

**THE EMPLOYMENT LAWYERS ASSOCIATION**

**RESPONSE TO THE EQUAL OPPORTUNITIES COMMISSION'S  
CONSULTATION ON THE NEW GENDER EQUALITY DUTY  
DRAFT CODE OF PRACTICE**

**MAY 2006**

## **The new gender equality duty: a public consultation on the draft Code of Practice**

### List of consultation questions

#### **Overarching Questions**

1. How clear is it what your organisation has to do to comply with the gender equality duty? If it isn't, what could we do to make it clearer?

1.1. This response contains the observations of the Employment Lawyers Association (ELA) on the Consultation draft of the New Gender Equality Duty draft Code of Practice (the Code).

1.2. The ELA is a professional association of employment law practitioners comprising over a thousand members throughout the UK specialising in the field of employment law including those who represent claimants and respondents in the Courts and Employment Tribunals. The ELA is an apolitical group and it is not the ELA's role to comment on the political merits or otherwise of proposed legislation or codes of practice, rather to make observations from a legal standpoint.

1.3. The Legislative & Policy Committee of the ELA is made up both of barristers and solicitors who meet regularly to consider and respond to proposed new legislation and codes of practice. A working party was set up by this Committee under the chairmanship of Maeve Vickery (Devon County Council) and comprising Maeve Vickery and David Widdowson (Bevan Brittan) to respond to the draft Code.

1.4. The Code of Practice covers all areas of activity of public authorities and is not limited to employment matters alone. In formulating this response the working party notes that future non-statutory guidance is due to be drafted, with a specific section on employment matters. The Working Party consider that Consultation on this proposed guidance is likely to be productive.

1.5. The ELA Working Party found the draft Code interesting and thought provoking, with good practical examples of how the Code might be implemented. Overall the Code is clear and contains good examples and references. Some further cross-referencing within the Code (referred to more particularly below) may be useful, especially for smaller public bodies subject to the Code.

2. Is it clear to you which steps are legal obligations and which are recommended as good practice? If not, what could we do to make it clearer?

Overall the distinction between legal obligations and recommended good practice are clearly drawn. It would be helpful to clarify the position in relation to contracted out functions and specific duties (see further comments on Chapter 3).

3. What is the most helpful aspect of the draft Code of Practice?

The Working Party consider that the inclusion of Chapter 4, covering complex legal issues; procurement, partnerships and single sex services is particularly useful. As is the clear overview of meeting the duty for equal pay at Chapter 2, in what is also a difficult legal area.

4. What is the least helpful aspect of the draft Code of Practice? What could we do to improve it?

Further cross-referencing of the introduction to the detail and examples contained in the specific chapters would be useful, see comments below on introduction.

5. Do any of the recommendations or guidance in the Code of Practice have a particular positive or negative impact on men and women from different racial groups?

The Working Party has no comment on this point.

6. Do any of the recommendations of guidance in the Code of Practice have a particular positive or negative impact on men and women with disabilities?

The Working Party has no comment on this point.

7. Would you find it helpful to have a glossary? If so, which terms would you like to have included?

The Working Party consider a Glossary would be useful, containing reference to matters such as proportionality, justification, sexual harassment, harassment on the grounds of sex, direct and indirect discrimination and genuine occupational qualification.

8. General Question: Do you have any further comments on the Code of Practice?

Given the interface between different areas of equality it may be useful to try and ensure that the policies and practices set out in the Code are drafted in a way that enables them to be adapted easily in relation to other forms of discrimination which are or will be the subject of a similar public duty and to try and achieve some sort of conformity between guidance from the CRE, EOC and DRC - whilst acknowledging that the CRE will maintain its own functions for a longer period than the EOC and DRC following the creation of the Equality Commission.

## **Chapter 1: Introduction to the gender equality duty**

9. How useful did you find this chapter, and what changes could be made to help you implement the duty more effectively?

9.1. This chapter may benefit from more cross-referencing to the specific details contained in the further chapters on more specific topics as set out below;

9.2. For example, in paragraph 1.6 the Introduction seeks to amplify the concept of “due regard” referring to proportionality and relevance. Cross-referencing this to the section in Chapter 2 “Meeting the duty in service design and delivery” (which provides examples as to how matters of proportionality and relevance should be considered) would be helpful and would be likely to assist public authorities in implementing the Code.

