

## **ELA response to Equality Act 2010: The public sector Equality Duty: Promoting equality through transparency: A consultation.**

### **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, 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 “Equality Act 2010: The public sector Equality Duty: Promoting equality through transparency: A consultation”. Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

### **ELA’s Response**

**Q1: Do you have any comments on our proposals for data reporting? Does the drafting of regulation 2 accurately reflect the aims of the policy described in paragraph 5.2 to 5.9?**

1. Generally, our assessment was that the data reporting requirements are imprecise. On our reading of the document proposals (at chapter 5) it was unclear whether or not the specific duty would impose any additional proposals for data reporting, above that already required by the “Public Sector Transparency Board”. If so, there would be no additional cost implication of the data reporting proposals under the Specific Duty. This raises the question however as to what purpose Regulation 2 serves.
2. When breaking down the information actually required to be published at Regulation 2, this seemed to us to split into two categories with Regulation 2(a) being the data which public bodies publish; and Regulation 2(b) & (c) encompassing impact assessments and supporting material. In relation to (a), no details are provided as to what ‘information relating to the protected characteristics of its employees’ must be

selected the examples given are expressed to be examples only - and non-prescriptive; so there would not seem to be any clear or consistent specific additional cost implication. This may prove to have significant cost savings when compared to the more specific existing duties to publish information (e.g. Regulation 3(d)(i-iii) of the DDA order, or the data collection obligations for educational/employment monitoring at Regulations 3 and 5 of the RRA order), if public bodies choose to limit the monitoring undertaken in future. This may however weaken the scope for citizen monitoring in line with the underlying policy proposals.

3. In relation to (b) and (c), arguably this is already required by proper compliance with the general duty, and if so, there would be no additional cost arising here either.
4. The proposals state that equality data must be released in a way consistent with the Public Data Principles set out by the Public Sector Transparency Board which states that the data will be published in machine-readable form. This means that all data currently published by public bodies in PDFs will have to be produced in a different format to become compliant with the Data Principles. This will pose immediate difficulties in that some public bodies may have to decide now whether to employ IT resources (with the inevitable accompanying expense) to ensure that all equality data is machine-readable, or whether to see if, following the responses to this consultation, this will remain an essential requirement. Early clarification of this point is essential.
5. As stated above, if this is a requirement for public data in any event, no additional cost implications would arise in relation to equality data specifically.
6. The policy states that if a public body does not have the data required to give the "full picture" then it should take "reasonable steps to fill that gap". It goes on to refer to the new "Right to Data" which will not require public bodies "to collect any more data which they do not need for their own purposes". In ELA's view there is some confusion as to whether the requirement on public sector bodies to collect equality data extends beyond the requirement to collect the data that they need for their own purposes in order to comply with the public sector equality duty itself. The EHRC guidance should clearly direct public bodies on the kinds of steps which should be taken. As a general observation, limiting the data requirement obligations to the level of assessment required for compliance with the general duty raises the question as to the utility of these regulations.

7. We also had concerns as to the lack of clarity concerning the requirement to assess the impact of policies. Case law on the general duty suggests that where due regard is required, assessment of the impact of policies should be conducted in advance, and since a written record is expected if significant analysis has taken place, this suggests that impact assessments should be published. Regulation 2 does not appear to impose a requirement to produce a particular prescribed form or format of impact assessment which is consistent with the decision not to outline a particular process/prescribed set of forms stated at Paragraph 5.7 of the policy.
8. The proposals state that the emphasis is on the equality results achieved, rather than on the completion of a tick-box list of processes, yet Regulation 2 does not appear, in our view, to accurately reflect this. Regulation 2.2(b) refers to impact assessments and appears to place public bodies under obligations which are similar to those which currently exist. This emphasises processes rather than the outcomes emphasised in the aims of the policy. Surprisingly therefore, Regulation 2 does not appear to reflect any emphasis on the results actually to be achieved. There is no reference to outcomes - merely to publishing data (which arguably the public authority may already be required to do in any event either under the general duty or under Freedom of Information law. Given the scope for confusion, guidance or examples should state what is expected.
9. Regulation 2(2) (d) appears to do little more than restate a public authority's obligations under Freedom of Information legislation.
10. The aims that public bodies should engage with people from protected groups (at 5.7) and that the data published should be broad enough to give a full picture of equality (at 5.8) do not appear to be reflected in the draft SI. Regulation 2(d) requires that details of any engagement are published, but not that the engagement takes place (it is also for the authority to determine who it considers to have an interest (not "reasonably considers"), a subjective rather than objective test).
11. In ELA's view the proposals for data reporting could potentially pose significant costs implications for public bodies. Achieving a balance between providing sufficient information to ensure transparency on services and employment and assist monitoring by citizens and also minimising cost may be difficult in practice. It is essential, therefore, that there is sufficiently clear guidance in the EHRC Code. More generally, the lack of precision in the obligations on public bodies will give rise to

uncertainty and potentially lead to litigation. It would be preferable for these matters to be clarified without delay.

