater levels of reporting as part of the duties, in order to avoid any inhibition of the ability of stakeholders and the Commission to monitor progress and hold public authorities to account. This would appear to underline that value which stakeholders place on such transparency measures.

This reporting could form part of the organisation's existing reporting systems or a stand-alone structure. This will further aid transparency and enable the Commission to take more effective and efficient decisions about compliance and enforcement matters. Consequently, this would not add any additional burden, or necessarily lead to production any additional, separate documentation.

**Q10: Do you agree that public bodies with 150 or more employees should be required to publish their gender pay gap, their ethnic minority employment rate and their disability employment rate? We would welcome views on the benefits of these proposals in encouraging public authorities to be more transparent.**

The Commission does not support the proposal that public bodies with 150 or more employees should be required to publish their gender pay gap as this represents a regression from the obligations imposed on public authorities by the Gender Equality Duty. A primary concern is that this will exclude a number of significant Non Departmental Public Bodies (NDPBs) and organisations such as Regional Development Agencies. As a comparable measure - Fair Employment legislation in Northern Ireland requires organisations with 10 or more employees to publish data. The Commission believes that the exclusion limit should be much lower in order to ensure that all relevant public authorities are working effectively to address inequalities in respect of employment rates and the equalities pay gap.

The Commission has a number of other concerns regarding the employment-related proposals. Firstly, the proposals would place different requirements upon public authorities in respect of gender, and race and disability equality. Given the available evidence base and our own cross-strand mandate we are unhappy with such a differentiation.

EHRc commissioned research has shown that pay gaps are substantial for most, but not necessarily all, major ethnic minority groups<sup>4</sup>. The gaps cannot simply be explained by the age, education or country of birth of these ethnic

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<sup>4</sup> *Pay gaps across the strands: a review*, Metcalf, NIESR, EHRc Research Report 14, 2009

minority groups. The ethnic pay gap is greatest for men. Bangladeshi and Black African men, followed by Pakistani and Black Caribbean men, are most disadvantaged. Indian and Chinese men have higher unadjusted pay than whites, but their pay is below that of similar white men.

For women, the gender pay gap dominates. Women in some ethnic minority groups receive similar earnings to white women, however Black African and Bangladeshi women experience the greatest pay disadvantage. The extent to which Pakistani women are disadvantaged is unclear. Overall, the evidence points to pay discrimination, rather than the gap being caused solely by patterns of employment or issues relating to skills.

These findings underline the importance of public authorities being required to take action not only in respect of gender pay gaps, but also in respect of ethnicity. As the EHRC equal pay audit tool makes clear an equal pay audit can identify discrimination on grounds of ethnicity as well as on grounds of gender.<sup>5</sup> Similarly, research has shown that, so far as good equal pay practice is concerned, getting it right for women means getting it right for all.<sup>6</sup> Occupational patterns contribute significantly to the ethnic pay gap, but this is not something that reporting on the ethnic minority employment rate alone will pick up.

The situation in respect of the disability pay gap is less clear cut, owing partly to a lack of research, but also because of low rates of both monitoring and self-reporting of disability. Requiring public bodies to report on their disability employment gap may help with monitoring but the extent to which it will encourage self-reporting is open to question.

The estimated size of the disability pay gap varies greatly between studies but disability appears to have a greater downward effect on relative male than relative female pay. The gap widens as the severity of disability increases. Research into causes of the disability pay gap has focused on traditional economic factors such as individual productivity (human capital) and discrimination. However, the pay gap research has not taken into account other differences in employment patterns by disability that are likely to affect

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<sup>5</sup> <http://www.equalityhumanrights.com/advice-and-guidance/information-for-employers/equal-pay-resources-and-audit-toolkit/toolkit-step-1-deciding-the-scope/>

earnings, such as concentration in part-time and temporary employment<sup>7</sup>. Requiring public authorities to publish their disability employment gaps will do nothing to identify the main causes of the pay gap, and will therefore do little either to increase our understanding of the disadvantage being experienced by people with a disability, or to prompt action to narrow the earnings gap.

