EXPLANATORY MEMORANDUM TO

THE EQUALITY ACT 2010 (PUBLIC AUTHORITIES AND CONSEQUENTIAL AND SUPPLEMENTARY AMENDMENTS) ORDER 2011

2011 No. [XXXX]

1. This explanatory memorandum has been prepared by the Government Equalities Office (GEO) and is laid before Parliament by Command of Her Majesty.

   This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 Section 149 of the Equality Act 2010 (c. 15) ("the Act") imposes a duty known as the public sector equality duty ("the duty") on the public authorities listed in Schedule 19 to the Act. The duty requires those public authorities to have due regard to the need to:

a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
c) foster good relations between persons who share a protected characteristic and persons who do not share it.

2.2 This Order exercises powers in section 151(1) of the Act which enable a Minister of the Crown to amend Part 1 of Schedule 19 to the Act. The Order also exercises powers in section 151(5) so as to make provision relating to cross-border Welsh authorities. Section 157(3) of the Act defines a cross-border Welsh authority as a person other than a relevant Welsh Authority (as defined in subsection (2)), or the Welsh Commission, who has any function that: (a) is exercisable in or as regards Wales and (b) is a devolved Welsh function. Section 151(6) provides that, on the first exercise of the power in subsection (5) to add an entry relating to a cross-border Welsh authority to Schedule 19, a Minister of the Crown must add a Part 4 to the Schedule for cross-border authorities and add the cross-border Welsh authority to that Part.

2.3 This Order amends Part 1 of Schedule 19 of the Act by adding additional bodies to the list of public authorities subject to the duty and adds a Part 4, listing cross-border Welsh authorities.

2.4 In addition, the Order makes some consequential amendments in articles 3 to 5 in relation to the Act and other legislation. Article 5 comes into force on the same day as the commencement of article 149, since it is consequential to that commencement. The Order also makes some supplementary amendments in article 6 to two provisions of the Act, and in article 7 to the Equality Act 2006 (c. 3), which are intended to correct inadvertent omissions or drafting errors, with the purpose of ensuring that these provisions work effectively.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The consequential and supplementary amendments to the Act are made under section 207(4)(b) and section 207(7) of the Act, in conjunction with section 216(3), which permit a separate order to be made with consequential and supplementary amendments in relation to provisions whether or not they have previously been commenced. To this extent, there is a power to amend primary legislation, including the Act, through this Order. In this case, some of the amended provisions were commenced by article 2 of the Equality Act 2010 (Commencement Order No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (S.I. 2010/2317 (C. 112)) ("Commencement Order No. 4"). There are also amendments in the Order which are consequential to the commencement of section 149 (the duty), which is not yet in force.

3.2 Schedule 4 to the Order lists a number of statutory instruments which will cease to have effect once the duty comes into force. These instruments insert a number of bodies into Schedule 1A of the Race Relations Act 1976 (c. 74), making them subject to the general statutory duty imposed by section 71 of that Act. Section 71 will be revoked once the duty comes into force.

3.3 The Order will be laid at the same time as the Equality Act 2010 (Specific Duties) Regulations 2011 ('the Regulations'), which will impose specific duties on some of the public authorities specified in Parts 1 and 4 of Schedule 19 to the Act. Some of those public authorities will be inserted into Schedule 19 by the Order; therefore, it is necessary for the Order to come into force before the Regulations are made. If the instruments are approved by both Houses of Parliament in time, it is proposed that the sequence of events is as follows:

(a) 3rd April: the Order is made;
(b) 4th April: (i) the Order comes into force and (ii) the Commencement Order which commences sections 149, 150 and 156 and Schedule 18 (and repeals the existing gender, race and disability duties) is made;
(c) 5th April: (i) the relevant provisions of the Act come into force by way of the Commencement Order and (ii) the Regulations are made;
(d) 6th April: the Regulations come into force.

