

The Equality Bill and the socio-economic inequality duty: What are the implications in Scotland?



Introduction

The UK Government's Equality Bill includes a new socio-economic inequality duty on public bodies, which potentially has important implications for anti-poverty policy in Scotland. This briefing explains what the new socio-economic duty is, how it affects Scotland, who it applies to and how it would be monitored and enforced. It also outlines some key weaknesses in the duty and suggests ways in which it could be strengthened.

This briefing is aimed at anyone who is interested in anti poverty policy and equalities in Scotland. It does not assume any prior knowledge of either the Bill itself, the previous legislation which it replaces or how the Bill affects Scotland differently from the rest of UK. It is hoped that it will stimulate a wide range of organisations and individuals to engage in the current debate about whether the duty should also apply to Scotland and if so, to what extent?¹

The Equality Bill

The Equality Bill is a piece of UK legislation which is designed to redraw and bring together all the existing anti-discrimination law in the UK. A key aim of the Bill is to simplify and consolidate the complex multitude of existing legislation into one Act, making it easier for public bodies and others to understand their duties and for individuals to understand their rights. Another aim is to make the duties on public bodies focused on better outcomes rather than the processes which they use to tackle discrimination. The UK Government also states that it intends the Bill to reduce the current administrative burden on public bodies, especially in relation to monitoring and reporting.

At the moment legislation deals with discrimination on the basis of gender, race and disability separately. The Bill brings all three areas together and redraws the existing legislation. It also covers age, sexual orientation, religion or belief, marriage or civil partnership, pregnancy and maternity and gender reassignment so that these are now all clearly recognised as potential areas of discrimination, in law. It also adds a new duty on certain public bodies to consider socio-economic inequality in their strategic planning and policy making.

¹ The Scottish Government is currently seeking views on whether the duty should be extended to Scotland. The deadline for responding to the consultation is 27th October 2009. You can download the consultation at <http://www.scotland.gov.uk/Publications/2009/08/Socio-EconomicDuty>

What is the new socio-economic inequality duty?

Part 1 Clauses 1 defines the new duty.

“Clause 1. Public sector duty regarding socio-economic inequalities

- (1) An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.
- (2) In deciding how to fulfil a duty to which it is subject under subsection (1), an authority must take into account any guidance issued by a Minister of the Crown.”

This is not an especially tough clause. In effect, it would mean that authorities are not bound to exercise their functions in a way that is designed to reduce inequalities, only that they should have due regard to the desirability of doing so. The new duty would apply at a strategic level only and would not apply to any decisions made by public bodies at a service delivery level.

The Bill does not define what is meant by socio-economic inequality. However, authorities will be required to take into account guidance as described under Clause 1 (2) above. In addition, commentary on the Bill makes it clear that the intention is that it will be for the authorities themselves to decide which aspects of socio-economic inequality they intend to focus on.

Clause 3 sets out how the new duty would be enforced.

Clause 3: Enforcement

“A failure in respect of a performance of a duty under section 1 does not confer a cause of action at private law.”

The explanatory notes in the Bill explain the affect of this clause.

“This clause ensures that individuals have no recourse to private law because of a failure by a public authority to comply with the duty imposed by clause 1. This means that individuals will not be able to claim damages for breach of statutory duty for a breach of this duty. However, this clause does not prevent an individual from bringing judicial review proceedings against a public authority which is covered by the duty, if he or she believes the public authority has not considered socio-economic disadvantage when taking decisions of a strategic nature.”

Why is the new duty important?

Despite the limitations of the new duty, this is the first time that socio-economic inequality and poverty has been explicitly recognised within equalities legislation as an area which should be tackled alongside other types of inequality. As such it represents a significant step forward for anti poverty policy makers and campaigners.

There is a wealth of evidence which demonstrates the widespread inequality and discrimination against people linked to their income and social class. For example, the shocking differences in life expectancy between for those living in the Calton in

Glasgow (54 years) compared to those living in nearby Lenzie (82 years).

There is also ample evidence which demonstrates how discrimination on the basis of for example gender, race or disability is inextricably linked into income inequality. Several commentators have stressed the importance of ensuring that the Bill recognises the existence of multiple discrimination and indeed a key aspect of multiple discrimination is the relation between socio-economic inequality and other types of discrimination. Thus, the duty will strengthen and underpin what action can be taken in relation to other areas of discrimination set out in the Bill as a whole.