**Q2: Do you have any comments on our proposals for employment reporting? Does the drafting of regulation 2 accurately reflect the aims of the policy described in paragraphs 5.10 to 5.11?**

12. The proposals place emphasis "on important inequalities such as the gender pay gap, the proportion of staff from ethnic minority communities and the distribution of disabled employees throughout an organisation's structure". In ELA's view these emphasise the existing duties and obligations and could appear to give the protected characteristics of sex, race and disability more weight than the others. This emphasis is not reflected in the drafting of Regulation 2.
13. Is the intention of Regulation 2(2) (a) is to cover all the protected characteristics? If so the aims of the policy which state that "the requirement should not be interpreted as a requirement on public bodies to routinely collect data on sensitive personnel issues, such as the religion or sexual orientation of their employees" is potentially misleading as it suggests that religion and sexual orientation will not fall within the remit of Regulation 2(2) (a). Disclosing an individual's sexual orientation without consent is a live issue before the Court of Appeal; *H M Land Registry v Grant UKEAT/0232/09*. It would be unfortunate therefore for the Regulations to contain any ambiguity on this point, especially given the emphasis on open access
14. If the aim is to avoid insensitivity to staff, this might be avoided by making it clear that it is optional for staff to disclose the information - rather than optional for public bodies to collect the data.
15. There may be an issue with employees being asked to provide personal information about protected characteristics, such as for example disability, but choosing not to. The extent of the duty imposed upon a public body in such circumstances would be ambiguous as it would not be in a position to force compliance by its staff.
16. Might it not be easier for all public authorities to publish on a certain date in the year, rather than on the annual anniversary of the first publication of that information? If so, consideration should be given to any such date being set with regard to any other reporting requirements which the public body may have to satisfy, which could be set

and clearly notified by the body concerned thus potentially eliminating a layer of bureaucracy

**Q4: Do you have any comments on our proposals for setting equality objectives to achieve transparency about impact on equality? Does the drafting of regulation 3 accurately reflect the aims of the policy described in paragraphs 5.15 and 5.16?**

17. ELA's response to the previous Government's consultation on the specific public sector equality duties dated 30 September 2009 supported the idea that a specific duty for public bodies to publish their equality objectives, citing relevant evidence, would be of benefit, and ELA's position has not changed on this issue. Publishing objectives aids transparency of decision making and the sharing of good practice in addition to enabling benchmarking. Furthermore, ELA considers that public bodies should have due regard to all protected characteristics but should not be required to set equality objectives in respect of each and every protected characteristic as ELA considers that public bodies ought to be able to determine their own priority areas of relevance, in accordance with need, which would be reviewed on a regular basis and may change in accordance with demographic changes.
18. The previous Government proposed a specific duty requiring public bodies, when setting their equality objectives and deciding on the steps required towards achievement and reviewing their progress in achieving them to take reasonable steps to involve and consult employees, service users and other relevant groups who have an interest in how they carry out their functions - or where appropriate their representatives; and in particular take reasonable steps to consult and involve the protected groups for whom the duty is designed to deliver benefits.
19. ELA notes that at paragraph 5.7 this approach has been rejected but ELA considers 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 and a specific duty requiring this would re-enforce public bodies need to do so and enable those groups to challenge those public bodies who fail to do so.
20. Parameters or guidance would need to be given in the EHRC Code to ensure compliance with this collaborative approach and to ensure consideration has been

given to the relevant needs of a protected group. Paragraphs 5.15 refer to "equality objectives" in the plural, however, and in contrast, Regulation 3 will allow a public body to set a single objective. Although the setting of a single objective is not objectionable *per se*, there is some concern that public bodies, if they so wish will be able to set very narrow objectives under Regulation 3, and thereby restrict the success of the aims set out in paragraphs 5.15 and 5.16. This is because under the terms of the current draft Regulation 3(1), the requirement to publish objectives is determined on a subjective reasonableness test. One suggested way of mitigating this risk would be to make the reasonableness test an objective one, having regard to the duty to publish information relating to its performance under Regulation 2(1). As a result, stakeholders will be re-assured that if a specific equality issue is identified through the publication of information, the public body will need to examine carefully its rationale if it chooses not to deal with the identified specific issue under a specific objective.

