

The New Equality Act Starts Its Journey – with both a formal reminder and much neglect, 2011

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Introduction and summary

This paper was published with slight variations (including a different title) in the journal *Race Equality Teaching*, summer 2011, vol 29 no 2. It begins by recalling that shortly after the coalition government in Britain was formed in May 2010 all cabinet members were formally reminded of their duties to implement the letter and spirit of the new Equality Act.

It then describes how the Department for Education (DfE) either ignored its responsibilities to promote equality or else misunderstood them. It draws to a close by noting certain growth points in Britain's equalities legislation, however, and in the coalition government's educational reforms. It stresses in this regard that both the DfE and local authorities have responsibilities, both legal and moral, to provide guidance and advice to schools.

A formal reminder and warning

On 9 June 2010, shortly after her appointment as home secretary and minister for women and equalities, Theresa May wrote formally to cabinet colleagues to remind them of their legal duty to have due regard for equality in relation to disability, ethnicity and gender. She also reminded them of forthcoming duties under the new Equality Act 2010 in relation to age, religion, sexual identity and transgender. Her immediate concern about the possible impact on equalities of imminent budgetary cuts. Her letter was in addition relevant, however, for the full range of government policies, actions and decisions. She warned that 'there are real risks that women, ethnic minorities, disabled people and older people will be disproportionately affected' by the cuts. All four of these groups, she pointed out, use public services more than the population as a whole, and the majority of people in receipt of tax credits and welfare payments belong to these groups. Her warning to cabinet colleagues was unequivocal:

If there are no processes in place to show that equality issues have been taken into account in relation to particular decisions, there is a real risk of successful legal challenge by, for instance, recipients of public services, trades unions or other groups affected by these decisions. The Equality and Human Rights Commission also has the power to bring judicial review proceedings or issue compliance notices if they think a public body has not complied with an equality duty.¹

In addition to warning her colleagues about their legal duties, the home secretary offered support and assistance, and mentioned in this connection that a package of help was available from the Government Equalities Office (GEO) to assist officials and ministers to understand their legal obligations, and to understand what good practice looks like. Further, she gave the name and email address of a senior official at the GEO who would be ready to answer enquiries and give focused advice. Her cabinet colleagues in the leadership of the coalition government, together with their closest advisers and most senior civil servants, had no excuse for not knowing what the law required them to do.

Two kinds of response

What happened? What, for example, did the Department for Education (DfE) do and not do as a consequence of the home secretary's letter? That is the subject of this article, with particular reference to issues of ethnicity and race. Also, in effect, it is the subject of all the other articles in this special edition of *Race Equality Teaching*.² Towards the end of the article, drawing on points made in the other articles, there is brief discussion of points arising and ways ahead. The article was written in early March 2011, at the same time that the committee stage of the Education Bill 2011 began, based on the 2010 white paper entitled *The Importance of Teaching*.³

Broadly, responses by the DfE to the home secretary's letter of 9 June were of two kinds. On the one hand, there were responses characterised by total disregard. In these instances there was no evidence that ministers and senior civil servants had ensured that processes were in place to show there had been due regard for public sector equality duties. On the other hand, there were responses characterised by what may be fairly though unkindly described as shallow and ignorant lip-service. These involved the production of documents which were said to be equality impact assessments (EQUIAs) but which were in fact amateurishly unaware of what equalities legislation requires, and of the good practice – indeed, the exemplary practice – developed in this regard in recent years by the DfE itself.⁴ These two kinds of response are considered in turn below.

Disregard

The most fully documented example of disregard concerns the cancellation of the building schools for the future (BSF) programme. Some of the local authorities affected by the cancellation brought judicial review proceedings. Their complaints included, but were by no means limited to, the DfE's disregard for equalities legislation. The judge who presided over the review, Mr Justice Holman, declared that the decision-making process in relation to cancellation of the BSF programme had been unlawful, in view of its 'failure to discharge the relevant statutory equality duties'.⁵ In coming to this conclusion, Mr Holman enunciated six principles developed in recent years through case law, known as the Brown principles.⁶ They applied, he emphasised, to all three of the equality laws in force at the time of the DfE's decision, namely those to do with disability, ethnicity and gender, and all were to do with the key core concept of 'due regard'.⁷ The concept was criticised by Lord Ouseley during the passage of the Equality Bill 2009 through the House of Lords,⁸ but the application of the Brown principles shows that the concept is powerful, particularly in relation to the need for rigorous analysis and assessment.