- 9.3. At 1.14 the introduction states there is no definitive list of public authorities to which the general duty applies. Cross-referencing to Appendix A “What is the definition of a public authority for the purposes of the general duty?” would be useful.
- 9.4. A further example is the statement at 1.12 – “The general duty is enforced by judicial review”. This would benefit from cross-referencing to Chapter 5: Enforcement and 5.9 in particular.
- 9.5. Paragraph 1.19 begins “Unlawful discrimination in the SDA and the gender duty means:” followed by a list of various forms of discrimination by way of bullet points. The Working Party found this unclear and felt that public authorities are likely to find it difficult to understand what the above statement means when read in conjunction with the bullet points. Amendment/ further clarification would be welcome.
- 9.6. The observations at 1.25 regarding how the gender equality duty fits in with the broader equality picture are helpful in assisting authorities understand how the different areas of equality relate.
10. How clearly do you understand what the gender equality duty is and who is covered by the specific and general duties? If it is not clear, what could we include in the Code of Practice to make it clearer?

It would be helpful to clarify the position on contracted out and procurement matters in relation the specific duty expressly i.e. to state that contractors are not subject to the specific duty if this is the case.

## **Chapter 2 : How to meet the general duty**

11. How useful did you find this chapter, and what changes could be made to help you implement the duty more effectively?
- The examples given in this chapter are particularly useful and should give considerable assistance in public authorities knowing how they are supposed to implement the duty.
12. How well does the Code of Practice explain the concepts of proportionality and relevance as they apply to the duty, and what further guidance would be helpful in this area?
- The examples given are useful. Reference to some of the main cases dealing with concepts of proportionality and relevance could be useful in explaining the legal requirements in relation to assessing these matters.
13. How useful do you find the explanation on the steps you have to take to eliminate discrimination and harassment for transsexual people in employment and vocational training? Would any further information be helpful?

The information in relation to transsexual people is useful. The ELA Working Party has no further comment on this particular aspect.

Note: at 2.62 Appendix F should read Appendix E.

## **Chapter 3 : How to meet the specific duties**

14. How useful did you find this chapter, and what changes could be made to help you implement the duty more effectively?

This chapter is useful, particularly the examples and describing the initial screening process. As previously stated, expressly stating the position in relation to procurement, contractors and partners in relation to the specific duty would be helpful.

15. How clear is the Code of Practice on when and how to conduct a gender impact assessment? (Chapter 2 and 3)

More emphasis on the legal requirement to carry out impact assessments would be helpful, preferably in a prominent position in the chapter on specific duties.

## **Chapter 4 : Complex legal issues: procurement, partnerships and single-sex services**

16. How useful did you find this chapter, and what changes could be made to help you implement the duty more effectively?

This chapter is likely to be very useful to public authorities. The Working Party consider it makes a good attempt at providing joined up thinking covering a variety of areas which public authorities often find difficult and complex. The matters covered in this chapter are not in the main relating to employment issues, save in relation to employment implications at 4.39 onwards. Setting out the relevant sections of the SDA or cross-referencing to a suitable appendix could be useful.

17. How clear is the explanation of the legal situation on procurement and the duty? What additional advice would you find helpful?

This is not dealing primarily with employment issues – however procurement is likely to invoke either the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and/or the Cabinet Office Statement of Practice on staff transfers in the public sector and/or the ODPM Circular 03/03 appending the Code of Practice on Workforce Matters relating to transferring out staff in the public sector. An example of how the Gender Duty could impinge on staff transfers and impact assessment in this type of scenario could be useful.

18. How clear is the explanation of the legal situation on single-sex services and the duty? What additional advice would you find helpful?

The Working Party consider this is useful, particularly the employment implications section at 4.39 onwards.

## **Chapter 5 : Enforcement**

19. How useful did you find this chapter, and what changes could be made to help you implement the duty more effectively?