The Commission's second concern is that what is currently proposed is a reporting duty, rather than the requirement to take action to address inequality. Under the Gender Equality Duty public authorities are required to comply with the Equal Pay Act. The General Duty of the Gender Equality Duty includes a requirement to have 'due regard' to the need to eliminate discrimination that is unlawful under the Equal Pay Act, and we would therefore like to see an equivalent provision in the Equality Duty. Reporting progress in respect of the actions undertaken should be undertaken via relevant mechanisms and the Code of Practice should be used to clarify any ambiguities regarding the action required.

The current Gender Equality Duty Specific Duties require listed public authorities, when setting their overall objectives, to 'consider the need to have objectives that address the causes of any differences between the pay of men and women that are related to their sex'. As the Gender Equality Duty Code of Practice makes clear, these requirements, taken together with the specific Duty to collect and make use of information on gender equality in the workforce and the Duty to assess the impact of policies and practices, mean that listed public authorities have to undertake a process of determining whether their policies and practices are contributing to the causes of the gender pay gap. The Code further recommends that this should be done in consultation with employees and others, including trade unions.

The first step for a public authority considering the need for pay objectives should be to gather information to ascertain if there is a gender pay gap in its workforce. It is implicit in the proposals that the Equality Duty should require public authorities to publish their gender pay gaps that such information should be gathered. There is however no compulsion to go beyond that to

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<sup>6</sup> *Pay gaps across the equalities areas*, Longhi and Platt, ISER, EHRC Research Report 9, 2008

<sup>7</sup> *Pay gaps across the strands: a review*, Metcalf, NIESR, EHRC Research Report 14, 2009

identify the main cause or causes of that gap, nor to take any action to close those gaps. This in itself is clearly a regression from the current position, but there is a further regression in that public authorities must currently also be able to demonstrate that they have considered the need to have objectives that address the gender pay gap, and, if a public authority does not include such objectives, to give reasons for that decision in its Equality Scheme.

Whilst the Commission concurs with the wish to simplify the demands placed on public authorities, the enduring nature of the gender pay gap and the very high levels of equal pay litigation in the public sector suggest that the need for transparency goes beyond the publication of the gender pay gap. The Commission has concluded that the current obligations should remain in place. This view is supported by evidence from EHRC commissioned research which shows that 43% of public bodies are involved in equal pay audits, as recommended by the Code of Practice on Equal Pay<sup>8</sup>. This rate of progress warrants being built upon, not rowed back from. We are also keen to see a requirement for any action taken in consultation with employees and others, including trade unions.

The Commission believes that the Government should go further and introduce a Specific Duty which is equitable across different mandate areas and which combines both reporting and an action orientated focus.

**Q11: Do you agree with the proposal to use the overall median gender pay gap figure? Please give your reasons. If not, what other method would you suggest and why?**

We recognise that the median is the preferred earnings measure of the Office for National Statistics, as it is less affected by a relatively small number of very high earners, but it is the inclusion of those same high earners in the mean gender pay gap that leads us to prefer the mean measure. The gender pay gap is subject to a downward pull at the lower end – caused by the disproportionate number of women working in low-paid jobs – and an upward

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<sup>8</sup> Equal Pay Reviews Survey 2008, Lorna Adams, Peter Hall and Stefan Schafer, EHRC Research Report

stretch at the higher end – caused by the exceptionally high earnings of a small number of workers who are almost entirely male. To use a measure which downplays the fact that the very high earners are predominantly male is to ignore one of the key dimensions of the gap.

Moreover, it is our view that to seek to represent a complex phenomenon such as the gender pay gap with a single figure could be misleading. We would much prefer public authorities to have sufficient information to enable them to identify the causes of the gender pay gap and take action to tackle it. This is what the Gender Equality Duty currently provides and it is what both the Gender Duty Code and the Equal Pay Code recommend.