What does the duty mean in practice?

The explanatory notes to the Bill give some examples of how the new duty is expected to work.

- The duty could lead a public body with strategic functions in relation to health to allocate money from its agreed budget to a separate funding stream which targets geographical areas with the worst health outcomes.
- The duty could lead a local education authority, when conducting a strategic review of its school applications process, to analyse the impact of its campaign to inform parents its school applications process, to analyse the impact of its campaign to inform parents about the applications process, looking particularly at different neighbourhoods. If the results suggest that parents in more deprived areas are less likely to access or make use of the information provided, the authority could decide to carry out additional work in those neighbourhoods in future campaigns,

to ensure that children from deprived areas have a better chance of securing a place at their school of choice.”

Who does the new duty apply to?

Clause 1(3) of the Bill sets out which authorities the duty is intended to apply to and the list includes public authorities which have strategic functions including Government departments, local authorities and NHS bodies. It does not apply to the Security Service, Secret Intelligence or Government Communications Headquarters.²

This is the list which is in the Bill as it applies to England. However, a further clause - Clause 1 (6) states that the socio-economic duty will only apply to some of these authorities in Scotland. The section below describes how the Bill in its current form would apply differently in Scotland.

How would the socio-economic inequality duty affect Scotland?

Under the Devolution Settlement devolved matters, such as health and education are the responsibility of the Scottish Government, whilst matters such as immigration, welfare benefits and taxation remain the responsibility of the UK Government. Clause 1(6) of the Bill sets out that the duty does not apply in Scotland with regard to devolved functions³. Thus, if the Bill were passed as it stands, the duty would not apply to those public bodies in Scotland which deal with devolved matters such as the NHS and local authorities, but it would apply to those responsible for reserved matters like the DWP.

The Scottish Government is currently considering whether the duty should be

² See Appendix 1

³ See Appendix 1.

extended to apply to bodies which have devolved functions in Scotland. This could be achieved by amending the Bill to remove this clause so that devolved matters are no longer excluded and incorporating the socio-economic duties in the Bill into Scots law via a Legislative Consent Motion in the Scottish Parliament. Another alternative would be to legislate entirely separately in the Scottish Parliament, along similar lines.

Do we need the new duty in Scotland?

The Scottish Government has already done much to focus on the need to tackle inequality across Scotland. It already has three key frameworks which include priorities for tackling socio-economic inequality across a range of areas: *Achieving Our Potential*, *Equally Well* and the *Early Years Framework*. There are also a number of key indicators in the 15 National Outcomes around which the Single Outcome Agreements for delivery of services at a local level are planned, as well as examples of good practice across a range of services.

Given that there are already these frameworks in place, is there any need for an additional legal duty? Or could it even cut across the work which is already being done in Scotland? The duty is very much in line with the work that the Scottish Government has already done in *Achieving Our Potential* and elsewhere. Rather than cutting across this work, incorporation of the duty into Scottish law would do much to reinforce and underpin the work that is ongoing. Of course, legislation on its own will not bring about equality. Nevertheless, the lessons learned from the introduction of other anti-discrimination legislation such as the Equal Pay Act and the Race Relations Act in previous decades, show that it is an extremely important tool - amongst others.

We therefore support the extension of this duty to Scotland.

Key areas for strengthening the duty

Although the new duty is to be welcomed as an important step forward, there are some areas where it could be strengthened to improve its effectiveness. In particular, there is a need for:

- a clear definition of what is meant by socio-economic disadvantage and some key targets set out in legislation;
- extending the duty to all public bodies and those that carry out public functions;
- a transparent system of monitoring so that progress on tackling poverty and reducing socio-economic inequality can be tracked;
- greater enforcement powers; and
- the involvement of people experiencing poverty.

Definitions and targets

Socio-economic inequality covers a wide range of areas. It could mean geographical distribution of inequalities between deprived and affluent areas; or inequalities in terms of health, life expectancy or educational attainment; or broad income inequality between the richest and poorest across society as a whole, to name just a few. There is already a large amount of data collected in these categories, but there are other areas where there is much less information available, for example, in relation to inequalities in assets and capital.

