

EQUALITY ACT 2010

1. The Equality Act 2010 (the 2010 Act) replaced previous separate pieces of legislation in relation to equalities, and introduced a general equality duty on public authorities. It places specific duties on public authorities specifically named in Schedule 19 to the Act (and accompanying secondary legislation); however, the Commission is not a named body and therefore only the general duty on the Commission exists – the specific duties are therefore not considered further in this paper. Whilst the public sector equality duty (PSED) encompasses both, in this paper it refers just to the general duty.
2. As it did at the commencement of the 2013 Review, the Secretariat has considered the implications of the PSED on the Commission's work and makes recommendations to the Commission on how to ensure it is complying with it. The Secretariat sought legal advice from the Treasury Solicitor's Department (TSol) when first making these recommendations in 2013; in reviewing them has sought the advice of the Government Legal Department. **The Commission is invited to agree the policy, and its implementation, outlined in paragraph 14.**

The 2010 Act

3. The PSED is set out in section 149 of the 2010 Act, and requires a public authority in the exercise of its functions to have due regard to the need to:
 - eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the 2010 Act];
 - advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - foster good relations between persons who share a relevant protected characteristic and persons who do not share it.' (tackle prejudice and promote understanding)
4. The Commission will wish to note that, while a 'public authority' is defined by the 2010 Act as 'a person specified in Schedule 19' to the 2010 Act – the duty set out in section 149 applies to public authorities listed, and the Boundary Commission for England is not one) and persons exercising public functions in the exercise of those functions.
5. This means that whilst the Commission is not a public authority for the purposes of the 2010 Act, it must still comply with the PSED in so far as it is exercising its public functions. This applies therefore to the Boundary Commission for England in the exercise of its public functions.

The application of the general duty

6. The second and third limbs of the PSED refer to persons who have a 'protected characteristic'. The protected characteristics for these purposes are (see section 149(7)):

- a) Age;
- b) Disability;
- c) Gender reassignment;
- d) Pregnancy and maternity;
- e) Race;
- f) Religion or belief;
- g) Sex;
- h) Sexual orientation.

For the purposes of the 2010 Act more generally, and for the purposes of the first limb of the PSED, marriage and civil partnership is also a protected characteristic.

7. Whilst the legislation is not prescriptive about the approach public authorities (or those otherwise exercising public functions) should take to the PSED, it is clear from the case law that the duty is a duty to have regard to the need to achieve certain ends rather than a duty to achieve a particular outcome. It is essential therefore that public authorities have regard to these matters when devising their policies and making decisions and are able to show that they have. The Equalities and Human Rights Commission (EHRC) has issued guidance to public sector authorities, to explain how such authorities can meet the requirements of the 2010 Act, and it is the Secretariat's intention that the Commission follows this guidance in its application of the PSED.
8. The guidance states that 'the broad aim of the public sector equality duty is to integrate consideration of equality and good relations in the day-to-day business of public authorities ... It requires equality considerations to be reflected in the design of policies and delivery of services ... and for these to be kept under review'. The guidance suggests, among other things, that public bodies should conduct an 'equality analysis' of its policies – and act on the outcomes of that analysis – in order to fulfil its obligations under the 2010 Act. The analysis should be proportionate to the size of the organisation and scope of the policy, and should be made available (on the internet and otherwise publicly on request). The Secretariat recommends that the Commission undertakes an Equality Impact Assessment in the development of its policies and considerations in order to meet the duty in respect of the exercise of its functions in the current review.
9. The two functions in relation to which the Secretariat has concluded the appropriate to apply the general duty (leaving aside, as mentioned, matters of a corporate nature that are covered by the Cabinet Office's policies) will apply are:

- a) Decisions taken relating to the initial, revised (where appropriate) and final proposals (including the arrangements made for making those decisions); and
- b) The manner in which the Commission engages, communicates and consults with its stakeholders and the general public.

Decisions taken relating to proposals

10. In relation to a), the Secretariat had concerns over the potential conflict between the factors contained in the rules in Schedule 2 to the 1986 Act to which the Commission must give effect when making recommendations, and the obligations placed upon it by the Equality Act 2010. For example, the Secretariat has anticipated that arguments might be put to the Commission during the consultation periods that are based on its obligations under the 2010 Act. Arguments may be made to the effect that placing a boundary in a certain place may detrimentally (or indeed positively) affect race or religious relations in the area (one of the protected characteristics). Although none of these arguments were made at 2013 Boundary Review, the Commission will however have due regards to the PSED during the 2018 Reviews.
11. The legal advice received in 2013 in relation to this potential conflict is quite clear (the Secretariat has emphasised the key points) and this advice has been upheld by the Government Legal Department when consulted on the preparation of this paper):

'If such arguments were advanced (and I think it likely that that will occur), then it is something that the Commission is entitled to "take into account" with all the other factors, mandatory and discretionary set out in schedule 2: I do not think that a representation citing the general equality duty would necessarily prevail: the Commission would have due regard to it – that is, to take it into account and balance it against the other factors. *There should be no question of the Equality Act controlling the Commission in the exercise of its powers in the fixing of constituencies*, and the duty would have to be consistent with the general purposes of the 1986 Act. *Where there is actual conflict between the Rules and the equality duty than the Rules would prevail*, providing a court is satisfied that there has been a rigorous consideration of the duty, it is for the decision maker to decide how much weight should be given to the various factors informing the decision. But the Court will look at whether the decision maker had sufficient information to enable proper discharge of the duty.
12. The Secretariat's clear recommendation to the Commission, therefore, is that the Commission must have due regard to its duty under the Equality Act 2010 when taking decisions on its initial, revised and final proposals..

The manner of engagement, consultation and communication

13. In relation to b), in conducting an initial scope of the types of issues that might be expected to be identified in an equality analysis of the way in which the Commission communicates and engages with the public, the Secretariat has

identified issues such as accessibility of documents and public hearings as likely key issues, though expects the list of issues to be far more thorough. The Secretariat intends to conduct an equality analysis of the way in which it intends to engage with the general public – the scale and scope of which will be proportionate to the size of the organisation, and undertaken by three members of the senior management team. The findings of this analysis will be acted upon and displayed on the Commission's website, and made otherwise publicly available. The Secretariat recommends that the Secretary be authorised to sign-off this analysis, given the proportionate approach and the issues being considered. The final version will be circulated to commissioners.

Recommendations

14. The Commission is invited to agree, therefore, that:
 - a) It will have regard to the general duty set out in the Equality Act 2010 in taking decisions on its initial, revised and final proposals;
 - b) The Secretariat will conduct an equality analysis of the manner in which the Commission engages, consults and communicates with the general public, and act upon its results;
 - c) The analysis, and the agreed policy from this paper, be published on the Commission's website and made otherwise freely available on request.