**Q12: Do you have any evidence of how much it would cost to produce and publish this information, and of what the benefits of producing and publishing this information might be?**

The Commission's experience, and that of the former Equal Opportunities Commission, is that the costs of producing and making available information on the gender pay gap are dependent upon the following factors:

- The extent to which payroll and HR data on employees' gender, rates of pay (including additions to basic pay) and hours worked are collected in a way that lends itself to analysis and inspection. If organisations hold payroll and HR data on different databases then producing the information is going to be more difficult than if the data is held on a single database. Computerised information is more readily obtainable than data held in manual systems.
- The level of staff expertise. Smaller organisations may need to be brought up to speed.
- The size of the organisation. Small organisations will be able to collate and analyse relevant information in a relatively short space of time – the number of employees and job types will be few and the pay system

relatively simple. Large organisations will have the resources either to produce the information in-house or to bring in additional people or purchase additional software. It is the medium-sized organisations who will find the tasks the most onerous as they will have to deal with a moderate level of complexity with few resources.

- The complexity of the pay system and of working patterns. The simpler the pay system and the more standardised the patterns of working, the easier it is to come up with the information.

As the Commission has stated in answer to question 10, we consider that this proposal represents regression from the current obligations and it follows that we do not see it as conferring any particular benefits. Moreover, it is our view that to seek to represent a complex phenomenon such as the gender pay gap with a single figure could be misleading. We would much prefer public authorities to have sufficient information to enable them to identify the causes of the gender pay gap and take action to tackle it. This is what the Gender Equality Duty currently provides and it is what both the Gender Equality Duty Code of Practice and the Equal Pay Code recommend.

**Q13: Do you agree with the proposal not to require public bodies to report employment data in relation to the other characteristics protected under the Equality Duty? If not, what other data do you think should be reported on?**

The Commission has yet to be convinced that there is a demonstrable need for an extension of employment data collection (and associated actions) to the new mandate areas. There is currently insufficient, meaningful data upon which to make such a decision. The Commission would not want to see legal requirements introduced which ultimately could be met.

The Commission would welcome further discussions on this issue with the Government and key stakeholders to explore the potential for future developments in this area.

**Q14: Do you agree with the move away from an emphasis on describing process, to requiring public bodies to demonstrate how they have taken evidence of the impact on equality into account in the design of their key policy and service delivery initiatives and the difference this has made?**

The Commission shares the Government's ambition to increase the take-up and effectiveness of equality impact assessments.

There appears to be broad agreement that, unlike the existing duties, the Specific Duties should not simply include a requirement to set out a process, but rather to require public authorities to actively assess the impact of their policies. The most important thing is that we ensure public authorities are routinely assessing impacts, rather than developing processes which will never be used.

The proposals are for a requirement for public authorities to assess the impact of key policies. The Commission believes that the proposals would be significantly strengthened by greater clarity about what decisions an EIA attaches to and at what stage, or stages, of policy development or decision making an EIA is required

The Commission notes that the current proposals only relate to proposed policies and do not currently extend to the monitoring of existing policies. This essentially leaves a significant gap as public authorities could potentially be left with a whole series of policies (older ones) which are potentially not 'fit for purpose'.

A further concern is that the proposal is for assessment of impact to be required for 'key policies', rather than the current requirement of the RED in respect of 'relevant policies'. Whilst there is a shared desire for a greater concentration on the policies that really matter, there is concern that the emphasis on 'key policies' may go too far. It is suggested that it would be more appropriate to leave questions relating to coverage to the Code and associated guidance. In addition, the proposals do not make clear that consultation and involvement (an integral requirement of the Race Equality Duty) would form part of the proposed model of assessing impact.

Finally, it is noted that the cited examples all relate to service delivery. It is important to underline that the impact assessment requirement extends to employment policies and a range of other functions. The Commission believes that it is important to make clear that the proposals extend beyond policy and service development to employment and other relevant functions. The Commission believes that Equality Impact Assessments have been one of the most effective aspects of the existing Equality Duties. They have led to clear changes in the way that public authorities develop policies and deliver services. It is important that the next generation of Equality Impact Assessment builds upon these strong foundations. This should clearly draw upon the Commission's experience of what effective Equality Impact Assessment looks like, as well as recent legal judgements in which the Courts have set their own expectations.