As the duty is general one, it has the advantage of allowing authorities to focus on those aspects of inequality which are most appropriate to their functions so that, for example, health authorities can focus on health inequalities and so on. It also gives authorities the scope to tackle those

problems which are most pressing. However, the broad scope of the duty makes monitoring and enforcement extremely difficult. The overarching duty in Clause 1 (1) needs to be supplemented by a small number of key areas with well defined targets. Some of the targets in *Achieving our Potential* could be the basis of some of these. This would ensure that legislation supports and reinforces the work that is already being done in Scotland.

Given the fact that income inequality between the poorest and richest members of society shows no sign of narrowing, consideration should be given to including a target on narrowing this gap, as measured by the gini-coefficient. As the duty is concerned with inequality it is critical that guidance and targets are set which aim to narrow the gaps in outcomes in income, health, educational attainment, housing and so on, and are not just focused on improving outcomes in absolute terms.

Who should the duty apply to?

Elsewhere in the Bill, there is a general overarching duty on all public authorities and others with public functions to have regard to eliminating other types of discrimination, promoting equality and fostering good relations. However, this does not apply to socio-economic inequality and in consequence this duty is much weaker than the others contained in the Bill. In principle there is no reason why clause 1 (1) couldn't function as a general duty as well and this would considerably strengthen the Bill by encouraging all public bodies to mainstream and prioritise action to tackle socio-economic inequality.

In addition, unlike the general duty described above, the socio-economic duty

does not apply to other bodies who undertake public functions. Given the number of bodies who are not, in the strict sense of the word, public authorities, yet who do engage in public functions, this is an important omission. This duty ought to be extended to all those who undertake public functions.

It should apply to regulatory bodies so that monitoring of the duty becomes a core part of their functions. It should also extend to regulators who oversee essential services provided by the private sector (see below).

Other parts of the Bill make provisions aimed at enabling public bodies to make better use of procurement, to promote equality and eliminate other forms of discrimination. Given the increasing use of outsourcing by public authorities, provisions should also be made to enable public authorities to prioritise tenders which incorporate measures to tackle of socio-economic inequality.

We welcome the fact that public bodies would be required to consider the impact of their policy and planning on socio-economic inequality at a strategic level. A strategic approach will help public bodies to mainstream policies which aim to tackle poverty and socio-economic disadvantage. However, it is important that the duty also applies to fiscal policy; especially during a recession when there is an even greater need to tackle growing levels of poverty and inequality.

Finally, in practice it is difficult to make a clear cut distinction between strategic and operational level decision making and hard to see how the impact of strategic planning and policy can be monitored unless the delivery of services on the ground is scrutinised.

Monitoring

There are no specific monitoring or reporting requirements for this duty in the Bill. Other duties in the Bill will be monitored by the Equalities and Human Rights Commission (EHRC). In contrast to this there is no provision for the EHRC (or any other central body) to monitor public bodies with regard to their compliance with the new duty. The absence of a central authority responsible for monitoring is likely to lead to a piecemeal approach and potentially, duplication of effort. The new duty ought to be monitored by a dedicated body in line with other duties.

It is important that the duty extends to those bodies which oversee and monitor those elements of the private sector which provide essential services such as fuel suppliers – where current pricing structures which charge the poorest some of the highest tariffs – only serve to increase income inequality.

Enforcement

Currently, the only form of enforcement is an application for judicial review. Given the complexity, time consuming nature and cost of such an action, in practice this means that there are few realistic options available for enforcement. **This is key weakness and more needs to be done to strengthen enforcement.** As a minimum there ought to be a role for a central monitoring body to take enforcement action (other than judicial review) against public bodies that are failing at a strategic level to implement the duty.

Under the Bill socio-economic disadvantage is not a protected characteristic like of race or gender, for example. This means that individuals

cannot take an action on the basis that they have been discriminated against because of their socio-economic status. Yet there is widespread stereotyping and discrimination against individuals on this basis. Whilst there are a number of practical difficulties (not least in terms of definitions) in making a provision on this basis, in principle it could be an important tool and we would like to see further work on done this.

Involvement of people experiencing poverty

It is essential that people experiencing poverty are able to participate fully in developing policy, setting targets, in monitoring and holding public bodies to account. All too often those who are the intended beneficiaries of equalities legislation have found the process of engaging with their rights, set out in legislation, an alienating experience.