4. Legislative context

4.1 The Act replaced and consolidated earlier anti-discrimination laws with a single Act.

4.2 Section 149 of the Act sets out the duty, which replaces similar, but separate, public sector equality duties relating to gender (including pregnancy and maternity), race and disability discrimination (sections 76A to 76C of the Sex Discrimination Act 1975 (c. 65), sections 71 to 71B of the Race Relations Act 1976 and sections 49A to 49D of the Disability Discrimination Act 1995 (c. 50)). It also extends coverage of the duty to the additional protected characteristics of age, sexual orientation, religion or belief, and gender reassignment (in full). The duty also applies to the protected characteristic of marriage and civil partnership, but only in respect of the requirement in section 149(1)(a) to eliminate conduct that is prohibited by or under the Act.

4.3 The duty is imposed on public authorities, as defined in section 150 of the Act, which includes a reference to the persons and bodies listed in Schedule 19 to the Act.

5. Territorial extent and application

5.1 This instrument applies to certain public authorities operating in England; to certain public authorities operating across Great Britain; and to cross-border authorities that have some devolved Welsh functions.

6. European Convention on Human Rights

The Secretary of State for the Home Department and Minister for Women and Equalities, the Rt Hon Theresa May MP, has made the following statement regarding human rights:

In my view the provisions of the Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1. The overall policy objectives of the Act are to streamline (through simplification) and strengthen equality law. Section 149 of the Act replaces section 76A of the Sex Discrimination Act 1975, section 71 of the Race Relations Act 1976 and section 49A of the Disability Discrimination Act 1995. These provisions imposed similar public sector duties in relation to gender (including pregnancy and maternity as an implicit part of gender, and partly covering gender reassignment), race and disability respectively. This section extends the duty to cover gender reassignment in full, age, sexual orientation, and religion or belief.

The amendment of Schedule 19 to the Act

7.2. There are two ways in which a person or body can be subject to the duty. It can either be listed in Schedule 19 to the Act, or it can be subject to the duty because it is exercising "a public function" (defined in section 150(5) of the Act as "a function that is a function of a public nature for the purposes of the Human Rights Act 1998 (c. 42)).

7.3. Schedule 19 to the Act lists under broad categories, certain public bodies which are subject to the duty, including central government departments, local authorities, the armed forces, and the key health, education, policing and transport bodies. In total, around 27,000 public bodies are covered by these categories.

7.4 This Order extends the duty to around 100 additional bodies and creates some new categories. The new entries include regulators and parliamentary and devolved bodies.

7.5 The Order also inserts a new Part 4 to Schedule 19 to the Act. This extends the duty to four cross-border Welsh authorities: the Environment Agency, NHS Blood and Transplant, the NHS Business Services Authority and the Student Loans Company Limited.

7.6 Listing these bodies in Schedule 19 serves two purposes:

- Firstly, it makes clear that the body named is subject to the duty. This is especially important if a particular body carries out a mixture of public and private functions, because it is possible in listing a body to specify that only some of its functions are covered by the duty. For example, the duty will only apply in respect of the BBC and Channel 4 and the Welsh Authority in respect of those functions which are neither undertaken for, nor concerned with, the provision of a content service or commercial activities. This is in order to ensure editorial and commercial independence for these bodies. For the BBC, this is achieved by making clear that the duty does not apply to it in respect of functions relating to the provision of a content service as defined in the Communications Act 2003 or to its subsidiaries unless they are wholly owned, not designed to make a profit and undertake activities primarily in order to promote the BBC's public purposes, which are those set out in article 4 of the BBC's Royal Charter. In addition, the duty will only apply in the case of certain bodies that exercise regulatory functions (e.g. the General Dental Council and the General Medical Council) in respect of their public functions.

- Secondly, listing a body in Schedule 19 allows a Minister of the Crown, through application of section 153(1) of the Act, by regulations to impose specific duties on that body for the purpose of enabling the better performance of the duty imposed by section 149(1). It is intended that the Regulations, which will impose specific duties on certain public authorities listed in Schedule 19 to the Act, will come into force on 6th April 2011. A Minister of the Crown will also be able to impose specific duties on the cross-border Welsh authorities that have been added to Part 4 of the Schedule in relation to their functions that are not devolved functions.