**Q15: Do you agree that public bodies should have a specific Duty - when setting their equality objectives, deciding on the steps towards their achievement and reviewing their progress in achieving them to take reasonable steps to involve and consult employees, service users and other relevant groups who have an interest in how it carries out its functions - or where appropriate their representatives; and in particular take reasonable steps to consult and involve the protected groups for whom the Duty is designed to deliver benefits?**

The Commission strongly supports the principal of involvement as one of the pillars of the public sector equality duty. The Commission therefore favours the inclusion of a specific Duty requirement which would require public authorities to ensure that appropriate groups and communities are involved and consulted in the development of priorities and other relevant aspects of the duty, including reporting on progress. It is important that we learn from the effectiveness of the DED involvement requirements. In particular, the degree to which 'involvement' has empowered disabled people by increasing their involvement in service delivery and decision making.

There are two areas in which the Commission wishes to see the proposals clarified and/or strengthened. Firstly, the consultation document uses the

terms consultation and involvement interchangeably. It is important that the Specific Duties clearly distinguish between the principles of consultation and involvement. The Commission's preference is clearly for a stronger emphasis on the principle of involvement, due to the successes attributed to the involvement requirements of the disability equality duty. However, we are aware that there are instances where consultation approaches may be more appropriate. This would be further clarified by the Code of Practice.

Secondly, the scope of the involvement and consultation requirements should extend to both the actions the authority proposes to take to meet the General Duty and to the reporting requirements. This would further help ensure that public authorities are considering the views of stakeholders when developing priorities, wider work programmes and when reporting on progress.

**Q16: Do you think that imposing specific equality duties on contracting authorities in relation to their public procurement activities are needed, or are the best way to help deliver equality objectives? Do you think such an approach should be pursued at this time?**

The Commission strongly supports the introduction of a Specific Duty in respect of procurement. International research has found that procurement is the most effective instrument for promoting positive action in employment and changing employers' practices with 'minimum pain and resistance'.<sup>9</sup> However, the Commission has repeatedly found that public authorities are unsure about whether it is legally permissible to use procurement to advance equality.<sup>10</sup> The fact is that they already have a statutory obligation to do so. The Race, Gender and Disability Duties require public authorities to promote equality through all their functions, including procurement. The Equality Bill has the potential to provide some much-needed clarity by establishing a more explicit connection between procurement and the new Equality Duty.

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<sup>9</sup> R. Singh Dhami, J. Squires & T. Modood, *Developing positive action policies: learning from the experiences of Europe and North America*, Research Report No 406 (London: Department for Work and Pensions), 2006, p.5.

<sup>10</sup> Equality procurement pilots recently carried out in central government on behalf of the Department for Work and Pensions found that the lack of clarity about the role of public procurement in social policy had an adverse effect on the way that the pilots were

As the Commission and others stated in response to the Discrimination Law Review, the need is not simply for more guidance. The legacy commissions<sup>11</sup> the Office of Government Commerce (OGC)<sup>12</sup> and many local authorities and health bodies<sup>13</sup> have all developed detailed guidance. There is little evidence that this body of advice has increased public authorities' confidence to make procurement into an effective equality tool. Specific Duties on procurement – accompanied by authoritative guidance – are imperative to spell out their obligations, which will in turn help suppliers know what is expected of them. It is critical that these Duties are constructed as clearly and consistently as possible to avoid further confusion.

The Commission has concerns that the current proposals row back from the status quo, particularly in respect of the Gender Equality Duty. It does not appear that the proposed Specific Duties impose any new requirements on public bodies covered not only by the Specific Duty, but also by the General Duty (with the exception of provision (a), which we support – see Q17). It is vital that the elevation of procurement to a Specific Duty requirement, which will only be applicable to a limited number of bodies, does not have the perverse impact of downplaying the wider General Duty requirements in respect of procurement for those bodies which are not subject to the Specific Duties.

The Commission is also concerned that the current proposals are limited to contracts above the EU thresholds which are clearly directly related to equality. The latter is reinforced by the examples given in the consultation document, such as diversity training for staff and support services for victims of domestic violence. However, in the Commission's view, equality is clearly relevant to the majority of public sector contracts, both above and below the EU thresholds, and to nearly all contracts for public services.

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implemented. See N. Dijan Tackey, H. Barnes, H. Fearn & R. Pillai, *Equality Procurement Pilots* (London: Department for Work and Pensions), forthcoming.