**Q5: Do you have any comments on these proposed changes? (Paragraphs 5.17 to 5.24)**

**National priorities specified by the Secretary of State (5.17 to 5.19)**

21. ELA agrees that public bodies should be able to prioritise their equality objectives as they see fit in accordance with the needs of their service users as identified following consultation and engagement with them.

**Procurement (5.20 to 5.21)**

22. The proposal for specific duties relating to procurement was a major part of the previous consultation on the specific duties in September 2009. ELA's view at the time, as set out in our response to the previous consultation (Questions 16-19) was that imposing specific equality duties on contracting authorities in relation to their public procurement activities was a helpful step in the promotion of equality and that to achieve this, more prescriptive guidance would help authorities to understand what they need to do to comply with their duties
23. ELA understands that the overarching transparency duty proposed in this consultation is intended to remove the need for specific duties such as in relation to procurement but given the £220 billion spent by the public sector on goods and services each year ELA thinks there is still a case for specific procurement duties to

ensure that such expenditure delivers wider benefits such as equality, and improved services for diverse users.

24. Furthermore ELA notes that the Welsh Assembly Government, in their recent consultation on the performance of the public sector equality duty in Wales (published on 21 September 2010), has proposed specific procurement duties which will require contracting authorities to have due regard to performance of their general equality duty when setting contract conditions and award criteria.

### **Action planning (5.22)**

25. ELA considers that in broad terms, it is desirable for public bodies to identify the rationale for the decisions they will take and how they will achieve them. This will also ensure transparency of decision making and that relevant factors have been taken into consideration in addition to providing guidance to those who are required to take the steps. However, ELA agrees that it is important that the process does not become overly bureaucratic and document heavy. ELA suggests that to ensure this balance is achieved under the new transparency proposals, the Government should ensure that guidance is provided to public bodies in the EHRC Code. Guidance should include:

- how to ensure transparency;
- how to document decision making;
- what data should be collected and analysed. The focus here should be on the quality of the analysis, the robustness of the data collection and analysis mechanisms that are used and open access to the data collected;
- standardising data collection for ease of comparison between public bodies;
- the frequency of monitoring and reporting.
- An alternative view of some members of the ELA working party is for public bodies to do their own monitoring. It would be for the public body to set their own objectives to monitor if they have complied with the guidance and to have executive/senior oversight to ensure accountability. This self-monitoring approach could ensure ownership.

### **Secretary of State reporting duty on disability (5.23 to 5.24)**

26. ELA agrees that Disability stands apart as a protected characteristic because of the many complex and distinct barriers facing disabled people. Assuming there are sufficient safeguards in place in relation to the overarching transparency duty and

consultation with disabled service users ELA agrees with the proposal not to retain a disability reporting duty on certain Secretaries of State.

**Q.6: Do you have any comments on our proposals for transition from the existing duties relating to race, disability and gender to the new public sector Equality Duty, as described in paragraphs 6.1 and 6.2?**

27. The proposed time scale for compliance with the new duties seems rather challenging. Although the consultation document records that it is "reasonable" that the general duty should come into force immediately, there is a real difference between the current duties in relation to race, disability and gender and the new holistic duties encompassing most of the protected characteristics identified in the Act. For the public bodies to meet their general duty effectively, we think they would need to evaluate their practice (including their policies and processes) in order to be able to show that they have actively directed their minds to the issues (see *Harris v LB Haringey and Ors* [2010] EWCA Civ 703). In addition, we wonder whether public bodies have been able to devote resources to meeting their general duties at the current time. We also consider that compliance with the general duty to "have due regard" and the specific duties proposed will be most effectively done if combined. Therefore the Government might/should give consideration to implementing both general and specific duties in a combined time frame.

**Q.7: We would welcome your views on the proposed list of public bodies for Part 1 and Part 4 of Schedule 19, as described in paragraphs 7.7 to 7.12?**

28. We note the extension of the list and the criteria established. We think it is a matter for Government to determine the bodies within scope but we are puzzled by the absence of a number of bodies such as the Office of Independent Adjudicator, or any bodies regulating accountants.

**Q.9: Do you have any other comments on the drafting of the statutory instrument? If yes, please explain.**

29. We have no additional comments on the drafting of the statutory instruments; our general comments on the likely legal ramifications of the regulations are outlined in answer to question 12.



**Q.11: Are you aware of any other benefits resulting from the proposal that have not already been described in the consultation document or the regulatory impact assessment?**

30. Of course, greater transparency has a positive effect on disabled and minority groups applying for posts which they may have previously considered previously unattainable, apart from this ELA is not aware of any other benefits resulting from the proposal that are not already described in the consultation document or the regulatory impact assessment.