Consequential amendments to the Act

7.7 The overarching policy reason for the consequential amendments is to ensure that all the legislation amended reflects the up to date position and interacts with the Act as intended. Some of the amendments are consequential to the commencement of the particular provisions under Commencement Order No. 4; the remainder are consequential to the commencement of section 149 of the Act, which has not yet come into force. In particular:

- **article 3(2) – addition of paragraph 106A to Schedule 26 of the Act in respect of the Housing (Scotland) Act 2006 (asp 1):** this new paragraph makes a consequential amendment to replace a reference to the "Disability Discrimination Act 1995" in the Housing (Scotland) Act 2006 with a reference to the Act. This is consequential to the commencement of the majority of the Act by Commencement Order No. 4. Schedule 26 to the Act has not been fully commenced. This

amendment inserts a new entry into Schedule 26 and that addition in turn is intended to be brought fully into force on 5th April 2011.

- **article 3(3) – amendment of Schedule 27 to the Act:** Schedule 27 lists the legislative provisions which will cease to have effect once relevant provisions in the Act come into force. This article inserts a new Part 1A and Part 3 into the Schedule which lists legislative provisions relating to Schedule 1A of the Race Relations Act 1976 that will cease to have effect on their repeal at the same time as section 149 comes into force. Schedule 27 to the Act has not been fully commenced. This amendment inserts new entries into Schedule 27 and those additions in turn are intended to be brought fully into force on 5th April 2011 at the same time as section 149.

- **article 4 – amendment of the Nationality, Immigration and Asylum Act 2002 (c. 41):** this amendment consequentially repeals provisions of the Nationality, Immigration and Asylum Act 2002 . It removes section 6(1) to (4) which made amendments to the Race Relations Act 1976 that are now spent. It also removes, in section 84(1)(b), a redundant reference to section 19B of the Race Relations Act 1976, the repeal of which (in Schedule 27) was brought into force by Commencement Order No. 4.

- **article 5 – amendment of paragraph 6 of Schedule 5 to the School Standards and Framework Act 1998 (c. 31):** paragraph 6 of Schedule 5 amends references in the School Standards and Framework Act 1998 to the race duty under section 71 of the Race Relations Act 1976, among other things. However, it is intended that the race duty will be superseded on 5th April 2011 when the duty in section 149 of the Act comes into force. Article 4 therefore amends the reference accordingly, to come into force on 5th April 2011. Paragraph 6 of Schedule 5 to the School Standards and Framework Act 1998 currently only expressly requires adjudicators to have regard to the race duty to which local authorities and governing bodies of schools are subject, but this is anomalous because local authorities and governing bodies of schools, along with other persons who exercise public functions, are also subject to similar duties in respect of gender and disability imposed by sections 76A of the Sex Discrimination Act 1975 and section 49A of the Disability Discrimination Act 1995 respectively. The current position has arisen because of the piecemeal way in which existing discrimination legislation has been applied. In accordance with the underlying purpose of the Act which is to harmonise equality provisions where possible, the amendment made to the School Standards and Framework Act 1998 in this Order means that the provision requires adjudicators to have regard to the duties owed by local authorities and governing bodies of schools in relation to all of the protected characteristics when they take a decision.

Supplementary amendments to the Act

7.8 The overarching policy reason for the supplementary amendments is to correct inadvertent omissions or drafting errors which prevent the specified provisions of the Act from working in the way intended. The amendments are supplementary to the Act and consistent with its purposes, as apparent from the wording of the Act. In particular:

- **article 6(2) – amendment of paragraph 20(1)(b) of Schedule 8:** Schedule 8 explains how the duty to make reasonable adjustments in section 20 applies to an employer or other persons under Part 5 (work) of the Act. Paragraph 20, in Part 3 of the Schedule, sets out various limitations on the duty. Paragraph 20(1) provides that the duty does not apply if a person does not know or could not reasonably be expected to know certain information. Sub-paragraph 20(1)(a) applies to knowing whether a disabled "applicant or potential applicant" for the work in question is, or may be, an applicant. Sub-paragraph 20(1)(b) then refers to "any other case referred to in this Part of this Schedule". However, there are no other cases referred to in Part 3. Therefore, article 6(3) corrects the reference to "any other case referred to in Part 2 of this Schedule" so that a reasonable lack of knowledge about a person's disability can result in the duty not applying in the cases referred to in Part 2 (Interested disabled person) of the Schedule. This restates the position that previously existed under section 4A(3)(b) of the Disability Discrimination Act 1995. In the circumstances, this amendment is supplementary to the purpose of the Act.