<sup>11</sup> See Commission for Racial Equality, *Race Equality and Public Procurement – A guide for public authorities and contractors*, 2003; Disability Rights Commission, *Procurement and the Disability Equality Duty*, 2007; Equal Opportunities Commission, *Guidance for Great Britain: Procurement*, 2007.

<sup>12</sup> Office of Government Commerce, *Make Equality Count*, 2008.

<sup>13</sup> Department of Health, *Beyond Procurement: Connecting Procurement Practice to Patients – Good practice guidance on integrating equalities into healthcare*, 2007.

It is already well established that legal obligations such as equality must be considered when determining what an authority's 'needs' are in any given contract, as the Equal Opportunities Commission's guidance on procurement explains:

*Government policy is that all procurement by public authorities must be based on value for money having regard to propriety and regularity. This does not mean the lowest price; value for money is the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user's requirement,<sup>14</sup> where the 'user' is the public authority as purchaser. The 'user requirement' will include any relevant legal obligations of the contracting authority including, for example, health and safety or gender equality.<sup>15</sup>*

The Commission also notes the Specific Duty as drafted only refers to three stages of the procurement process. It is important that the Government does not convey the false impression that these are the only times at which equality can and should be considered. A key problem over recent years has been the failure of public authorities to mainstream equality throughout the whole of the procurement cycle.<sup>16</sup> The Duties would be greatly strengthened by including the other key stages of the procurement process. They should make it clear that a contracting authority should consider the relevance of equality when:

- defining the subject matter of each of its contracts
- determining the technical specification of each of its contracts
- establishing selection criteria for each of its contracts.

The Commission recommends that the Specific Duty should be extended to include a requirement for public authorities to monitor, manage and enforce

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<sup>14</sup> Government Accounting 2000 Annex 22.2 Procurement Policy Guidelines, HM Treasury <http://www.government-accounting.gov.uk/current/frames.htm>

<sup>15</sup> Equal Opportunities Commission, *Guidance for Great Britain: Procurement*, 2007, p. 10.

<sup>16</sup> C. McCrudden, 'Buying Equality', *European Anti-Discrimination Law Review*, July 2009, pp. 11-16.

any equality requirements in the contract specifications and conditions. Recent Commission-sponsored research found that monitoring the equalities aspects of contracts was the part of the procurement process that is least often implemented and where staff feel the least confident.<sup>17</sup> A recent series of equality procurement pilots across Whitehall also revealed that contract managers prioritise delivery of the subject of the contract above all considerations, including equality and diversity.<sup>18</sup>

Finally, the Commission recommends an additional requirement on supplier diversity, which would require contracting authorities to consider how best to encourage underrepresented firms such as SMEs, third sector organisations and ethnic minority, female and disability-led companies, to participate in the public procurement process. Whilst business is broadly supportive of using public procurement to promote equality,<sup>19</sup> small and medium-sized businesses (SMEs) have expressed concerns that they are adversely affected by the practice. The Commission believes it is vital that public procurement opportunities are open to as wide a range of suppliers as possible. Our recent research on procurement and the 2012 Olympics found that supplier diversity is all too often forgotten in the context of competing policy through procurement priorities.<sup>20</sup>

**Q17: Do you agree that contracting authorities should be required to state how they will ensure equality factors are considered as part of their procurement activities?**

The Commission agrees with the Government that it is imperative to consider equality factors at the earliest stages of the procurement process. We support a specific duty requiring contracting authorities to set out how they will use

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<sup>17</sup> Just over a third of procurement survey respondents (37%) indicated that equalities aspects of contracts were monitored. The full research can be found online: [www.lga.gov.uk/lga/core/page.do?pagelid=1314696](http://www.lga.gov.uk/lga/core/page.do?pagelid=1314696).

<sup>18</sup> N. Dijan Tackey, H. Barnes, H. Fearn & R. Pillai, *Equality Procurement Pilots* (London: Department for Work and Pensions), forthcoming.

<sup>19</sup> For example, the CBI has stated that employers believe public procurement is a highly effective lever for increasing diversity and agrees that there must be more systematic use of public purchasing power to achieve this aim.