**Q. 12: Are there any other comments you would like to make in relation to this consultation that have not already been covered by this form? If yes, please explain.**

31. In answering this question, ELA aims to look more broadly at the proposals as a whole in order to comment more generally on the effectiveness of the proposed legislation.

ELA recognises the primacy of the general duty in section 149 of the Equality Act 2010. The role of the specific duties is to provide some direction for public bodies to help them towards compliance with that general duty. ELA welcomes the various cross references in the draft Regulations to the “section 149(1) duty” which should help maintain the appropriate hierarchical linkage between the general and specific duties and thus ensure that neither is overlooked or regarded as merely a tick box exercise.

32. Overly specified specific duties can drive compliance towards the minimum legislative requirement rather than peer group pressure which can operate on an “adopt, adapt, improve” competition style model, driving standards up. ELA would caution against too much faith being placed in competition. The experience of ELA members has been that public bodies are very keen to drive forward an equality agenda and find legislative compliance to be a very useful tool in the internal battle within public bodies for recognition of the issue 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.

33. This problem stems partly from framing the general duty as an obligation to have “due regard” rather than as a duty to take steps to eliminate discrimination and achieve equality of opportunity. However, we are where we are with the general duty. Our concern is that the proposed set of specific duties compounds the weakness of the general duty by adopting an insufficiently prescriptive approach for public bodies and that the proposed specific duties will therefore provide an insufficiently robust framework for achieving the ambitions expressed in the consultation document.

ELA has structured its comments on the effectiveness of the draft Regulations around the government’s stated approach to the specific duties set out in paragraph 4.8 of the consultation paper:

transparency;

enabling citizens to exercise greater choice;

devolving power;

focusing on measurable results.

## **Transparency**

### **Paragraph 2(1)**

34. The draft Regulations deal with transparency at paragraph 2 which is headed “Publication of information.” The timing of publication is dealt with in paragraph 2(1). ELA has two general concerns about the timing proposals.

35. First, the initial obligation will be to publish information on 4 April 2011 about compliance with a general duty which will itself have only just come into force. The transition from the transparency requirements of the three outgoing sets of specific duties could perhaps be more clearly handled.

36. Secondly, the obligation to publish at intervals of not more than one year could result in information being withheld for periods of up to one year or possibly longer since the one year obligation runs from the publication of the last set of information and there is no obligation to publish an all encompassing annual report. ELA’s concern is that local democratic accountability (paragraph 3.5 of the consultation paper) could be frustrated by the delay between, for example, an impact assessment of a proposed policy, the subsequent implementation of that policy and the eventual publication of the information relating to the impact assessment. This is mitigated to

a degree by the Freedom of Information Act and the Public Data Principles particularly those dealing with timeliness and openness. ELA is conscious of the need not to increase administrative problems or expense for public bodies. However, the specific duties might better support those Principles if the obligation was either framed as requiring all information to be published at least annually or perhaps more effectively by providing an obligation to publish relevant information:

- in respect of paragraph 2(2)(a) at least annually; and
- in respect of paragraphs 2(2) (b) to (d) on an on-going basis as soon as reasonably practicable after the information is generated.

As to the general concept referred to in paragraph 3.5 of the consultation paper “of replacing top-down interventions from the centre with local democratic accountability driven by transparency and decentralisation” that is, ELA assumes, a reference to stakeholder action through either accountability at the ballot box (which will not generally be relevant to all public bodies), the “court” of public opinion and judicial review proceedings in respect of the general duty (in which case the timing of publication may be particularly important).

### **Paragraph 2(2) (a)**

37. Guidance on the monitoring data required in respect of the protected characteristics of staff is largely being left to a Code of Practice. ELA would question whether this model is going to result in the level of consistency and “fine granularity” (which ELA takes to mean “detail”) in the information necessary to drive change through local democratic accountability. A Code of Practice is perhaps inherently likely to be less prescriptive than, for example, the current race specific duty in article 5 of the Race Relations (Statutory Duties) Order 2001 (and others). That article applies in part to all listed public bodies (and in this respect is arguably more transparent than the proposed Regulations) but applies greater scrutiny to those with 150 or more full time staff including requiring the publication of data by racial group of those involved in grievance and disciplinary procedures and those leaving employment.

38. ELA would also question the likely effectiveness of the enforcement model for this specific duty. Legal enforcement remains through “bureaucratic quango[s]” (paragraph 4.6 of the consultation paper - presumably a reference to the Equality and Human Rights Commission?) starting with an assessment under section 31 Equality Act 2006. Under the proposed specific duty the EHRC would be assessing

compliance not with a set of minimum reporting requirements under secondary legislation but with guidance in their own Code of Practice.