The Working Party consider that public authorities will consider this useful, particularly the forthcoming non-statutory guidance to supplement the Code. The guidance again examples are likely to be very helpful.

20. How clear is the explanation of the enforcement regime? What additional advice would you find helpful?

Some further clarification on how failure to meet the duty could impact on such things as audit and for example, local authorities continuing performance assessments would be useful.

### **Appendix A: What is the definition of a public authority for the purposes of the general duty?**

21. Do you have any comments on this appendix? (Please note the definition is not open to change via this consultation)

No.

### **Appendix B: Public bodies and functions which are exempt from the gender duty**

22. Do you have any comments on this appendix? (Please note the legislation is not open to change via this consultation)

No.

### **Appendix C: Public authorities subject to the specific duties**

23. Do you have any comments on this appendix?

The definition of educational institutions cross-referencing to relevant Education legislation such as the Education Act 2002 will be necessary.

### **Appendix D: list of EOC proposed guidance**

24. What are your views on our plans for supporting guidance? Are there any subjects that you would like to see covered that are not currently listed

This will be extremely helpful, preferably with references to appropriate case law and examples particularly in the employment section. In relation to procurement details as mentioned above in comments on Chapter 4 Question 17 would be helpful i.e. TUPE/code of practice on workforce matters etc. and how the Gender Duty could impinge on these procurement issues in practice.

### **Appendix E: The meaning of unlawful discrimination - a brief overview of the SDA**

25. How useful did you find this appendix? What changes could be made to help you implement the duty more effectively?

25.1 Under the heading "Indirect Discrimination" at the first paragraph, the text is a summary of the provisions of the SDA. This reads rather uncomfortably and makes the definition slightly unclear, particularly the use of the words "woman" and "he" at the last sentence of the first paragraph.

- 25.2 Under the section on harassment it would be helpful to clarify the distinction between intentional and unintentional harassment and how this is treated differently in law in that unintentional harassment will be considered under the subjective test set out at 4A(2) SDA i.e. relating to all the circumstances including, in particular, the perception of the woman as reasonably having that effect.
- 25.3 Under the section on the Equal Pay Act 1970 the example of the woman being paid at a lower hourly rate than a man because she works part-time is a good example of why the material factor defence will not work. This statement that it is “unlikely to be a good defence to an equal pay claim” seems something of an understatement and this may be usefully qualified by reference to the need to justify any apparent indirect discrimination – although given the current apparent dichotomy with UK and European law on this objective justification of the material factor defence this may be viewed as undesirably complex.
- 25.4 The section under “Discrimination in the employment field”, explaining the protection extending beyond people who are not “employees” as defined in, for example, unfair dismissal law is useful.

## **Appendix F: Further details of prohibition from discrimination in Parts III and IV SDA and the exceptions which permit discrimination on grounds of sex.**

26. How useful did you find this appendix? What changes could be made to help you implement the duty more effectively?

The ELA Working Party believe that an employment related example under the section “Further exceptions to prohibitions on discrimination in employment, education and goods facilities and services and other unlawful acts” would be useful.

27. Has Appendix F helped to make the legal situation on single-sex services clearer to you? (2.36-39, 4.7-42 and Appendix F) If not, what could we do to make it clearer?

In keeping with the rest of the main body of the document it may be helpful to put examples in boxes in this section cross-referencing between the sections on single-sex services in Chapter 4 is important.

## **Appendix G: Assessment of compliance with the general and specific duties**

28. How useful did you find this appendix? What changes could be made to help you implement the duty more effectively?

The Code refers to assessment of compliance by the EOC and the CEHR from 2007. It may be useful to explain the reason for this - although the majority of individuals reading the Code should be aware, some may not. Further clarification on the distinction between assessment and enforcement and how they processes interrelate would be useful.

The section on Representations is unclear – some further clarification on criteria in respect of when the Commission may refuse to consider representations from third parties and the authority under scrutiny could be useful. The section as drafted

indicates that when representations are made by a barrister, solicitor or advocate then the Commission will never refuse to consider them.

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