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Consultation on Public Sector Equality Duty – Revised Draft Regulations - Scotland

Response from the Employment Lawyers Association

25 November 2011

ELA RESPONSE TO SCOTTISH GOVERNMENT CONSULTATION ON PUBLIC SECTOR EQUALITY DUTY – REVISED DRAFT REGULATIONS - SCOTLAND

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, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Advocates 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 chairmanship of Paul Brown (Biggart Baillie LLP) to consider and comment on the consultation document "Consultation on revised draft Regulations for the Public Sector Equality Duty – Scotland". . Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

ELA'S RESPONSE

Question 1: Do you agree that if a public authority's equality outcomes do not cover all relevant protected characteristics it should publish the reasons(s) why?

Yes. ELA's view is that if Local Authorities are going to be able to ensure fair and equal treatment for all, they should publish equality outcomes in respect of each protected characteristic even if these might differ depending on which particular characteristic is being protected. In order to ensure that a local authority is exercising its functions fairly and equally the authority itself and those with whom the authority contracts, require to know what the authority considers its equality outcome to be in respect of each particular characteristic. The absence of these in relation to any particular characteristic would lead to uncertainty and regulations should require the authority to explain why they do not consider it relevant in any particular circumstance to publish this information.

QUESTION 2: Do you agree that if a public authority's equality outcomes do not cover all relevant protected characteristics, it should publish the reason(s) why?

Yes. ELA believes that to include a requirement for publication of the results of equality impact assessments enhances clarity for organisations and transparency for service users. It is however concerned that the wording of Regulation 5(3)(b) namely that a listed authority must "publish each result in a manner and within a period that it considers reasonable" may be unreasonably subjective and lead to confusion as to when the publication of the outcome of an EIA should take place.

QUESTION 3: Do you agree that a public authority's impact assessments should consider relevant evidence including any received from people with relevant protected characteristics in relation to the policy or practice in question?

Yes. Whilst agreeing with the proposal for organisations to consider evidence from those with protected characteristics, ELA is concerned that the use of the word "*relevant*" where it occurs in Regulations 5(2) may add confusion by introducing a wide element of discretion prematurely in the process. The general duty introduced by s149 Equality Act 2010 applies across <u>all</u> protected characteristics. Accordingly a public authority should in our view consider relevant evidence relating to person with all protected characteristics after which the relevance of the evidence obtained should be considered.

QUESTION 4: **Do you agree that a public authority should make arrangements to review and where necessary change or revise existing policies and practices to ensure that these do not have a detrimental effect on its ability to fulfil the general duty?**

Yes. ELA agrees with the above subject to the comments below.

QUESTION 5: Do you agree that a public authority should not be required to undertake an impact assessment where the policy or practice in question has no bearing on its ability to fulfil or otherwise the general duty (e.g. purely technical or scientific matters)?

ELA is mindful of the need for proportionality in the conduct of Equality Impact Assessments but is concerned about the use of the wording in Regulation 5(5). Such a discretion introduces dubiety and may leave public organisations open to challenge that they failed to assess the impact of a policy or practice which, it transpires, did have a bearing on the authorities ability to meet the s.149(1) duty. The conduct of an initial assessment of the impact of all policies or practice being drafted or reviewed provides a clear and consistent approach. It will also enable organisations to evidence their considerations and to come to a proper judgement on the true nature of the impact of the policy or practice thereby reducing the possibility of a subsequent challenge.

QUESTION 6: Do you agree that authorities subject to the specific duties should be required to take reasonable steps to gather information on the relevant protected characteristics of employees, including information on the recruitment, retention and development of employees?

Whilst ELA supports the principle of gathering and reviewing employment information, to assist authorities in identifying potential issues, we have concerns regarding the potential ambit of the Regulations.

It is not clear exactly what information authorities are required to collate, and we would question whether the Regulations may anticipate a regime in practice that is broader than under s 149. We would make particular reference to the use of the word "development" and what it is intended to capture; the requirement to gather information across all protected characteristics, and the removal of the threshold of 150 for Regulation 6 information.

We are also concerned about the cost implications for authorities who are required to undertake this exercise bearing in mind that the purpose of the additional consultation process was to clarify the wording of the Regulations and reduce the need for the Regulations to be supplemented by EHRC-produced Guidance. We are also aware that concern has been expressed by public sector employers about the cost implications of gathering, analysing and reporting this information potentially across all protected characteristics. At a time of financial austerity, there is concern that public sector organisations may not have the resource to invest in new IT systems or to adapt existing systems to be able to capture and process this information efficiently. Similarly there are likely to be challenges in securing the necessary resource to collate this information manually. This needs to be considered in terms of the feasibility of these proposals.