39. ELA's view is that stated objective of transparency is more likely to be successfully and consistently achieved through clear specific duties like those currently applying in respect of the protected characteristic of race, than through a Code of Practice. Given the difficulties acknowledged in paragraph 5.11 of the consultation paper of gathering monitoring data in relation to sexual orientation and religion or belief, setting out basic monitoring data in respect of race, disability and gender in the Regulations while supplementing this with a Code of Practice that also deals with the other protected characteristics may be more effective.

#### **Paragraph 2(2)(b)**

40. The connection between impact assessments and the general duties has been, in ELA's view, always a little too removed. The race duty requires that a Race Equality Scheme should set out the public body's arrangements for carrying out impact assessments whilst falling short of providing a clear obligation to carry them out: the obligation being in part implied through the equality scheme model and in part through the evidential question "without an impact assessment how would a public body demonstrate that it has had due regard to equality in the context of its general duty?" The disability and gender duties plug the implementation lacuna in the race duty and are therefore stronger on the link between framework and action.

41. The proposed paragraph 2(2) (b) of the draft Regulations adopts an assumption that impact assessments will be carried out and therefore that those that are should be published. This is regulation with a much lighter touch than currently exists. However, the question is whether it is more or less effective than the current model of achieving transparency?

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. Taking the example of unfair dismissal, a positive outcome is that every dismissal is fair but that is only achieved through an employer following its disciplinary and performance management processes which themselves have been constructed on a foundation of the ACAS Code of Practice and case law.

42. It is ELA's view that the draft Regulations miss an opportunity to provide a clearer connection between impact assessments and the general duty, underlining their central importance in mainstreaming equality considerations into existing and proposed policies and practices. Further, the removal of the equality scheme model makes it less easy to hold public bodies accountable to the arrangements, actions and standards they have set for themselves.

**Paragraph 2(2) (c)**

43. ELA has no additional comment to make on this paragraph.

**Paragraph 2(2) (d)**

44. One element of transparency is stakeholder engagement. This paragraph requires the publication of details of such engagement and is welcomed by ELA so far as it goes. However, ELA also notes that certain aspects of the current engagement framework are being abandoned. For example, there will be no replication or development of the current obligation to involve disabled people in the preparation of a disability equality scheme and the obligation in the preparation of a gender equality scheme to consult employees, service users and others (including trade unions) who appear to have an interest in the way the public body carries out its functions. In this respect the current proposals represent a step backwards to a less transparent model which is less democratically accountable at a local level.

**Enabling citizens to exercise greater choice.**

45. The consultation paper recognises that there is often little or no choice in respect of where one sources public services which limits the ability of stakeholders to vote with their feet. ELA does recognise the power of comparison in driving equality standards forward. Comparison can be between a public body's actions and statutory requirements or EHRC guidance or it can be comparison between one public body and another – especially where bodies are carrying out similar functions such as local authorities or regulatory bodies. To facilitate comparison there does need to be consistency in the gathering and presentation of data and some guidance in this area would be helpful.

46. There is recognition in paragraph 5.3 of the consultation paper that “different bodies will necessarily publish different data sets relating to their particular business.” ELA does not see the different nature of public bodies as “necessarily” resulting in

different data sets in all areas. The existing race monitoring obligation is an example of an area where data sets can be applied to all public bodies. ELA sees the potential for inconsistent data as being a significant weakness in enabling citizens to exercise greater choice or hold public bodies to account. Much will now rest on the EHRC Code of Practice.

### **Devolving power**

47. We have commented above on the limitations of local democratic accountability. The existing specific duties enable every public authority to devise their own bespoke approach within in a set framework. This blends opportunities for innovation with minimum standards. ELA's concern with a more laissez-faire approach is that those who have innovated will continue to do so and those who would have struggled to hit minimum standards will achieve less with the minimum standards removed.

### **Focusing on measurable results**

48. This is presumably a reference to draft Regulation 3. Whilst ELA broadly supports the idea of incorporating objectives, ELA is concerned 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 message this sends is that one objective represents full compliance and two objectives would be going twice as far as necessary. Contrast this with for example, the existing gender duty which requires a gender equality scheme to set out the “overall objectives” – having consulted stakeholders (a concept missing from the new model) - which the public body has identified as being necessary for it to perform the general and specific duties.

49. ELA welcomes the requirement that objectives be specific and measureable and that the public body must set out how progress should be measured. The drafting would however, benefit from a requirement that the objectives must be measured and the findings included in the list of information that should be published under Regulation 2.

**10 November 2010**

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