



EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Consultation: The public sector Equality Duty: reducing bureaucracy

Response of the Employment Lawyers Association

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ELA Response to consultation ‘The public sector Equality Duty: reducing bureaucracy’

INTRODUCTION

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA’s role to comment on the political merits or policy aims of proposed legislation, but rather to make observations from a legal standpoint. ELA’s Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative & Policy committee of ELA under the co-chairmanship of Susan Belgrave (9 Gough Square) and Bronwyn McKenna (UNISON) to consider and comment on the consultation document “The public sector Equality Duty: reducing bureaucracy”. Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

OVERVIEW

ELA has long held the view that a good understanding of the specific duties framework and effective compliance had taken time to gain traction within public bodies. In our original response to the consultation on the Single Equality Act on 4 September 2007 we said (at paragraphs 4.):

“4.13 Legislation often takes time to bring about change. There is evidence that the public equality duties are becoming more prominent and are beginning to have their intended effect: for example, in the courts in cases such as R (Elias) v Secretary of State for Defence [2005] IRLR 788, CA and R (BAPIO) v Secretary of State for the Home Department and others [2007] EWHC 199, Admin Ct. and in actions taken by public authorities (in carrying out impact assessments when developing policy) and trade unions

(which are now requesting impact assessments more regularly when representing claimants in Employment Tribunals).

1. The policy document states that until now the public sector duties were used to prescribe processes that public sector bodies must undertake in the hope that this would deliver equality improvements on the ground. The policy document states that the Government wishes to turn this approach on its head so that public bodies will be held to account through transparency and challenge by the public for the equality improvements they deliver and not the processes they undergo. The majority of ELA members remain generally unconvinced by the workability of this proposed change in approach. By adopting an insufficiently prescriptive approach for public bodies, ELA believes that the proposed specific duties will provide an insufficiently clear framework either for implementing the section 149 general duty or for holding public bodies to account. This will inevitably lead to inconsistent applications of the aims and duty set out in the Equality Act 2010.
2. Public bodies will still need to demonstrate compliance with the general duty; they will just have a less tangible legal framework within which to work. In ELA's view this is unlikely to lead to less bureaucracy but has the potential to lead to a less consistent, less efficient form of bureaucracy.
3. There has been much historical commentary on the administrative burden of the existing specific duties. This has mostly been characterised as “process” bad – “outcomes” good. It is ELA's view however, that good outcomes follow from clear processes. If the specific duties do not provide a sufficiently prescriptive foundation, ELA is concerned that there will be a lack of clarity as to public bodies' obligations.

Tools and mechanisms

4. The policy review paper states that “*We are developing tools and mechanisms to support organisations and individuals to challenge public bodies.....*” No details are provided of these tools and mechanisms so ELA is unable to comment. However, the only legal mechanism apparently available would be a judicial

review of the general duty. In some respects public bodies will be more vulnerable to challenge not because of any tools or mechanisms but because with less prescriptive specific duties, demonstrating compliance with the general duty may be less straight forward. ELA submits that it would instead be better to focus on helping public authorities to comply proactively with clear duties rather than encouraging costly litigation which they might be hard-placed to defend. The onus is placed on members of the public to challenge public authorities either through campaigning which may or may not be successful depending on the profile of the issue or through the expensive and sometimes frustrating route of litigation which many individuals will be unable to afford.

Lighter touch transparency tool

5. The previous requirement to publish “*details of the engagement it undertook when developing its objectives*” in effect, required such engagement to take place.
8. The comment in the policy review paper at paragraph 23 that “*A requirement on public bodies to describe the process of how they will measure progress against their objectives will not contribute to the delivery of equality improvements ...*” is unsupported by any reasoning for this conclusion. If this means that only the destination is important not the progress along the road to that destination, then ELA has some sympathy with that view. Either the objective has been achieved or it has not. However, in practice, ELA believes that performance against equality objectives will be heavily nuanced and a published methodology for measuring progress would be extremely helpful in improving transparency. It is also likely that publishing such methodology and measuring progress by reference to it might pre-empt legal action from service users.
9. It is difficult to see how the other changes proposed to the publication obligations fit in with the stated objective of transparency. ELA doubts whether any amount of guidance on what constitutes good practice will be a substitute for regulation.

Equality objectives

10. ELA has not changed its original view, given in response to the last consultation, that the Regulation is framed in a rather unambitious way referring as it does to “one or more objectives” which the public body reasonably thinks that it should achieve in order to further “one or more of the aims” of the general duty. The experience of some ELA members has been that those responsible for the equality duties within public bodies find legislative compliance to be a very useful tool in the internal battle for recognition and resource allocation. An inability to articulate with any degree of accuracy what compliance with the general duty looks like – i.e. what a public body actually needs to do to satisfy the general duty requirements – can result in less being achieved than might be achieved with clearer specific duties. ELA fears that the return to the “*one or more objectives*” wording will lead to a lack of certainty. This lack of clarity as to regulatory compliance is also unlikely to be assisted by lengthy guidance materials, the interpretation of which will, in ELA’s view, place additional burdens on those responsible for compliance. The 52 page EHRC guide to the duties will now need to be rewritten and we are still waiting for the EHRC statutory code of practice. The EOC statutory Code of Practice for the previous gender equality duty ran to some 81 pages and the DRC code of practice for the previous disability equality duty ran to 141 pages.