Reg 6 (1) Each listed authority must take reasonable steps to gather information. The decision to remove the 150 threshold to gather and publish employment information potentially contradicts the evidence in the response to the previous consultation. At paragraph 31 of the Consultation on Draft Regulations and Order - Overview of consultations findings and action taken (the Overview document) it states that "*A majority (63%) felt that public authorities with 150 or more full time staff should report on employment data starting from April 2012 and no later than every 2 years*." In our view, the two reasons for having the 150 threshold which were put forward in the earlier consultation document which ran from September to November 2010 (the 2010 Consultation) remain valid considerations.

Smaller organisations are unlikely to have the capacity or systems to do this type of reporting and secondly there could be data protection implications of disclosure amongst a small group where sensitive personal data could be disclosed. Although the EHRC points to the Fair Employment Legislation in Northern Ireland (within their response to the 2010 Consultation) who have a threshold as low as 10, this relates to religious belief and political opinion. Although these issues are obviously personal it is rather less likely that these issues are either kept secret by the individual employee or shared only with a limited number of persons away from the workplace with a view to maximising privacy.

The use of the word "reasonable" would be expected to be supported by guidance to explain what factors will be taken into account in determining what is reasonable for a given organisation. Public authorities would be expected to look to such guidance in order to confirm that size, resources and cost should also be considered in assessing what is reasonable? The guidance might also need to address how the issue should be approached if an employer does not have a payroll or HR system that records this information currently? Similarly, this leaves questions about how this information will be gathered.

6 (1) (a) the composition of the authorities employees

This effectively requires an annual snapshot of staff working at a particular time.

6(1) (b) the recruitment, development and retention of persons as employees of the authority

The word **development** is potentially very wide and could pose problems for employers to monitor. It will be important to clarify the ambit of development. Does this include every training session attended, every annual appraisal rating given and any performance or disciplinary processes? If so, then this would be following the previous obligations under the race duty which had much higher standards of specific monitoring imposed on employers. Similar obligations to monitor workforce composition; applications for employment, training and promotion; results of annual organisational performance assessments; instances of staff being involved in grievance, harassment and disciplinary processes and leavers, may be appropriate.

While this might have been feasible for a percentage of staff who were BME, the position under the Equality Act is different. Now every aspect of employee development across every protected characteristic would require data monitoring.

It is also notable that the Regulation 7 of The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011(the Welsh Regulations) refer to **specific** categories of employment information in a similar manner to the previous race duty (see Reg. 7(6) (c) (i)-(iv).

ELA would suggest that to avoid ambiguity that the specific areas of development should be covered in the same way as they were listed in the race duty or the Welsh Regulations.

It seems to us inconsistent that authorities would receive 4 years notice that they have to collate data on occupational segregation under Regulation 8, but that this aspect of the duty is imposed on all authorities immediately, which may have significant impact on the allocation of resource.

6 (1) (b)… with respect to, in each year, the number and relevant protected characteristics of such persons.

The previous version of the Regulations provided that: authorities should publish employment rates for disability, sex, ethnicity and their gender pay gap; and public authorities with more than 150 employees should publish an equal pay statement.

The revised Regulations cover all relevant protected characteristics and the filter comes at the reasonable steps stage, (although the 150 threshold is retained for gender pay and the equal statement which is dealt with below). ELA are concerned that this Regulation is ambiguous

which may lead to uncertainty regarding what exactly employers are obliged to do. Can an employer simply choose to gather information across, say, three key protected characteristics and make no attempts in relation to the other protected characteristics? Or do they have to take reasonable steps across **all** relevant characteristics – the impact of the latter being much more significant. This should be clarified particularly as the Overview document discounted taking this approach, yet it is contained in the revised Regulations - " *We have not extended the requirement to publish employment information to all protected characteristics at this stage given the lack of data and the issues which need to be resolved with regard to, for example collecting information on sexual orientation and religion and belief."*

Authorities may be put off even trying to gather this information if they think they also need to include employment information on points they have never previously reported upon including sexual orientation, religious belief and age. They may say this is too difficult to cover all the strands and fail to report on even the key areas where they do gather information. Or they may spend so much time trying to report across all eight protected characteristics that they spend a disproportionate amount of time doing this and not focussing on their equality objectives. This would return to the position under the previous duties that there was too much focus on process and not enough time was spent on achieving outcomes.