The six Brown principles, and their application to the DfE's decision to cancel the BSF programme, are summarised briefly below. They are also of course relevant to all other policy decisions made by a public body, not just the decision by the DfE relating to building schools for the future.

1 Decision-makers must be made aware of their equality duties

It was in accordance with this principle, Mr Justice Holman pointed out, that Theresa May wrote the letter in June 2010 which is cited at the start of this article. He said he was sure the secretary of state (Michael Gove) and his senior officials had received and read the letter, even though they did not act in accordance with it. He noted that Michael Gove had declared in parliament on 5 July 2010 that 'the coalition government are determined to make opportunity more equal ...' but commented that

this, though laudable, 'is entirely generalised and not at all disability, race or gender specific'. He added: 'There is absolutely no mention whatsoever in the statement of any disability, race or gender equality issues or needs having been considered by the secretary of state at all.' Further, he said he had studied option papers about BSF prepared for ministers in the period May–July 2010 but had been unable to find a single reference to disability, race or gender within them. He concluded:

Whilst the absence of such references or records is not determinative, I regret to say that in this case I regard the absence as glaring and very telling. I am simply not satisfied that any regard was had to the relevant duties at all, let alone rigorous regard.

2 Equality must be considered at the time that decisions are made

Due regard must be paid before and at the time that a particular decision is being considered, not later. 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 Analysis must be rigorous

The duty must be exercised in substance, with rigour and with an open mind – it is not a question of just ticking boxes, or of merely paying lip service. There must be substantial sifting of relevant facts and research, and fair attention to conflicting views. It follows there must be meaningful consultation and engagement with interested parties. Said Mr Justice Holman:

Different claimants have emphasised to me schools of particular disability (special needs), race or gender (single sex schools) relevance in their respective areas. The point is that if only the secretary of state had consulted with them they would have been able (if they wished) to highlight those special equality considerations to him.

4 Non-delegation

The duty to have due regard cannot be delegated.

5 Ongoing

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. Minimally, the record should be dated and should indicate the evidence that has been taken into account. The purpose is to discipline decision-makers to undertake their equality duties conscientiously.

The scathing criticisms which Mr Justice Holman made of the BSF decision-making process could also be made in relation to the scrapping of the education maintenance allowance, the proposed changes relating to curriculum and assessment, changes in initial teacher training, and changes in approaches to behaviour and bullying. They could also probably be made of decisions which lead to huge cuts in support for English as an additional or second language and in support agencies such as Multiverse.⁹

Inadequate regard

In relation to other aspects of the government's reforms, equality impact assessments have been published. In these instances it cannot be said, as it can be in relation to cancellation of the BSF programme, that equality duties were wholly disregarded. The duties were not, however, regarded with the rigour required by the Brown principles. David Gillborn, in his article in the summer issue of *Race Equality Teaching*, shows the woeful lack of rigour in the EQUIA relating to the academies programme. Serious deficiencies in the EQUIA relating to *The Importance of Teaching* are outlined below.¹⁰

First, a point which might appear trivial but may in fact be deeply significant. At one stage the EQUIA referred to *How Fair is Britain?*, an authoritative compendium of facts and figures published in autumn 2010 by the Equality and Human Rights Commission (EHRC).¹¹ The reference was highly relevant, for the EHRC report provided substantial statistical evidence about inequalities in the UK's education systems. But the EQUIA attributed the report not to the EHRC but to the European Court for Human Rights.

It is easy to guess how the error occurred – careless use of a keyboard, followed by a hasty and ill-informed internet search to find the meaning of an abbreviation, sod's law in action. What is not easy to understand is how the error remained in the draft document and was in due course published, and why it was not corrected even after it had been pointed out.¹² A simple typographical error became thus a blunder or howler. It suggests that the principal authors of the EQUIA, and all those who read and approved it in its successive drafts, were careless or ignorant. The DfE will need to reassure equality campaigners, and indeed all concerned citizens, and more importantly all headteachers, teachers and governing bodies, that civil servants tasked with overseeing the implementation of *The Important of Teaching* are neither careless nor ignorant in relation to equality issues, but are on the contrary deeply committed and substantially well-informed. Such reassurance has not yet been given, either in words or in actions.