Meanwhile, public authorities who are charged with equalities duties have often failed to implement them in a meaningful way - often seeing them as a bureaucratic burden, rather than important aims to be mainstreamed throughout policy and service delivery. The new focus in the Bill on outcomes rather than process should help to remedy this. However, part of this failure is also due to a lack of understanding of how inequality is really experienced - and therefore what measures are needed to tackle it. This lack of understanding is reinforced by widespread negative stereotyping of people living in poverty. As this is a new duty the need for awareness-raising is particularly important.

The participation of those living in poverty in both the development and monitoring of this new duty is critical to overcoming the

lack of power experienced by those living in poverty and the lack of commitment to implementing equalities duties by public bodies. Participation and empowerment should be built into the new duty at every level and resources made available to ensure this happens.

Relationship with other areas of legislation

Clause 1 (7) states that the duty does not apply to any inequalities which a person experiences as a result of being a person subject to immigration control within the meaning given by section 115(9) of the Immigration and Asylum Act 1999.⁴

Sec 115 (9) defines who is a “person subject to immigration control” and then excludes anyone in that category from accessing welfare benefits and some other forms of public assistance. Clause 1 (7), therefore ensures that the new socio-economic inequality duty does not conflict with current immigration law. Clearly it is desirable that there should be coordination between different bodies of legislation. However, arguably there is a fundamental difficulty with this clause, as it goes against the broad aims of the Bill as a whole.

Although the restrictions (in Sec 115) on access to benefits and other assistance, for persons with particular immigration status is justifiable in some instances (an obvious example would be holiday makers), the restrictions on asylum seekers impact in a discriminatory way. Thus, excluding asylum seekers, as a group, under Clause 1 (7) goes against the broad aim of the Equality Bill - especially in relation to tackling discrimination on the basis of race.

Links to the Equality Bill and official related documents are available at

http://www.equalities.gov.uk/equality_bill.aspx

If you have comments on the views expressed in this briefing paper or require further information please contact:

Maggie Kelly, Policy and Campaigns Officer

maggie.kelly@povertyalliance.org.uk

0141 353 0440

www.povertyalliance.org.uk

⁴ See Appendix 1

Appendix 1

Equality Bill: selected Clauses related to the duty on socio-economic inequality duty

Clause 1. Public sector duty regarding socio-economic inequalities

(1) An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.

(2) In deciding how to fulfil a duty to which it is subject under subsection (1), an authority must take into account any guidance issued by a Minister of the Crown.

(3) The authorities to which this section applies are—

- (a) a Minister of the Crown;
- (b) a government department other than the Security Service, the Secret Intelligence Service or the Government Communications Headquarters;
- (c) a county council or district council in England;
- (d) the Greater London Authority;
- (e) a London borough council;
- (f) the Common Council of the City of London in its capacity as a local authority;
- (g) the Council of the Isles of Scilly;
- (h) a Strategic Health Authority established under section 13 of the National Health Service Act 2006, or continued in existence by virtue of that section;
- (i) a Primary Care Trust established under section 18 of that Act, or continued in existence by virtue of that section;

- (j) a regional development agency established by the Regional Development Agencies Act 1998;
- (k) a police authority established for an area in England.

(4) This section also applies to an authority that—

- (a) is a partner authority in relation to a responsible local authority, and
- (b) does not fall within subsection (3), but only in relation to its participation in the preparation or modification of a sustainable community strategy.

(5) In subsection (4)—

- “partner authority” has the meaning given by section 104 of the Local Government and Public Involvement in Health Act 2007;
- “responsible local authority” has the meaning given by section 103 of that Act;
- “sustainable community strategy” means a strategy prepared under section 4 of the Local Government Act 2000.

(6) The reference to functions in subsection (1) does not include any functions that—

- (a) are exercisable in or as regards Scotland, and
- (b) do not relate to reserved matters (within the meaning of the Scotland Act 1998).

(7) The reference to inequalities in subsection (1) does not include any inequalities experienced by a person as a result of being a person subject to immigration control within the meaning given by section 115(9) of the Immigration and Asylum Act 1999.

Clause 3. Enforcement

A failure in respect of a performance of a duty under section 1 does not confer a cause of action at private law.