Although a new provision has been added to say that authorities are not required to adopt **equality objectives** across all the protected characteristics, there is no corresponding provision for employment information. Perhaps one way to clarify this would be to align the monitoring information with equality objectives. Therefore if sex, race, disability and religion have all been identified as characteristics with equality objectives then information should be gathered regarding these issues. The downside of this is that you may not be aware of problems in other areas; that said, ideas for equality action planning may be expected to come through sources such as consultation and involvement with equality groups and not simply through the analysis of a statistical discrepancy.

QUESTION 7: Do you agree that authorities subject to the specific duties should be required to use the employment information which they have gathered to assist progress on the general duty?

As we have outlined in our response to question 6 we think that Regulation 6 should make it clearer what exactly an authority is obliged to report upon – in relation to identifying key characteristics and reducing the areas of employment information to cover recruitment and retention and that the threshold should be reintroduced.

It seems appropriate and perhaps inevitable that if the authority has spent time, money and effort on gathering employment information that they should then be obliged to use it as part of their overall equality action planning, because this is what the authority would be expected to do in practice. The extent to which it is taken into account we would expect to be a matter of judgement on the part of the authority. We note that the Welsh Regulations takes a more prescriptive approach by referring to an assessment of the information.

QUESTION 8: Do you agree that authorities subject to the specific duties should be required to report on progress on gathering and using employment information, including an annual breakdown of information gathered within the mainstreaming report?

By virtue of regulation 4 all listed authorities will be required to publish this information within the mainstreaming report every two years and publish this information annually. Publication on an annual basis seems to have had limited support in the last consultation. ELA considers that it would be more appropriate for organisations to report every two years within their mainstreaming report.

QUESTION 9: Do you agree that authorities with more than 150 employees should publish an equal pay statement, the first covering gender and the second and subsequent statements covering gender, disability and race?

The 150 employee threshold is maintained for gender pay gap information and the equal pay statement. Maintaining a threshold for these provisions follows on from the previous obligations under the Gender Equality Duty (GED), and indeed goes further than the GED by proposing that the second and subsequent statements refer to information regarding sex, disability and race.
It is not clear why Regulation 6 information should be published annually yet equal pay, only requires to be addressed every 4 years, and gender pay every 2 years.
It is helpful that the previous reference to occupational segregation has been maintained and widened to cover disability and race although it seems rather inconsistent with the duties imposed in Regulation 6 that this type of information may take longer to collate and would not be required for a further 4 years. We do support the principle of reporting on occupational segregation across different protected characteristics.

QUESTION 10: Do you agree that where a listed authority is a contracting authority and proposes to enter into a relevant agreement on the basis of an offer which is the most economically advantageous it must have due regard to whether the award criteria should include considerations relevant to its performance of the general duty.

Yes. Detailed guidance and clarification will be required in order to assist contracting authorities to comply with these duties in what is a complex and significant area of economic activity, and one which regularly produces legal challenges. This point has already been made by the ELA in its response to consultation on the proposals for Wales. The equivalent provisions in regulation 18 of *the equality act 2010 (statutory duties) (Wales) regulations* 2011 are in terms that are not materially different from draft Regulation 9.

The term "due regard" is not defined in the draft regulations, the E*quality Act* 2010 or the P*ublic Contracts (Scotland) Regulations* 2006. Some assistance with interpretation is to be found in the interim guidance published by the Equality and Human Rights Commission (5 April 2011), which identifies the two linked elements of proportionality and relevance and the importance of having sufficient information about the needs and experiences of those with protected characteristics. In each case, both the substance of the decision and its reasoning are relevant as is a proper appreciation of the duty itself (*R (on the application of Medical Justice) –v- The Secretary of State for the Home Department)*.

Q 11: Do you agree that where a listed authority is a contracting authority and proposes to stipulate conditions relating to the performance of a relevant agreement it must have due regard to whether the conditions should include considerations relevant to its performance of the general duty?

This raises similar issues of guidance and clarification of the duty to assist with compliance with the general duty, the main difference being the point in the process prescribed by the Public Contracts (Scotland) Regulations 2006 at which the duty arises.

ELA's view is that in order to ensure transparency and compliance with its published equality outcomes and the general aim of achieving equality, contracting authorities should be required to include consideration of their general duties in all public procurement activities and in entering into relevant agreements.

24 November 2011

Members of the ELA Working Party:-

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Jill Bell, Anderson Strathern LLP
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