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The Scottish Government Consultation

Introduction of diversity succession planning for board appointments

Response from the Employment Lawyers Association

27 November 2015

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1. 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 otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and 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 and Policy Committee of the ELA under the co-chairmanship of Eleanor Mannion of Renfrewshire Council and Jonathan Chamberlain of Wragge Lawrence Graham & Co to consider and comment on the Scottish Government consultation paper. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Question 1

Do you think that making a requirement for listed public authorities to use their board diversity information for succession planning purposes will have a positive impact on the board appointments process? (Yes, No or Don't Know)

In ELA's view it is difficult to say that making it a requirement for listed public authorities to use board diversity information to succession plan will have a positive impact on the board appointments process in the sense of increasing diversity.

Listed public authorities are already subject to the General and Specific Public Sector Equality duties. This duty obliges listed public authorities to advance equality of opportunity between persons who share relevant protected characteristics such as gender and those who don't. This includes, amongst other things the obligation to have due regard to encouraging people who share a relevant protected characteristic like gender to participate in public life or any other activity in which participation by such people is disproportionately low.

Under the Specific Equality Duties (set out in the Scottish Specific Duties Regulations 2012) public listed bodies have various obligations including the obligation to produce a mainstreaming report every two years. The EHRC Technical Guidance on the Public Sector Equality Duty: Scotland defines mainstreaming as

“the process of making the general equality duty an integral part of all of an authority's relevant functions and practices by all staff at all levels, embedding it across policies, procedures and corporate systems and reflecting it in business planning and reporting cycles.”¹

It is up to public listed bodies to decide how to mainstream the equality duties.

Requiring public listed bodies to use diversity information to plan would perhaps allow them to focus very clearly on any under representation at board level and take active steps to address it through a plan, progress on which can be monitored and reported on.

It would perhaps also allow them to take advantage of the positive action provisions of the Equality Act 2010.

Having the diversity information will serve to highlight where there is any underrepresentation. In turn this will hopefully lead to boards addressing the underlying reasons for any under representation identified so that they can turn their minds to ways of trying to redress the balance and plan for greater diversity in the future. This will allow them to consider what if anything they could do as a Board to increase participation of under-represented groups in line with the positive action provisions of the Equality Act 2010 and the associated ECHR Guidance.

Question 2

Do you agree that the data collected covering individual boards should be aggregated up into sectoral and Scotland wide statistics? (Yes, No or Don't Know)

ELA is in agreement with this proposal. The data ingathered as part of this proposed exercise is likely to constitute either personal or sensitive personal data and will be covered by the Data Protection Act 1998 as noted in the consultation document. It is hoped that by protecting the anonymity of those providing information and ensuring that upon publication there a reduced likelihood of re-identification, individual board members will be more inclined to respond which in turn will bolster the accuracy of

¹ At paragraph 6.2.2

the figures returned. Protection of anonymity is key here and in line with the ICO's guidance for employers on equalities monitoring².

Question 3

What do you think are the issues for colleges meeting this new reporting duty?

ELA is a membership organisation and is unable to respond to this question.

Question 4:

Do you think that formalising the process of diversity succession planning will support those involved in the board recruitment and selection process to achieve greater diversity on their board? (Yes, No or Don't Know)

Yes. ELA considers that it is likely that formalising the process of diversity succession planning will support those involved in the board recruitment and selection process to achieve greater diversity on their board.

By requiring public sector organisations to put in place a written plan for diversity succession planning, this will require them to proactively consider and discuss:

- in what respects their boards are underrepresented;
- the reasons for that underrepresentation;
- the strategies and measures that they intend to deploy to address any areas where there is underrepresentation.
- the extent to which those measures have been successful in achieving greater diversity.

It is ELA's view that it is likely that having a legal requirement to engage in a succession planning process of this sort will inevitably support those involved in board recruitment because:

- Diversity succession planning is more likely to be approached in a consistent way across public sector organisations to whom the new laws will apply. All organisations will do it as a matter of course.

² Information Commissioner's Office – The Employment Practices Code November 2011

- Those involved in board level recruitment and selection will have the endorsement of the organisation when they are implementing the succession plan as it will have been committed to writing and approved.
- It is also more likely that organisations will prioritise diversity succession planning in practice where there is a legal requirement to comply with it.
- those involved in board recruitment will be able to point to a specific succession plan as legitimate justification for taking certain steps in order to improve diversity. For example, those involved in Board recruitment and selection may be more confident in using positive action (which is permitted in accordance with the terms of the Equality Act) where that is set out in a succession plan which has been approved.
- Succession planning is more likely to be effective as organisations will have the opportunity to learn from best practices in other organisations where succession plans have worked successfully.

Question 5:

Where and when do you think is the most appropriate place and timing of the publication of diversity succession plans?

ELA believes that diversity succession plans should be shared publically, preferably having a prominent position on the organisation's website. Prominent publication will allow greater comparability between organisations and increase transparency within the organisation itself.

It would be preferable if the diversity succession plan is published to coincide with the publication of equality and gender pay gap information within the public sector. This occurs in April on a two yearly cycle. We feel aligning both publication dates will increase the possibility for benchmarking equality information.

Question 6:

Please provide details of any additional issues, not addressed in your other responses, that you think should be considered in relation to the introduction of diversity succession planning.

