

RESPONSE FROM THE RACE EQUALITY FOUNDATION: THE CONSULTATION ON THE LANGUAGE REQUIREMENTS FOR PUBLIC SECTOR WORKERS

About the Race Equality Foundation

The Race Equality Foundation promotes race equality in social support and public services. We do this by:

- exploring what is known about discrimination and disadvantage;
- developing evidenced-based better practice to promote equality;
- disseminating better practice through educational activities, training and development programmes, conferences, written material and websites;
- working with a range of national and local partners from the community, voluntary, statutory and social enterprise sectors who are delivering health, housing, social care and parenting support.

We are a founding member of, and support, the Coalition for Race Equality Organisations (CORE); we are also one of the Health and Care Strategic Partners of the Department of Health (DH), NHS England and Public Health England.¹ The Foundation was established in 1987 as part of the National Institute for Social Work (NISW) and was known as the Race Equality Unit. We became an independent charitable organisation in 1995, and in 2006 we became the Race Equality Foundation. We have offices in London, Manchester and Leeds.

About this submission

As a leading national charity that seeks to advance racial equality and equalities more broadly, we are profoundly concerned about the English Language provisions set out in part 7 of the Immigration Bill 2015/16 (see table 1).² We are also concerned that the scope of the consultation is too narrow and fails to properly address the requirements of the Public Sector Equality Duty (PSED, see appendix 3).³ For these reasons, in addition to completing the standard form provided for this consultation (see appendix 1), our response sets out the Foundation's concerns about:

- clause 47 (see table 1) (part 1);⁴
- the limited scope of this consultation, deficiencies in the associated Impact Assessment⁵ and the absence of an equalities analysis together with our recommendations (part 2);
- the draft code and responds to relevant consultation questions (appendices 1 & 2).⁶

¹ [The Health and Care Strategic Partner Programme](#) enables the Voluntary and Community Sector (VCS) organisations to work in equal partnership with the DH, NHS England and PHE.

² As the Foundation does not operate in Wales, this response does not address the Welsh language provisions.

³ Equality Act 2010, section 149, the wording of the provisions is set out at as appendix 3.

⁴ The version of the Immigration Bill 2015/16 referenced ([Bill 79, 2015/16](#)) as at 2/12/15 (see table 1).

⁵ The Impact Assessment: The [English Language Requirement for Public Sector Workers](#) published on 28/8/15.

Table 1: The Immigration Bill 2015/16 - clause 47: English language requirements for public sector workers
(1) A public authority must ensure that each person who works for the public authority in a customer-facing role speaks fluent English.
(2) In determining how to comply with subsection (1), a public authority must have regard to the code of practice under section 50 that is for the time being applicable to that authority.
(3) A public authority must operate an adequate procedure for enabling complaints to be made to the authority about breaches by the authority of subsection (1) and for the consideration of such complaints.
(4) In determining whether a procedure is adequate for the purposes of subsection (3), a public authority must have regard to the code of practice under section 50 that is for the time being applicable to that authority.
(5) For the purposes of this Part a person works for a public authority if the person works— (a) under a contract of employment with the public authority, (b) under a contract of apprenticeship with the public authority, (c) under a contract to do work personally with the public authority, (d) as an agency worker within the meaning of the Agency Workers Regulations 2010 (SI 2010/93) in respect of whom the public authority is the hirer within the meaning of those regulations, (e) for the public authority as a constable, or (f) for the public authority in the course of Crown employment.
(6) In subsection (5) “Crown employment”— (a) has the meaning given by section 191(3) of the Employment Rights Act 1996, and (b) includes service as a member of the armed forces of the Crown and employment by an association established for the purposes of Part 11 of the Reserve Forces Act 1996.
(7) References in this Part to a person who works in a customer-facing role are to a person who, as a regular and intrinsic part of the person’s role, is required to speak to members of the public in English.
(8) For the purposes of this Part a person speaks fluent English if the person has a command of spoken English which is sufficient to enable the effective performance of the person’s role.
(9) This section applies in relation to a person who is working in a customer-facing role for a public authority when this section comes into force as well as to a person who begins to work in such a role after that time.
(10) This section does not apply in relation to a person whose work is carried out wholly or mainly outside the United Kingdom.

⁶ The [Draft Code of practice on the English language requirement for public sector workers](#), 13/10/15.