Second, the EQUIA contained many references to socio-economic inequality. In order to show due regard for equalities legislation, this was not strictly necessary. It was, however, a significant and welcome development, as was the inclusion of socio-economic issues in *How Fair is Britain?* But the EQUIA failed to point out that poverty affects different communities and groups in different ways, and that there are distinctive needs in each community which have to be addressed directly and explicitly, not left to chance within a general programme. *The Importance of Teaching* rightly criticised 'one size fits all' approaches to education. However, it frequently appeared to assume that tackling socio-economic disadvantage will inherently and automatically raise levels of educational attainment in all communities, regardless of ethnicity and of experiences of discrimination and prejudice. There is persistent evidence over three decades to show that this assumption is false.

Third, *The Importance of Teaching* EQUIA rightly recognised and emphasised that educational attainment differs measurably between different groups and communities. It did not, however, recognise that the overall national picture obscures substantial regional differences. The two largest communities in which attainment is substantially below the national average are the African-Caribbean community and the Pakistani community. Overall, the attainment gap at 16+ for African-Caribbean pupils in 2009 was about 11 percentage points. But in the East Midlands and in Yorkshire and the Humber it was close to 20 points, and in the North East over 30. There were also large differences between individual local authorities. The attainment gap in Lambeth, for example, was

only four percentage points, whereas in Bristol, Camden, Hackney, Kirklees and Leeds, amongst many others, it was at least 20.

Similarly in relation to the Pakistani community there are significant regional differences. Overall, the attainment gap in 2009 at 16+ was almost eight percentage points. But in London the attainment of Pakistani-heritage pupils was four points *above* the national average, whilst in Yorkshire and Humber it was about 15 points below. It is regrettable that the EQUIA for *The Importance of Teaching* did not take account of the significance of these regional variations. It is essential that the government should explain how its policy proposals will address regional variation.

Fourth, *The Importance of Teaching* highlighted by its very title that the skills of teachers are of essential importance and implied, though did not state in as many words, that a key determinant of successful teaching is the kind of relationship a teacher establishes with pupils. 'The academic research on pupil performance,' a leading educationist advising the Liberal Democrats has remarked, 'says it's not the school you're in that matters, it's the classroom'. He added, explicitly criticising the policies of the coalition government of which his party is a member: 'Our national efforts should be focused on improving teaching and learning rather than on an expensive and distracting administrative re-structuring.'¹³

At the very least *The Importance of Teaching* could and should have recognised that over the last 40 years the teaching profession has developed and consolidated a substantial body of practical expertise and theoretical understanding relating to the teaching of English as an additional language (EAL), to cultural sensitivity more generally, and to tackling prejudice and racism. Practical support, advice and training for teachers have been provided by local authorities, and by a series of influential national projects. *The Importance of Teaching* EQUIA did not acknowledge the valuable expertise which has been built up in these regards over many years, and the crucial role which has been played - and still needs to be played - by local authorities and national projects. If this valuable knowledge and expertise is lost or diminished, as seems increasingly likely as a consequence of 'expensive and distracting administrative re-structuring', there will be an extremely adverse impact on large numbers of pupils and their families, and on their life chances and future capacity to play a positive part in public life.

Further, it is widely recognised amongst teachers, headteachers, parents and observers that a very significant role is played by teachers who are themselves from minority backgrounds. In addition to teaching, they make invaluable contributions as mentors, role-models, advisers, policy-makers and decision-makers. It is regrettable that the EQUIA for *The Importance of Teaching* failed to acknowledge this.

Fifth, a central purpose of an EQUIA, as explicated clearly and at length in recent publications from the Government Equalities Office (GEO) since the coalition government came to power, is to enable citizens and equality campaigners to hold public bodies to account. To achieve this purpose an EQUIA must not only cite relevant evidence but must also provide precise bibliographical references for the evidence on which it bases its judgements and expectations. Concerned citizens cannot otherwise check, if they wish, whether the judgements and expectations are well-founded. So it is regrettable that the EQUIA for *The Importance of Teaching* did not provide a single bibliographical reference. It is unreasonable to expect readers to turn to *The Importance of Teaching* itself and search through its endnotes. In any case, not all the relevant sources were given there.