11. Finally we noted above at paragraph 1 that in 2007 the public sector equality duties had begun to gain some traction. 2010 and 2011 to date have seen a notable increase in the number of successful claims being brought against public authorities under the public sector equality duties, mostly challenges to the reduction of funding and its disproportionate impact on certain groups. This would seem to indicate that there is still compliance work to be done by public authorities: reducing the force of the new specific duties is unlikely to result in this happening and risks undoing the work that has been put into compliance by equality officers and campaigning organisations over the last 9 years (since the first public sector equality duty, the race equality duty, came into force in May 2002). Public authorities are already accustomed to producing equality schemes

and many have already prepared them for 2011/12 on the basis of the previous draft regulations.

12. Although a clear majority of the working party thought that the revised regulations and the reasons for them were not an improvement on the original draft regulations published earlier in the year and on which the EHRC had published clear guidance, a small minority of ELA membership welcomes the flexibility which the new approach brings. It was also thought that very few regulatory bodies were covered in the list of public bodies subject to the duty and that this was unfortunate given their important statutory functions.

SPECIFIC REGULATIONS

13. In terms of specific comments we have focused on regulations two and three.

Regulation 2

14. ELA's response to the August 2010 consultation (10 November 2010) confirmed that ELA's position had not changed since responding to the previous Government's consultation (30 September 2009) in supporting the idea of a specific duty for public bodies to publish their equality objectives, citing relevant evidence, and this continues to remain the case. Publishing objectives aids transparency of decision making and the sharing of good practice in addition to enabling benchmarking. ELA maintains that to involve and consult employees, service users and others (particularly the protected groups for whom the duty is designed to deliver benefits) when setting their equality objectives is a good way of understanding and responding effectively to issues. For this reason, ELA has been of the view that a specific duty requiring this would reinforce on public bodies the need to engage, as well as enabling those groups to challenge those public bodies who fail to do so. It is therefore disappointing to ELA that the revised draft regulations do not take this approach.
15. As mentioned above, ELA considers the re-insertion of the words '*one or more*' objectives surprising, given the government's decision to remove these words upon publishing the revised draft regulations in January 2011, on the basis that

their inclusion had the potential to discourage public authorities from focusing on more than one equality objective (including the adverse outcomes both of potentially reducing the areas of focus in work currently undertaken, and/or failing to take up the newer strand equality objectives, on the basis that what was sufficient prior to the newer wider general duty would seem to be sufficient if only one equality objective is expressed to be enough).

16. Consistent with ELA's position in November, ELA remains concerned that, as currently drafted, Regulation 2 could allow public bodies to set very narrow objectives, disproportionate to the size and role of the public authority and its current equality performance, and thereby restrict the aims of the policy as described in paragraphs 3, 7 and 8. In particular, as set out in ELA's consultation response in November 2010, this is because the requirement to publish objectives is determined on a subjective reasonableness test. ELA's suggestion to mitigate this risk is to make the reasonableness test an objective one, having regard to the duty to publish information relating to its performance under the current Regulation 3(1); such that stakeholders may be reassured that public bodies will have considered carefully the rationale for not dealing with any specific equality issue identified through the publication of information. This could then be clarified in the guidance accordingly.

Regulation 3

17. As stated in paragraph 11, our concern was that the proposed set of specific duties adopted an insufficiently prescriptive approach for public bodies and that they would therefore provide an insufficiently robust framework to achieve its legislative purpose, namely the better performance of the general duty. The approach of the revised draft regulations compounds this weakness further, by removing what were only very limited clearly prescribed publishing requirements.

18. At paragraph 3 of the 17 March 2011 consultation paper, the objective of these revisions is expressed to be moving towards "a focus on transparency". At paragraph 4, this is emphasised again, "to make public bodies truly transparent and accountable to the public for their performance on equality". The stripping out of the clearly specified publishing requirements (details of engagement undertaken when determining policies, and equality objective; equality analysis undertaken in reaching policy decisions and information considered in undertaking such analysis), leaving only the much more blunt requirement to publish information to demonstrate its compliance with the general duty, with no clarity as to what that might be, would appear to be at odds with the expressed objective of transparency. In order to meet the general duty, public authorities have to consider these matters in advance, and caselaw on the general duty has clarified that this must be a rigorous (though proportionate) analysis, ruling that written evidence of the exercise is expected wherever a proper assessment has been conducted. ELA would therefore expect that, consistent with an emphasis of transparency, public authorities should be required to publish these details, rather than discouraged by the removal of the requirements.

19. For these reasons, the balance between non-prescription and guidance in the new draft regulations seems to be off-kilter, bearing in mind the legislative function of the specific duties to assist listed public authorities in the better performance of their duties. Though a more minor change than the removal of the specific publishing requirements, the removal of the requirement to publish "sufficient" information to demonstrate compliance would appear only to have the effect of making it less clear to the authorities what information they have to publish than assisting in clarification.

20. ELA is concerned that the impact of the revised draft regulations in removing clearly defined obligations is to leave public authorities with uncertainty as to whether they are compliant or not, which is counter-productive, given the rationale that public authorities could, through meeting the clearly defined specific duties, take comfort that they were likely to be complying with the general duty. Instead, the risk is that without having sufficiently clarified obligations (as the current draft regulations represent), they may unwittingly adopt an approach which is in breach of the general duty, and thereby be exposed to valid legal challenges by means of judicial review under the general duty.

Members of ELA Working Party

Susan Belgrave, 9 Gough Square – Co-Chair

Bronwyn McKenna, UNISON – Co- Chair

Samira Ali, Rebian Solicitors

Sue Ashtiany, Ashtiany Associates and Nabarro

Emma Burrows, Trowers & Hamlins

Sophie Cameron, PLC Public Sector

Mugni Islam-Choudhury, Eversheds

Richard Kenyon, Field Fisher Waterhouse

Samantha Mangwana, Russell, Jones and Walker