1. Concerns about part 7 of the Bill, language requirements for public sector workers and the associated draft code of practice

1.1 Overall concerns

The Foundation agrees that employees working for public sector bodies should be able to communicate effectively with those who use or wish to use the services of public bodies. We agree with the Immigration Law Practitioners Association (ILPA) that workers should *'have a command of spoken English which is sufficient to enable the effective performance of the person's role.'* Our concerns about the proposed English language requirements are that the provisions are poorly conceived, poorly drafted and ill-thought through. The Foundation is concerned that the provisions:

- a. are open to misinterpretation and abuse;
- b. will encourage racially biased testing and complaints;
- c. will leave black and minority ethnic (BME) workers disproportionately open to complaints about their English Language proficiency;
- d. will worsen the employment prospects of BME workers if the provisions are implemented without the necessary checks, balances and monitoring;
- e. will burden a wide range of public bodies with the task of developing new English language tests and complaints procedures at a time when resources are limited and there is no robust evidence that this heavy handed legislative approach is the most appropriate course of action;
- f. will task such public bodies with applying new English fluency requirements across very different 'customer facing roles';
- g. may undermine work to prevent discrimination against a range of disabled people whose language skills may be affected by their disability (e.g. the hearing impaired, learning disabled people and those who have speech impairments);
- h. may adversely impact on anyone whose English language skills are unfairly deemed not to be 'fluent'.

We have also identified key issues, questions about the evidence base and have worries about the divisiveness of the policy. We have also made a number of recommendations.

1.2 Key issues

- a. No research has been published, before these proposals for primary legislation were brought forward. We ask where the evidence is that there are significant problems with public bodies recruiting staff who cannot communicate effectively with service users/clients.
- b. No commissioned research has been published which examines which policy solutions would best address any important deficiencies in English language proficiency of public sector workers.

- c. The consultation document, on the draft code, identifies some of the English Language proficiency requirements already in place across the public sector but there has been no mapping, or evaluation, of these various provisions or what would best address any gaps.
- d. The decision to introduce primary and secondary legislation together with a statutory code of practice prior to undertaking this basic research flies in the face of the Government's commitment to reducing Red Tape and the principles to reduce legislation advocated under the Red Tape Challenge.
- e. The language used in clause 47 – 'fluent' and 'fluency' – is problematic as ILPA's submission to the House of Commons Public Bill Committee makes clear.⁷
- f. We also agree with ILPA, that if the policy aim is to ensure that workers can communicate with customers and service-users then the word 'adequate', rather than 'fluent' or 'fluency' should be used.⁸
- g. Research [suggests](#) that about '*about 5 million*' of working age have '*below-functional literacy skills in England.*' If there is a positive correlation between poor literacy and poor fluency in English then any objective implementation of an English fluency test would affect all workers and possibly disproportionately affect those with poor English skills. Unless the test was racially biased, this would mean that any worker with poor English language communication skills could fail the test.
- h. If the process is not simply meant to be punitive and is meant to improve language skills we question where the resources will be found to skill up anyone whose fluency is deemed to be below par.
- i. The wording of clause 47 presents a number of serious problems.
- j. The assumptions that underpin the introduction of these provisions are potentially divisive and contrary to the Government's claims, the Foundation sees no evidence that introducing these provisions will promote British values or support British values. By contrast we believe that they will promote division.

1.3 What is the evidence?

The Factsheet – English Speaking in the Public Sector – quotes the Immigration Minister James Brokenshire: "*Being able to speak English is key to integrating into our society.*" "*All public sector workers should be able to speak English fluently so they can communicate effectively with their customers and colleagues.*" "*Our new rules will break down the language barrier to help the public use the services they need and promote integration and British values.*" The inference is that a significant number of BME public sector workers do not have the necessary language skills to communicate effectively with service-users or colleagues. We say that this is the inference because one assumes that the Government would not propose the introduction of primary legislation, statutory regulations and a

⁷ Further written evidence submitted by [the Immigration Law Practitioners' Association \(IB 32\)](#)

⁸ ILPA (Immigration Law Practitioners Association) submission to the House of Commons Public Bill Committee (IB32), proposed amendment to part 7 of the Bill.

statutory Code of Practice if it was not arguing that there is an extensive problem that warranted such a legislative response. However no evidence base or research has been provided to support this government assertion.