In support of the proposals proposed in *The Importance of Teaching*, it is frequently claimed that educational standards in England are dropping behind standards in other countries. There is much talk of the need for 'world class' institutions, and much reference to the Programme for International Student Assessment (PISA), as mentioned in the articles here by Sally Tomlinson and Jean Conteh. It is also claimed that changes currently taking place in the United States, similarly motivated or justified by reference to international comparisons, constitute a relevant model for the UK to emulate. However, the PISA findings are widely misunderstood and over-simplified, and do not logically provide support for projects such as charter schools in the US and academies and free schools in England.¹⁴

Further, research in the US shows that current reforms may be failing African-American students, and also other students of minority backgrounds.¹⁵ If *The Importance of Teaching* EQUIA had been appropriately rigorous, objective and professional, in line with the third Brown principle summarised above, it would have referred to academic debates currently taking place in the US about the relevance of PISA statistics and the impact of school reform on the life-chances of minority students.

The document's lack of academic rigour was compounded by the inclusion of material that was irrelevant. For example, the document began by mentioning that out of the 80,000 students eligible for free school meals in a recent year only 40 had gone to Oxford or Cambridge. This was an interesting statistic, certainly, but was irrelevant at the start of a document legally required to focus essentially on issues of disability, ethnicity and gender. It would, however, have been relevant to mention that Russell Group universities, not just Cambridge and Oxford, have for many years recruited very low numbers of students from African, African-Caribbean, Bangladeshi and Pakistani communities, and very low numbers of disabled students.¹⁶

The prose style of the document was reminiscent of a political manifesto, ministerial speech or public relations exercise. This was not appropriate in a context which was supposed to be – to cite the third Brown principle again – objective, open-minded and rigorous. It is difficult to believe the document was written by professional civil servants, for their essential duty is to inform, advise and warn ministers, not just to help them win or maintain electoral support.

The unprofessional nature of the EQUIA was additionally evident in its frequent implied or explicit criticisms of the previous administration. Such criticisms would have been appropriate if the context had been a ministerial speech, but did not belong in what was supposed to be a non-partisan and open-minded appraisal of options in accordance with the rule of law. They were particularly inappropriate when made without the citing of any evidence. For example, the document declared that the coalition government would be 'replacing the ceaseless central government initiatives that have done little to impact on inequality in recent years'. No explanation was provided for the phrase 'ceaseless central government initiatives' and there was no engagement with the indisputable fact that many race inequalities in education have narrowed over the last ten years, or with the fact that serious academic evaluation studies show that national projects have in this connection played a significant role.¹⁷

Looking ahead

Key concepts in the coalition government's approach to education, as to equalities and social policy more generally ('the big society'), include transparency and accountability. David Gillborn argues that such discourse is no more than 'fine words' whose function and perhaps even purpose is to mystifyingly obscure 'foul deeds'. The discourse is nevertheless significant, as Bruce Gill and Feyisa Demie point out, in an article which hopefully will turn out to be seminal.¹⁸

Other potential growth points in the government's approach include free schools, increased emphasis on parental concerns, and increased encouragement for experiment and innovation. Of course, such features of the proposed changes will not universally or necessarily lead to improvements from the point of view of race equality. But there is a chance they will give a stronger voice and influence to African-Caribbean and African parents and communities. By the same token they have the potential to amplify the voice and concerns of Muslim parents and communities, and those of refugee communities.

Teresa May's letter to colleagues in June 2010 was in accordance, as Mr Justice Holman pointed out, with the first of the Brown principles underlying the concept of due regard – the principle that decision-makers should be reminded of their legal duties. Also, it reflected a general duty of care – a collegial and supportive expression of concern, a friendly word of caution, not just a stern warning or threat. The DfE has a similar duty of care towards the education sector as a whole. It has started to exercise it in relation to the Equality Act 2010 by putting some preliminary information on its website.¹⁹ Much more still needs to be done, however, to assist schools and local authorities to undertake the specific equality duties which the Act entails.

Also, of course, local authorities have a duty of care. There is absolutely no need for them to wait for actions by central government before they send a friendly letter to schools, analogous to Theresa May's letter of June 2010 to cabinet colleagues, reminding them of their duties to have due regard for equality in all that they do, and informing them where they can find further information and support.

¹ The full text of the letter, in the form that it was sent to the chancellor of the exchequer, can be read at <http://www.guardian.co.uk/politics/interactive/2010/aug/03/theresa-may-letter-chancellor-cuts>. It was summarised in 'Budget cuts could break equality laws, Theresa May warned chancellor' by Vikram Dodd, The Guardian, 3 August 2010.