We look forward to seeing more details of the proposed reporting process and note that the Scottish Government proposes to ingather this information directly. It would be helpful to understand how the

data ingathered anonymously will be relayed back to the board itself. We see two potential issues arising here. Audit Scotland in 2010 indicated that most boards in Scotland have fewer than 14 members³. For smaller boards particularly, any data relayed back to its members on the composition of that particular board is likely to result in re-identification of the individual concerned. If however, the board only received the aggregated figures, it will be unable to benchmark the success of its succession planning, particularly in circumstances where it does not carry out any equalities monitoring of its own or board members do not wish to disclose this information directly.

Question 7:

Do you agree with the proposal to amend the threshold for gender pay gap and equal pay statement publication from 150 employees to 20 employees? (Yes, No or Don't Know)

Yes. ELA is of the view that reducing the threshold of 150 employees to 20 employees may result in increased transparency.

If such information was published, employees, service users and the public more widely would be able to further monitor a public authority's performance on equality. The public nature of this information has the potential to narrow any pay gaps existing within the workforce. It may also increase public confidence in these bodies being able to achieve progress on pay equality.

This requirement may assist public authorities to advance their own agendas on equality by providing them with a further opportunity to collect and analyse relevant data from employees. It may be that a number of the 30 additional public authorities who will be captured by the proposed changes will not have thoroughly considered and utilised this employee information, despite having already gathered this raw data.

The fact that reducing the threshold only brings in around an additional 30 public authorities into scope means that there is unlikely to be widespread concern across the sector regarding this requirement. However, ELA recognises that smaller public authorities may struggle with the administrative burden that this requirement will place them under. Larger-scale public authorities with more employees may have greater access to a range of staff members (such as HR staff, analysts, finance staff etc) who can get involved in the process of gender pay gap reporting compared with smaller scale authorities with 20 or slightly more staff. It also may not be possible to ensure that all the data produced is entirely anonymised. This could create data protection concerns and implications for those smaller public authorities.

³ Audit Scotland – The Role of Boards September 2010

Question 8:

Please provide details of any additional issues, not addressed in your other responses, that you think should be considered in relation to the introduction of diversity succession planning for listed public authorities.

This has been dealt with in our answer to Question 6.

Question 9:

What resource issues, if any, will there be for public bodies to gather information on their board's diversity and then produce a succession plan for future board appointments? Please give reasons for your answer.

ELA is a membership organisation and is unable to respond to this question.

Question 10:

Can the impact of any resource issues for public bodies be quantified using existing costing structures?

ELA is a membership organisation and is unable to respond to this question.

Question 11:

To help with the development of a Business Regulatory Impact Assessment, please provide any other information you think is relevant.

ELA is a membership organisation and is unable to respond to this question.

Question 12:

The Scottish Government wants the people of Scotland in all of their diversity to be represented on the boards of public bodies. Do you think there are currently barriers that especially impact on certain groups that would stop them applying for board positions? Yes, No or Don't Know. If yes, which groups and what are the barriers?

Yes. Gender stereotyping in employment was a prominent issue in the course of equal pay litigation. While a valid job evaluation scheme will go some way towards levelling the playing field of those in work, it is unlikely to fully address gender stereotyping i.e. more women will apply to be cleaners and more men will apply to be gardeners. ELA anticipates the same issue may be felt with these proposals. Reporting duties and succession planning are important tools that will go some way towards addressing equalities issues but unless a diverse group of individuals actively apply for board membership positions, the diversity composition of boards will not improve. We expect that grassroots change needs to occur, from school level upwards to take steps to level the playing field. Practical steps which might assist including supported application processes and anonymous applications

Question 13:

Do you think there is additional supporting action that could be taken to help certain groups overcome or mitigate these barriers? Yes, No or Don't Know. If yes, what action and who should take it?

Yes. Please see our answer to Question 12 above.

Question 14

To help further with the development of our Equality Impact Assessment, please give any other information you think is relevant.

The sub-committee has nothing further to add.

Question 15:

Do you think there are other factors involved in the data collection process that should be taken into account? Yes, No or Don't Know. If yes, what are they?

Yes. This has covered to an extent in our response to question 6 already but preserving the confidentiality of individual's personal data whilst disclosing diversity information will be important. Aggregating data and the collection of data by the Scottish Government should assist in preserving the confidentiality of personal data to a great extent. Organisations will also have to be mindful about complying with the Data Protection Act 1998 when processing sensitive personal data.

Question 16:

Do you think there is additional supporting action that could be taken to help listed public authorities gather and then use board diversity information? Yes, No or Don't Know. If yes, what action and who should take it?

The sub-committee has nothing further to add.

Question 17:

To help further with the development of our Privacy Impact Assessment, please give any other information you think is relevant.

The sub-committee has nothing further to add.

ELA Sub – committee members

Co-chairs: Eleanor Mannion, Renfrewshire Council; Jonathan Chamberlain, Wragge Lawrence Graham & Co

Lynne Marr, Brodies LLP

Jillian Merchant, Thompsons Solicitors

Elaine McIlroy, Weightmans (Scotland) LLP

Jennifer Murphy, Glasgow City Council

LauraAnne Murray, Thompsons Solicitors