The draft code makes reference to anecdotal evidence. Proper research, not anecdotal evidence, should underpin any proposed primary legislation, statutory regulations or statutory code of practice. Some commentators suggest that in some sectors where there are particularly low paid workers, and a significant percentage of the workforce may be migrants, there may be language skills issues. However, feedback from those active in working with migrants and providing ESOL and other English language classes suggest that upskilling the workforce where there are English language skills issues is about providing time for training and providing access to ESOL and other English language classes.⁹

1.4 *Promoting a divisive approach*

The government fact sheet that supports part 7 of the Bill says that part 7 of the Bill ‘*will ensure there is no language barrier to British Citizens accessing public services by delivering the manifesto commitment to make sure those public sector workers who have customer facing roles can speak fluent English.*’ The language of part 7 of the Bill, and the Minister’s comments, encourages a divisive ‘them and us’ approach, with BME public sector workers being part of ‘the other’ who will now need to demonstrate their English Language skills and commitment to British Values.¹⁰ Moreover, from the Government’s statements, presumably we are meant to assume that only ‘British Citizens’ speak English, that one or more objective tests for ‘English fluency’ can be developed and applied across the board in the public sector and that somehow English language fluency tests will facilitate ‘integration’ and ‘British values’. Furthermore, the reference to British values in this regard suggests that BME public sector workers, the majority of whom will also be British Citizens, somehow do not share British Values and/or can undermine British values. By contrast, our assessment is that these poorly worded, shoddily thought-through and discriminatory provisions raise a series of questions, issues and dangers.

⁹ [‘I can’t speak properly. I am different’: do you need to speak English to be a good citizen?](#) The Guardian, Emine Saner, 7/8/15

¹⁰ See table 1 for the wording of part 7 of the Bill as considered by the House of Commons.

2. Concerns about the scope of this consultation, deficiencies in the associated Impact Assessment, no equalities analysis and recommendations

2.1 The scope and timing of the consultation

The consultation document specifically states that it is '*primarily targeted at public authorities to whom the Code applies*'. The Foundation is concerned that:

- a. there should have been a proper consultation about the proposals contained in part 7 of the Immigration Bill 2015/16, 'Language requirements for public sector workers' before part 7 was included in the Bill;¹¹
- b. it is problematic and premature to consult about the scope of this draft code prior to parliamentary consideration of the associated primary legislation;
- c. some of the deficiencies in the draft code are a direct result of deficiencies in the proposed primary legislation; however there has been no wider consultation about the nature and scope of the English Language provisions, currently set out as clauses 47-54, before their parliamentary consideration as part 7 of the Immigration Bill 2015/16;
- d. the language used in relation to the ability of civil society organisations to respond is dismissive and suggests that such responses are relatively unimportant;¹²
- e. some questions posed are likely to be impossible to answer because of the uncertainties posed by the proposed primary legislation and the draft code (see appendix 1)

2.2 Deficiencies in the Impact Assessment

- a. The Impact assessment sets out the policy objectives and intended effects in the following terms: '*The policy objective is to ensure a sufficient standard of fluent English is maintained and can be enforced across all customer facing public sector workers. This is intended to improve the quality, efficiency and safety of public service provision and support taxpayers' confidence they are receiving value for money. This proposal is expected to support current priorities for the management of immigration into the UK.*'¹³
- b. The language of enforcement seems entirely in keeping with the hostile environment that the Government declared that it wanted to foster in relation to undocumented migrants. However, as the Foundation noted in 2012 and 2013, the creation of a hostile environment for undocumented migrants could easily spill over into creating a hostile environment for settled documented migrants and BME communities. These language provisions are a case in point.
- c. Despite the obvious, and not so obvious, equality implications (see parts, 1, 2 and appendix 1 of this submission), the Impact Assessment does not contain a single reference to equality, discrimination or the Public Sector Equality Duty; let alone any

¹¹ As at 2/12/15, clauses 47 – 54 of the Immigration Bill 2015/16.

¹² '*Anyone may return a completed form to the above e-mail or address, but it is primarily targeted at public authorities to whom the Code applies.*' [Consultation on draft language requirements for public sector workers Code of Practice](#) launched 13/10/15, page 9.

¹³ Page 1 of the Impact Assessment published on 28/8/15.

consideration of the issues. These deficiencies are further reinforced by the absence of a Policy Equality Statement. Although one would still have to question how any Impact Assessment could simply ignore all equality issues on a matter like this.