² There is a link to further information at http://www.trentham-books.co.uk/acatalog/Race_Equality_Teaching_Volume_29_Number_2_-_Spring_2011.html#a1478_2d8551_2d29_2d2

³ The home page for the Education Bill is at <http://www.education.gov.uk/aboutdfe/departmentalinformation/educationbill/a0073748/education-bill>

⁴ *Equality Impact Assessments: a workbook*, first published in December 2007 and updated and re-issued in February 2011 at <http://www.dcsf.gov.uk/des/downloads/EQUIAWorkbookv5.doc>. A good example of an

EQUIA conducted according to the DfE's own guidance is the one about the educational maintenance allowance (EMA) at <http://www.dcsf.gov.uk/des/downloads/ema-equia.pdf>.

⁵ The judgement is dated 11 February 2011 and can be read in full at <http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html>. The section dealing with equalities legislation starts at paragraph 98.

⁶ There is further information about the Brown principles of due regard at <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/guidance-and-codes-of-practice/using-the-equality-duties-to-make-fair-financial-decisions/relevant-case-law/>

⁷ The concept of due regard appeared at 76A of the Sex Discrimination Act 1975, Section 71 of the Race Relations Act 1976 and Section 49A of the Disability Discrimination Act 1995. From April 2011 it will apply to the other equality strands as well.

⁸ Extracts from Lord Ouseley's speech were quoted in 'Equality Priorities and Equality Objectives– the Equality Act 2010, a cautious welcome' by Robin Richardson, *Race Equality Teaching*, summer 2010, published at <http://www.insted.co.uk/equality-priorities.pdf>.

⁹ There are references to all of these in the spring 2011 issue of *Race Equality Teaching*.

¹⁰ The EQUIA of the schools white paper produced by the DfE can be read at <http://media.education.gov.uk/assets/files/pdf/s/schools%20white%20paper%20overarching%20equia.pdf>. The EQUIA for the Education Bill is virtually identical and can be read at <http://media.education.gov.uk/assets/files/pdf/e/education%20bill%20equia.pdf>.

¹¹ The chapter about education in *How Fair is Britain?* is summarised at <http://www.equalityhumanrights.com/key-projects/triennial-review/online-summary/education/> and the full text is at http://www.equalityhumanrights.com/uploaded_files/triennial_review/how_fair_is_britain_ch10.pdf

¹² The error was pointed out in a formal letter to Michael Gove from *Race Equality Teaching* in December 2010, but as of 10 March 2011 it had still not been corrected on the DfE website. It was, however, corrected in the EQUIA on the Education Bill, which in nearly all other respects was identical. Incidentally, the text of the journal's letter can be read at http://www.trentham-books.co.uk/RACE%20EQUALITY_equia.pdf. The journal did not receive a reply, nor was there any mention of the issues it raised in the DfE response to feedback on the white paper consultation published at <http://www.education.gov.uk/schools/teachingandlearning/schoolswhitepaper/b0074736/your-feedback-on-the-importance-of-teaching>.

¹³ Peter Downes, 'Why I oppose free schools and academies', *The Guardian*, 20 September 2010.

¹⁴ See, for example, 'The Best Sites For Getting Some Perspective On International Test Comparison Demagoguery' on Larry Ferlazzo's website, <http://larryferlazzo.edublogs.org/>.

¹⁵ For example, *The Death and Life of the Great American School System* by Diane Ravitch, New York Basic Books, February 2010. There is a guide to discussion in the US about school reform on the voluminous website of Larry Ferlazzo, <http://larryferlazzo.edublogs.org/>.

¹⁶ Cited in Chapter 10 of *How Fair is Britain?*, published by the Equality and Human Rights Commission in autumn 2010.

¹⁷ For example, *Black Children's Achievement Programme Evaluation* by Uvanney Maylor, Sarah Smart, Kuyok Abol Kuyok and Alistair Ross, Institute for Policy Studies, London Metropolitan University, 2009.

<https://www.education.gov.uk/publications/eOrderingDownload/DCSF-RR177.pdf>

¹⁸ 'Fine Words and Foul Deeds: why coalition education policy will make things worse for black students and the white working class' by David Gillborn and 'The White Paper and Accountability: new lamps for old?' by Bruce Gill and Feyisa Demie, both published in *Race Equality Teaching*, spring 2011.

¹⁹ Published on 17 January 2011 at

<http://www.education.gov.uk/schools/pupilsupport/inclusionandlearnersupport/inclusion/equalityanddiversity/a0064570/the-equality-act-2010>.