- **article 6(3) – amendment of paragraph 14(4) of Schedule 17:** Schedule 17 sets out the arrangements for disability discrimination claims to be made in respect of disabled school pupils. Paragraph 14(4) defines appeal arrangements as arrangements under the 1996 and 2002 Education Acts (c. 56 and c. 32) "enabling an appeal to be made by the person's parent against the exclusion decision". This misdescribes the arrangements. In England, where the pupil is 18 it is the pupil rather than the parent who brings an appeal against the exclusion. In Wales, where the pupil is aged 11 or above, both the pupil *and* the pupil's parent may bring an appeal; and, where the pupil is above compulsory school age, it is the pupil rather than the parent who brings an appeal. Therefore, article 6(4) corrects the wording to reflect the effect of the arrangements made under those statutory provisions.

- **article 7 – amendment of section 27(1) of the Equality Act 2006: s**ection 27 (conciliation) of the Equality Act 2006 permits the Commission for Equality and Human Rights ("the Commission") to make arrangements for the provision of conciliation services in respect of proceedings under section 114 of the Act. However, paragraph 71(2) of Schedule 26 to the Act omits to mention proceedings under section 116 of the Act, thus depriving the Commission of the power to arrange conciliations in relation to claims involving disabled pupils in schools. But at the same time, paragraph 4(2) of Schedule 17 to the Act refers to the possibility of conciliation and allows an extension of time in such circumstances. It is therefore clear that it was intended that such conciliation should be permitted and the amendment in article 7 corrects that omission.

8. Consultation outcome

8.1 This Order has been made following a formal GEO consultation procedure which invited views on a proposed list of public bodies for inclusion in Part 1 and Part 4 of Schedule 19 to the Act.

8.2 The consultation[1] appeared prominently on GEO's website. Over 500 equality partners were contacted directly to alert them to the consultation and to invite them to comment on the proposal, including a number of key equality groups and representatives of the public, private and voluntary sectors.

8.3 In addition, GEO consulted its established wide network of contacts that were involved in the development of the Act, other Government Departments, public bodies that would be subject to the duties, the Devolved Administrations (particularly in regard to the cross-border authorities that have some devolved Welsh functions), and the Commission.

8.4 The consultation ran from 19th August to 10th November 2010. During the 12 week consultation period, 373 responses were received. Of these, approximately 62% were from the public sector, 18% from the voluntary sector, 7% from the private sector and 13% from other types of organisation or individuals.

8.5 Bodies to which this Order relates have been notified of the intention to list them in Schedule 19 to the Act, and none has indicated that they are not content to be listed.

9. Guidance

9.1 Section 149 of the Act, together with the Regulations which underpin section 149, will be supported by a statutory Code of Practice prepared by the Commission for Equality and human Rights. An extensive suite of non-statutory guidance was published by the Commission for Equality and Human Rights on 12th January 2011.

9.2 No guidance has been specifically published alongside this Order in relation to the consequential and supplementary amendments, which are technical provisions whose purpose is to ensure the Act and other legislation works effectively.

10. Impact

10.1 Section 149 of the Act (the duty) brings three existing duties together, bringing important efficiency savings. The supporting specific duties set out in the Regulations will cut down on unnecessary bureaucracy and focus on achieving real outcomes and public services that take account of the needs of citizens.

10.2 As the duty applies only to the public sector, there will be no cost implications for businesses, charities and voluntary bodies from the parts of the Order relating to the duty. The remaining provisions are consequential and supplementary.

11. Regulating small business

11.1 This instrument does not apply to small business.

[1] http://www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf

12. Monitoring and review

12.1 As with the Act, this instrument will be monitored and reviewed on an ongoing basis by GEO and the Commission.

13. Contact

13.1 Paul Howarth, Tim Morgan or Harshbir Sangha at GEO can answer any questions regarding this instrument.

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