- d. What looks at first glance as if it could be a perfectly sensible policy to ensure that people can receive high quality services starts to unravel and to reveal a more problematic face when one examines the Impact Assessment, key examples follow.
- a. It is unusual to resort to extensive legislation before first assessing the scope of the problem.
 - b. The Impact Assessment contains no clear assessment of the scope of the alleged problem of poor English Language skills in the public sector workforce;
 - c. the preference to resort to legislative action is asserted but not justified by evidence.
 - d. There is no assessment of the costs of the policy, exceptionally concerning given the poor state of the public purse.
 - e. Whether or not the policy will be reviewed is identified as being TBC (page 1);
 - f. there is no assessment of any financial benefits associated with the policy, an attempt will be made to gather this information during the consultation (page 3);
 - g. The costs to be incurred by public bodies are assumed to be 'minimal' (page 3) but this would appear to be questionable given the requirements set out in the draft code (see appendix 1).
 - h. The benefits of introducing the English Language requirements are pure speculation primarily because there is no evidence to support the assertions made in the Impact Assessment.¹⁴
 - i. A series of statements are about the importance of public trust and the erosion of such trust (paras. 7, 8, 9 and 10), then reference is made to anecdotal evidence that some workers do not have the necessary English Language skills;
 - j. A couple of reports are referenced which suggest that responsible officers had the power to deal with a small number of concerns expressed about language skills (see para 10).
 - k. A series of apparent non sequiturs then follow in paras. 10 -13¹⁵:

¹⁴ Ensuring sufficient English fluency within public services will bolster efficiency, through reducing the time taken to effectively communicate with the public and reducing the likelihood of errors being made, especially those caused by misunderstandings or miscommunication. Without a sufficient understanding of English for their role public sector workers are likely to need more time to comprehend issues raised by the customer, and are also more likely to misunderstand the needs of the customer and act in error. This in turn may erode customers' confidence and faith in public services. Furthermore, any misunderstanding or errors have the potential to have substantial material impacts on members of the public if they are made in matters relating to health and safety.' Impact Assessment, page 4 para 6.

¹⁵ Para 11. 'We also expect that English fluency will help increase access to employment, productivity and job retention as well as social integration outside of work. Therefore we expect this proposal to help support the management of immigration to the UK and to ensure it is of maximum possible benefit to both migrants and UK society.' Para. 12. 'Ensuring public sector workers are able to speak English is also consistent with current priorities to manage the number and skill level of immigrants to the UK. Potential immigrants who might wish to seek work in the public sector in the UK may be deterred if they do not have the required fluency in English,

- First, where is the evidence that these workers are coming to work in the public sector?
 - Second, where is the evidence that these new English Language requirements would have any impact on immigration?
 - Third, if the idea is to ensure that people coming to the UK have the necessary language skills, building on existing language requirement programmes/ assessment frameworks would almost certainly be more effective than the bureaucratic nightmare proposed.
- l. In para 14, page 6, the Impact Assessment finally acknowledges that the *‘current figures show that the likely number of people working in public sector, customer-facing roles who do not have fluent English is likely to be small, there is nevertheless a portion of the population for whom this might be a concern.’*
- m. In short, the Impact Assessment provides no clear evidence that supports the introduction of these English Language provisions and the evidence that it does present suggests that if there is a problem in the public sector, it is a small one.

2.3 Failure to give due regard to equalities issues and the Public Sector Equality Duty

The Foundation is concerned that:

- a. English language requirements for public sector workers have significant implications for BME staff and BME communities, yet there has been no attempt to consult with BME communities or BME organisations about these proposed provisions and no equalities analysis or Policy Equality Statement on these provisions has been published;
- b. the Cabinet Office’s consultation focuses on responses from public sector bodies and fails to recognise the significance of the provisions for BME communities, BME voluntary and community organisations and wider civil society organisations (see appendix 1);
- c. the design of the questionnaire is public sector focused yet fails to make explicit reference to the Public Sector Equality Duty (PSED) (see appendix 1);
- d. the approach and questionnaire design fail to properly recognise the equalities implications of the provisions or the requirements of the PSED (see appendix 1);
- e. given the question about possibly extending the Code of Practice to voluntary and private sector suppliers (see appendix 1, q6), the failure to encourage VCOs to respond to the consultation is problematic;
- f. the failure to publish an equalities analysis or Policy Equality Statement on part 7 of the Bill undermines compliance with the requirements of the PSED and consideration of important equalities issues by parliamentarians.¹⁶

or may be encouraged to learn English prior to moving to the UK.’ Para.13 *‘Without legislation central government does not have the power to ensure a standard of fluency is maintained throughout the public sector, or a complaints process established where concerns are raised. Therefore to fulfil the manifesto commitment and to meet the expectations of the public consistently, regulation is necessary.’*