<sup>20</sup> D. Smallbone, J. Kitching, R. Athayde & M. Xheneti, *Procurement and supplier diversity in the 2012 Olympics*, Research Report No 6 (London: Equality and Human Rights Commission), 2008.

procurement to deliver equality objectives, including on issues such as equal pay. However, as we stated above, we recommend that the specific duties set out more clearly how authorities can incorporate equality considerations into these early stages.

**Q18: Do you agree that contracting authorities should be required to consider using equality-related award criteria where they relate to the subject matter of the contract and are proportionate?**

The Commission is in favour of a requirement for contracting authorities to use equality-related award criteria. This is already a requirement of the Gender Equality Duty (GED), and the Code of Practice on the GED explains that public authorities must:

*Ensure that the Duty to have due regard to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women is appropriately addressed and given due weight in the selection and award criteria in a way which is consistent with European Union procurement rules.<sup>21</sup>*

We recommend that the words ‘to consider’ be removed from the Specific Duty, as they diminish its importance. If the award criteria are relevant and proportionate, contracting authorities should be required to use them.

The new Duty should also make clear that authorities should consider equality when determining the weighting given to the award criteria when the contract is to be awarded to the most economically advantageous tender, as well as when considering whether a bid is abnormally low, where any of its contracts is subject to competitive bidding.

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<sup>21</sup> Equal Opportunities Commission, *Gender Equality Duty: Code of Practice England and Wales*, 2006, p.47.

**Q19: Do you agree that contracting authorities should be required to consider incorporating equality-related contract conditions where they relate to the performance of the contract?**

The Commission similarly believes that contracting authorities should be required to include equality related contract conditions into their contracts. However, there are some basic equality-related conditions which should be included in all contracts, regardless of the subject matter. For example, the OGC has confirmed that conditions requiring compliance with all laws, orders or regulations prohibiting discrimination in employment on all grounds should be included in *all* public sector contracts.<sup>22</sup> The model standard conditions of contract for central government departments and agencies now include a clause requiring the contractor his servants, employees or agents not to discriminate unlawfully in employment on all grounds currently protected under anti-discrimination laws and to take all reasonable steps to prevent such discrimination by any sub-contractors.

As with award criteria, the Commission recommends that the words 'to consider' be omitted from the wording of the Specific Duty on contract conditions.

**Q20: What would be the impact of a regulatory proposal aimed at dealing with suppliers who have breached discrimination law? What might be the benefits, costs and risks?**

The Commission supports an explicit requirement for public authorities to exclude suppliers with a history of unlawful discrimination unless they can demonstrate that effective steps have been or are being taken to resolve the issue. Public bodies have a legal obligation under the equality legislation, to ensure that public money is not spent on practices that lead to discrimination. It has become increasingly common for public authorities to include pre-qualification questions asking for details of any judgment, finding or formal investigation of unlawful discrimination within the last three years, as well as

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<sup>22</sup> Office of Government Commerce, *Social Issues in Purchasing*, p. 30, para 7.7, 2006.

an opportunity to explain what steps have been taken as a result of that finding or investigation.<sup>23</sup>

In the Commission's view, it would be virtually impossible for public authorities to meet their statutory responsibilities if they did not ask these questions. Moreover, they do not represent a significant burden, as authorities do not have an obligation to verify that the information in the PQQ is correct. Our research found that more than four-fifths of the procurement officers surveyed (85%) reported that they used standard equalities pre-qualification questions, and that they were generally used for all or most contracts (72%-80%, depending on the type of contract).<sup>24</sup>

**Q21: Do you support the proposal to establish a national equality standard which could be used in the procurement process? If so, do you believe this is achievable through a specific Duty or is this better tackled through a non-legislative approach? Are there any practical issues that would need to be considered?**

The Commission has been working closely with the Government Equalities Office (GEO) to explore the feasibility of creating a new national equality standard. In addition to improving private sector equality practices, a standard could be used to streamline the procurement process, for example by allowing accredited companies to bypass the PQQ stage. This could help to reduce burdens on business, especially SMEs, providing an extra incentive to address discrimination and equality. However, in order to maximise its effectiveness, the new standard would have to be recognised by as many of the country's authorities as possible. The Commission supports the creation of a specific duty requiring contracting authorities to give due regard to any forthcoming national equality standard, as this would be an effective means of

