

## The Public Sector Equality Duty: core concepts and structure.

1. The core concepts and terminology in the PSED are drawn from the race equality duty (RED) that was formulated in section 71 the Race Relations (Amendment) Act 2000 and that had been inspired in part by the Stephen Lawrence Inquiry report (1999). The wording of the RED was used later as a model for formulating the disability equality duty (DED) that came into force in 2005 and for the gender equality duty (GED) that came into force in 2007.

2. When the three duties were merged with each other into the PSED, and were joined there by similar duties for age, gender reassignment, pregnancy, religion and sexual identity and orientation, the formulation referred to three essential aims:

- **to eliminate unlawful discrimination**
- **to advance equality of opportunity**
- **to foster good relations.**

3. The key terms in this summary of aims – ‘unlawful discrimination’, ‘equality of opportunity’, ‘fostering good relations’ – are briefly explained on the face of the Act itself.

4. The PSED, like the RED, DED and GED before it, has two aspects – a general duty and certain specific duties. The general duty is stated in section 149 of the Equality Act 2010 and requires public bodies to have ‘due regard’ (a phrase whose meaning has been clarified and defined in recent years by case law) for the three essential aims summarised above.

5. The specific duties are not stated in the Equality Act itself but in regulations that were agreed by parliament, following substantial consultations, in July 2011. They require schools and other public bodies a) to publish information relevant to how they approach and implement the general duty and b) to publish specific and measurable objectives.

### Further information about the PSED

1. There is further and fuller information about the PSED on the Home Office website at <http://www.homeoffice.gov.uk/equalities/equality-act/equalityduty/> and, in substantially greater detail, at the website of the Equality and Diversity Forum (EDF) at <http://www.edf.org.uk/blog/?cat=79>.

2. With particular regard to the PSED’s implications for schools there is information in the Insted briefing papers entitled The Changing Legal Framework at <http://www.insted.co.uk/legal-frameworks.pdf> and The Equality Act 2010 – Specific Duties for Schools at <http://www.insted.co.uk/specific-duties.pdf>. Both these papers contain links to key documents issued by the Department of Education, the Equality and Human Rights Commission, the Government Equalities Office and Ofsted.



### Implications for schools.

Since 6 April 2011 all public bodies – including local authorities, all schools and other state-funded educational settings, including academies – have been bound by the public sector equality duty (**PSED** – section 149 of the Act).

A public authority must, it says, have ‘**due regard**’ (this crucially important concept is explained below) to the following three needs:

- a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act
- b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

### **Six elements make up the concept of due regard**

Case law relating to the concept of due regard is well summarised in Equality Duty Toolkit, published by the Trades Union Congress in autumn 2011 at <http://www.tuc.org.uk/equality/tuc-20159-f0.cfm>. The principles underlying the concept are sometimes known as the Brown principles, after the specific case which generated them. In brief, they are as follows:

#### **1. Awareness**

A decision-maker who has to take decisions which do or might affect an equality group (for example, disabled people, or persons of a particular ethnic background or gender) must be made aware of their duty to have due regard to the three aims of the Act.

#### **2. Timeliness**

Due regard must be fulfilled before and at the time that a particular decision is being considered. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not sufficient to discharge the duty.

#### **3. Rigour**

The duty must be exercised in substance, with rigour and with an open mind, and with conscious and deliberate attention to relevant evidence, including evidence derived from consultation with staff and service-users.

#### **4. Non-delegation**

Having due regard is not just a question of ticking boxes. The duty cannot be delegated.

#### **5. Continuing**

The duty is a continuing one – namely, it cannot be exercised once and for all, but on the contrary must continually be revisited and borne in mind.

#### **6. Record-keeping**

It is good practice to keep an adequate record showing that the equality duties have been actually considered and pondered. This disciplines decision-makers to undertake their equality duties conscientiously.

***There is further information about the Brown principles of due regard at***

<http://www.equalityhumanrights.com/advice-and-guidance/public-sectorduties/guidance-and-codes-of-practice/using-the-equality-duties-to-make-fairfinancial-decisions/relevant-case-law/>.

They were formulated in the first instance in a case to do with disability equality, but were explicitly extended in February 2011 to ethnicity and gender in a judgement relating to the building schools for the future programme (BSF), <http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html>.

The section of the judgement dealing with equalities legislation starts at paragraph 98.

**The Department for Education has explained the concept of due regard as follows:**

*‘Having due regard means that we need to think in advance about the potential implications of our decisions, seeking not just to eliminate negative outcomes but also thinking about potentially positive ones. We also need to be able to demonstrate – ideally proactively, or otherwise if challenged – that we actually have paid due regard to the duties. One important way in which public bodies, and especially government departments, demonstrate that they have taken due regard is through equality analysis – analysing what we do and how we do it so that we are clear about the impact on equalities, and so that we take action as a result of our analysis in order to promote equality.*

(Workbook on equality analysis, updated in December 2011 and revised again slightly in April 2012 –

<http://www.education.gov.uk/aboutdfe/policiesandprocedures/equalityanddiversity/a0077522/equality-analyses-equias-workbook>)