¹⁶ As at 7/12/15, Policy Equality Statements (PESs) have been published on just three of the nine parts of the Bill - appeals (27/10/15), access to services (23/10/15) and Reforming support for failed asylum seekers and

2.4 *Recommendations*

- a. The Foundation would recommend that a proper equality analysis on Part 7 of the Bill is undertaken in the form of Policy Equality Statement to assess compliance with the PSED before Part 7 of the Bill is considered by the House of Lords.
- b. If part 7 of the Bill is enacted, the Foundation would recommend that a proper consultation is undertaken with all relevant stakeholders to discuss the draft Code of Practice and how part 7 of the Bill can be implemented in a manner consistent with the PSED.
- c. If the provisions are enacted, the Foundation would also recommend that these new provisions should be the subject of local consultation with trade unions, workers and service users, BME communities and civil society organisations to ensure that the provisions are implemented in a manner that really does improve the quality of service provision whilst not encouraging discrimination or undermining the advancement of equality or the PSED.
- d. The Foundation would recommend that public bodies should only be required to implement new systems if there is evidence that their existing systems for maintaining ensuring that customer facing staff can communicate with clients are deficient.
- e. The Foundation would also recommend that the appropriate equality monitoring and analysis is undertaken of the implementation of the new provisions.
- f. The Foundation would recommend that the additional proposals and recommendations provided in appendices 1 and 2 are considered.

other illegal migrants (30/10/15). Unfortunately, despite the Bill having completed its Committee Stage in the Commons, as of 7/12/15, there is no comprehensive PES for the Bill.

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3, 8	<i>Concern:</i> The draft Code refers to the ‘fluency’ duty and uses the term ‘fluent’. We agree with ILPA that terms ‘fluency’ and ‘fluent’ are inappropriate and should be replaced by the term ‘adequate’. ¹⁷ However, this will require an amendment to the wording of clause 47. Addressing these concerns would require that sections 2.7 and 2.8 be rewritten.
4	We welcome the following statement. <i>‘Although all staff in customer-facing roles will be required to speak English or Welsh to the necessary standard, the fluency duty does not require public authorities to ensure that their customer-facing staff speak only in English or Welsh to communicate with members of the public. Public authorities are free to provide guidance to their customer-facing staff that they may where appropriate, make use of any language skills they have to communicate with citizens who speak other languages.’</i> However, this section should be relocated as it does not really fit under the heading ‘how to use the Code’. Perhaps it could be relocated under a new section entitled, ‘preventing discrimination and advancing equality and diversity’.
4	The draft code says <i>‘Examples included in this draft Code are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light.’</i> It really is unclear what this sentence is meant to convey.
5	1.1 seeks to explain which public bodies are caught by the Code. However the use of the term <i>‘bodies which carry out functions of a public nature must be properly defined’</i> . Extensive work was done around this area for the public sector equality duty. One assumes that the intention is only to include ‘true’ public sector bodies, not organisations that exercise the functions of public bodies? Both part 7 of the Bill and the Code need to provide legislative clarity about which bodies are caught by the provisions. We agree with statement 1.4. ¹⁸ Statement 1.1 needs to be restated to reflect statement 1.4.
5	<i>Concern:</i> The Bill and the draft Code assume that a blanket requirement should apply to customer facing roles in the public sector which are defined as roles where workers <i>‘as a regular and intrinsic part of their role, are required to speak to members of the public in English or Welsh are considered as working in a customer-facing role.’</i> An issue and recommendation which goes back to the proposed primary legislation, is that public bodies should only be required to

¹⁷ ILPA IB 32: *The requirement to have “a command of spoken English which is sufficient to enable the effective performance of the person’s role” would appear uncontroversial in any sensible recruitment process. But the label “fluent” does not capture this. It suggests a higher standard of spoken English than is required for many roles, for example those when interaction with the public is simple and formulaic.*

¹⁸ 1.4, *‘The fluency duty does not extend to workers employed directly by a private or voluntary sector provider of a public service, or whose work is carried out mainly or wholly outside the UK.’*