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<sup>23</sup> These are three of the six approved questions on race equality in employment that local authorities are permitted to ask prospective contractors under the Local Government Act 1988. The 2004 European procurement Directive and UK Regulations also make it clear that a public authority can exclude a prospective tenderer on specific grounds, including conviction of an offence relating to the conduct of its business or an act of grave misconduct in the course of its business. Recital 43 of the Directive explains that breach of the EU Directives on equal treatment of workers is grounds for exclusion unless a firm can show that effective steps have been or are being taken to resolve the issue.

<sup>24</sup> See [www.lga.gov.uk/lga/core/page.do?pagelid=1314696](http://www.lga.gov.uk/lga/core/page.do?pagelid=1314696).

harmonising and simplifying the procurement process without compromising on equality.

**Q22: Which of the above four models do you consider achieves the best balance between joined-up working and senior accountability for equality outcomes, while avoiding unnecessary burdens? Please explain why.**

The Commission has recently reviewed the effectiveness of the first round of Secretary of State reports which were required by the Disability Equality Duty. This analysis identified a number of perceived benefits of the report production process. These include an increased sense of senior level ownership across Whitehall, the notion of departmental responsibility for relevant policy sectors and a strengthening of links between the policy and delivery bodies and the identification of new activities.

There were however a number of areas of concern. In particular, Departments were concerned that the process of compiling reports was highly resource intensive and that the focus of individual reports was often too broad and consequently less strategic than originally envisaged. Similarly, stakeholders argued that some of the resulting reports, whilst providing account of sectoral performance, often contained less new specific actions than expected.

The Commission has concluded that, whilst the exercise was worthwhile and produced an enhanced focus on disability equality, that there may be more effective ways to use the principles which underpinned the DED Secretary of State reporting process.

This a further factor to be borne in mind when considering the most effective form for the Secretary of State reports is the extension to the new mandate areas. Assuming that the existing requirement would be extended to all equality grounds this would considerably increase the scale of what Departments are required to do.

It is therefore important that what is introduced is focused and does not place unrealistic expectations upon Whitehall Departments. The Commission is therefore proposing that the next generation of Secretary of State should

retain a number of the key features of the DED reports, for example, the principle of reporting on progress across individual policy sectors, senior level ownership, involvement and the notion of realising change via the relevant delivery chains. However the focus of the report should be on a very clearly defined set of measures. These include:

- The policy sector's progress in addressing national level priorities
- Progress against the EHRC's Triennial issues

This will effectively tie the different aspects of the Equality Duty together by making an explicit the link between nationally set priorities and local delivery in respect of the most important issues relating to access to services and the most durable inequalities.

It is anticipated that the Commission will work with the GEO to determine the most effective framework for this particular specific duty. It is important that we derive something which is both realistic and achievable. The Commission will provide greater detail regarding the structure of the Secretary of State reports in the relevant Code of Practice.

**Q23: Do you have any other suggestions how this Duty could be remodelled to retain the valuable features of senior accountability and joined-up working, whilst avoiding unnecessary burdens?**

The establishment of an explicit link between national level priority setting and reporting on progress towards the achievement of genuine reductions in inequality and increased access to services will help ensure senior level ownership across Whitehall Departments. This in turn is likely to lead to greater co-ordination and greater levels of accountability.

**Q24: Are there any specific requirements, other than those that we have proposed, which you think are essential to ensure that public bodies deliver equality outcomes in an effective and proportionate manner?**

Those areas in which the Commission believes that the Government should either clarify or strengthen the current proposals are set out in response to the relevant questions.

**Q25: What role do you think the guidance from EHRC should play in helping public bodies implement the specific duties in a sensible and proportionate manner? What do you think it would be helpful for such guidance to cover?**

The Commission welcomes the opportunity for stakeholders to set out their expectations and provide advice on what should be included in the guidance. The Commission will obviously consider these responses in the development of the relevant Codes of Practice and guidance materials.

**Equality and Human Rights Commission**

**30<sup>th</sup> September 2009**