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	implement new systems if there is evidence that their existing systems for maintaining high service delivery standards are deficient.
6/7/8	<i>Concern:</i> We are concerned that the arrangements suggested for identifying customer facing roles set out in 1.8 of the draft code and the process for setting a standard set out in section 2 are formulaic, time consuming and will engage public bodies in unnecessary effort for a limited return. A less formulaic and time consuming approach is needed.
8	We welcome the statement that ' <i>Fluency does not relate to accents regional or international, dialects, speech impediments or the tone of conversations.</i> ' This requires further emphasis noting how failure to recognise this could lead to unlawful discrimination which could be actionable. (2.9)
9	<i>Concern:</i> There is an obvious omission in statement 2.11; many jobs in the public sector will have both a job description and a person specification. Where the person specification specifies a relevant competence, for example ability to communicate effectively, this would normally be tested during the interview process for new recruits. In relation to existing employees, where there are normal staff supervision arrangements in place it would be odd if a supervisor or manager who regularly meets with their staff in one to ones and in team meetings would be unaware of English language deficiencies. 2.11 should be rewritten to reflect this.
9	<i>Concern:</i> Para. 2.12 suggests that public bodies may decide to introduce new academic qualifications. From an equalities perspective this may introduce an unjustified barrier which may unnecessarily exclude workers from groups who are disproportionately excluded from education. Because of the possibility of indirect discrimination including indirect race discrimination, this provision should be withdrawn. The statement should be included in a new equality, diversity and preventing discrimination section. It should say that because of the potential of indirect discrimination, new qualification requirements should only be introduced if this is the most appropriate way to test English language proficiency. It should also suggest that an equalities analysis be carried out before and following the introduction of such new qualification requirements.
9 - 11	<i>Concern:</i> Language and qualification tests paras. 2.10 – 2.16. The information provided appears to be a mishmash of information. It is unclear whether this information would assist public bodies to comply with the new duty. A proper mapping exercise should be undertaken and the information be made available to public bodies and other interested parties online.
11-12	<i>Concern:</i> The guidance provided in 2.17 is in stark contrast to the light touch

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	<p>approach to the PSED taken by the Government. The statutory regulations for England for the better performance of the PSED simply require public bodies to publish equality information annually and set equality objectives every 4 years.¹⁹ The Government has decided that no statutory code of practice is required to support the PSED. If the Government argues that the PSED does not require a statutory code or practice, we would argue that neither do the English language requirements.</p>
13	<p><i>Concern:</i> If a public authority determines that someone’s standard of work is deficient the first approach should always be to assess whether support, training or some other form of positive intervention should be provided. The section on training (3.3) should be rewritten. If this new duty is introduced and then local authorities have an obligation to assist their workers to meet the requirements. We note that public authorities in Wales ‘must’ provide relevant training.</p>
14	<p><i>Concern:</i> The only reference to worker’s rights and investigation appear under sections 3.6 – 3.9. The assumptions appear to be that it will only be when dismissal is being considered that workers’ rights kick in. The Equality and diversity section of the Code should explicitly recognise that complaints may be made improperly against a worker and that proper opportunities to challenge and question allegations should be available.</p>
14-15	<p><i>Concern:</i> The proposals on agency workers and self-employed people suggest that allegations of poor English could result in termination of contracts with little or no challenge. These proposals suggest a flawed understanding of anti-discrimination provisions, the law and the PSED. These provisions should be withdrawn.</p>
16 & 17	<p><i>Concern:</i> The section on complaint handling needs to be rewritten. 4.4 says that for ‘<i>the purposes of the language requirement, a legitimate complaint is one about the standard of spoken English or Welsh of a public sector worker in a customer-facing role. It will be made by a member of the public or someone acting on his or her behalf.</i>’ The use of the word ‘<i>legitimate</i>’ is clearly incorrect and clearly presents one of the most difficult aspects of these provisions. If simply making a complaint about someone’s language skills constitutes a ‘<i>legitimate complaint</i>’ then many BME public sector workers will be in fear and at risk. Yes a complaint about the standard of English of a worker would constitute a complaint for the purposes of these new provisions however the legitimacy or otherwise of the complaint would have to be objectively tested. The complaint might turn out to be justified or unjustified – legitimate or not legitimate. The language used in part</p>

¹⁹ The Equality Act 2010 (Specific Duties) Regulations, 2011
<http://www.legislation.gov.uk/ukxi/2011/2260/contents/made>

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	4/7 also needs to be rewritten.
17	We welcome statement 4.4 that ' <i>A complaint about the strength of a public sector worker's accent, dialect, manner or tone of communication, origin or nationality would not be considered legitimate as a complaint about the fluency duty. Public authorities should make this clear in the terms of their complaints policy.</i> '
18	<i>Concern:</i> We are concerned about how easy it will be in practice for a worker to prove that they have been the subject of a vexatious, oppressive, threatening or abusive complaint (paras. 4.4 & 4.5).
18	We welcome statement 4.5 that effectively says that complaints without foundation or that are vexatious should not be allowed to continue.
19	<i>Concern:</i> We note the proposed arrangements with respect to complaints proposed (paras. 4.6- 4.8). We accept that potential complainants must be aware of how to complain but we are concerned that without piloting this approach, BME staff and staff with foreign sounding names and accents will be the subject of unfair complaints.
19	<i>Concern:</i> The section on obligations under the Equality Act [2010] is deficient. Direct reference needs to be made to the PSED. As previously identified a new section on advancing equality, preventing discrimination and good relations is required.

Appendix 2: Questionnaire completed by the Race Equality Foundation²⁰	
Name	Jabeer Butt
Job Role	Deputy Chief Executive
Organisation	The Race Equality Foundation
Contact details: e-mail	jabeer@racefound.org.uk
Contact details: address	Race Equality Foundation Unit 17 Deane House Studios 27 Greenwood Place London NW5 1LB
<p>Q1: Is the guidance in the Code of Practice sufficient to help you meet the duties imposed on public authorities by Part 7 of the Immigration Act [2016] and set the necessary standard of spoken English? If not, please suggest what additions are necessary.</p> <p>Response: The Foundation does not believe that the guidance in the draft Code is sufficient. The draft Code seeks to be non-prescriptive, which is welcome, however the draft code presents a number of challenges and difficulties in part because of flaws in the proposed primary legislation. Whilst some of the problems relate to the proposed primary legislation, set out as clauses 47 – 54 of the Immigration Bill 2015/16, appendix 1 identifies a series of problems and flaws associated with the failure to properly understand or address the requirements of the Equality Act 2010 and in particular provisions on discrimination and the PSED.</p>	
<p>Q2: Is the Code of Practice clear in its alignment with any existing legal obligations that you must adhere to, such as the Equality Act 2010 or Welsh Language (Wales) Measure 2011? If not, please suggest how it could be better aligned with those obligations or any others not already included.</p> <p>Response: The Code is not clear about the alignment with the existing equality obligations of public sector bodies. The references to equality obligations are located on page 11 and on page 19²¹ and these references are deficient. The reference on page 11</p>	

²⁰ The Foundation notes that the cover note to this questionnaire stated that ‘anyone may return a completed form to the above email or address, but it is primarily targeted at public authorities to whom the Code applies. Public authorities are also expected to consult widely with their staff and employee groups before completing their responses.’

²¹ Obligations under the Equality Act, para. 5.2. ‘Public authorities must take into account their obligations under the Equality Act 2010 when considering their duty to ensure that each person in a customer-facing role speaks fluent English or Welsh. The processes and methods used to determine whether a person has a command of spoken English or Welsh for effective performance in the role must be fair and transparent. Para. 5.3. ‘It is unlawful to discriminate directly against a person or persons on grounds of race. Authorities should ensure that people from particular nationalities or ethnic backgrounds, in a recruitment process or during employment, are treated in the same way as people from an English or Welsh ethnic background’ Para. 5.4.

Appendix 2: Questionnaire completed by the Race Equality Foundation²⁰

refers to public bodies considering whether it is appropriate to ensure that recruitment practices do not contravene the Equality Act 2010.²² As with all employers, public bodies are **required not to discriminate unlawfully** in employment, the problematic wording of this guidance suggests that not breaching the Equality Act 2010 is optional as opposed to obligatory.²³ No direct reference is made in any part of the Code to the Public Sector Equality Duty (PSED).²⁴ One assumes that para. 5.2 makes an indirect reference to the PSED but this reference needs to be explicit. We would suggest that explicit reference to the PSED is included along with the text of section 149 (see appendix 3). Article 14 of the Human Rights Act 1998 also includes a prohibition on discrimination to which public bodies are directly subject. These are important legal obligations whose significance and importance must be recognised especially when introducing the proposed English Language provisions. If the English Language provisions are not implemented carefully they will undermine compliance with anti-discrimination and equality provisions.

Q3: Do you have an existing minimum language standard for your customer-facing workers? If so, please provide details and confirm if you are satisfied that your existing standard meets your obligations under Part 7 of the Immigration Act [2016].

Response: We are aware from discussions with the BMA, RCN and TUC, that there are specific English language testing requirements for doctors, nurses and certain teaching staff. We note that reference is made to the existence of a range of schemes in draft code and in the consultation document. We believe that this is valid question but one that should have been posed **before**: a) developing the proposed new requirements set out as clauses 47 – 54 of the Immigration Bill 2015/16; and b) producing the draft Code of Practice. Finding out how well the existing provisions are working and lessons to be learnt should have been a pre-requisite **before** the current legislative and regulatory process was embarked upon by government.

Given the lack of clarity about what the 'standard' would be under the new English Language regime proposed, the question is ambiguous and any answers are potentially misleading. How can any public body say definitively that it is satisfied that their existing arrangements will satisfy the requirements of the poorly defined English Language scheme proposed under Part 7 of the Immigration Bill 2015/16 and in the draft Code of Practice?

Q4: Do you have, or are you aware of, any existing best practice for establishing a necessary level of English or Welsh fluency that would be useful to reflect in the Code of Practice? If so, please give details.

N/A

'Public authorities have a duty towards disabled members of staff under the Equality Act 2010 to provide such adjustments as are reasonable to remove a disadvantage caused by the application of a particular provision, criterion or practice'.

²² *'In order to fulfil the fluency duty public authorities should consider'...'if it is appropriate to: 'Ensure that their recruitment processes do not contravene the Equality Act 2010; all job applicants must be treated in the same way at each stage of their recruitment process.'*

²³ Equality Act 2010, part 2, sections 4 – 27 and part 5, sections 39 – 43.

²⁴ The PSED, the Equality Act 2010, section 149 (1):

Appendix 2: Questionnaire completed by the Race Equality Foundation²⁰

Q5: What would be the impact of extending the Code of Practice to voluntary and private sector suppliers that you contract with? Please explain your answer.

- these provisions should not be extended to voluntary and community organisations unless a number of conditions are met:
- the provisions have been successfully introduced into the public sector and related equality concerns and other issues raised by workers and their representatives are addressed;
- the schemes have been operating effectively in the public sector for at least 2 years and the scheme has been subject to a proper independent review and evaluation after 2 years of operation;
- objective evidence and costs benefit analyses demonstrate the effectiveness and value of the scheme;
- separate consultations about how the scheme that would operate for VCS and private sectors suppliers are undertaken with different classes of public sector bodies;
- the scheme is only introduced for VCS contractors if it is also introduced for private sector contractors.

Q6a: What will be the additional cost to your organisation to implement this duty? Please provide detailed estimates.

Response: The Foundation believes that the provisions in the draft Code could require considerable activity by public bodies for little positive return whilst also encouraging discrimination. The reasons for this assessment are set out in parts 1 and 2 of this submission and in appendix 1.

Q6b: From your perspective, would implementing this policy have a specific impact on the country, region or business sector which you operate in? Please explain your answer.

See appendix 1 and the responses in parts 1, 2 and appendix 1 of this submission.

Q6c: If you are a local government body, to what extent would this new duty constitute a New Burden for your organisation? Please explain your answer.

Response: The Foundation believes that the provisions in the draft Code could require considerable activity by public bodies for little positive return whilst also encouraging discrimination. The reasons for this assessment are set out in parts 1 and 2 of this submission and in appendix 1.

Appendix 2: Questionnaire completed by the Race Equality Foundation²⁰

Q7: How many workers will this new duty affect in your organisation? Please provide details such as employment status.

N/A

Q8: If complaints handling were to remain at the discretion of your organisation, what do you envisage as the basic process for enforcing it and for dealing with workers who do not meet the requisite language standards? Please provide details of your current process for dealing with complaints and escalation route from members of the public; any complaints data you currently publish, and the likely cost of expanding the process to include language-related complaints.

Response: This question is worrying. It appears to suggest that complaints handling might not remain the responsibility of the relevant public sector body. If this is proposed it would be an extraordinary way to deal with employment matters. It would be helpful to know whether it is being contemplated that complaints handling would not remain at the discretion of the relevant public body.

As with the other questions about costs and implementation, in the absence of the primary legislation and given the poor quality of the draft code, we suspect that it will be difficult for public bodies to respond.

Appendix 3: The Public Sector Equality Duty, Equality Act 2010, section 149

(1) A public authority must, in the exercise of its functions, have due regard to the need to— (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.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to— (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to— (a) tackle prejudice, and (b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are— age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to— (a) a breach of an equality clause or rule; (b) a breach of a non-discrimination rule.