



Scottish Government

Response to the Consultation on Public Sector Duty Specific Duties

**The UNISON Scotland submission to the Scottish Government's
Consultation on Public Sector Equality Duty Specific Duties.**

Introduction

UNISON Scotland has over 160,000 members in Scotland, Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers, working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector. Over 70% of our members are women; many are low paid or work part time.

We welcome the opportunity to respond to this Scottish Government consultation. UNISON supports the proposals within the Equality Bill to introduce a single equality duty. We note that this will require public bodies to pay due regard to the need to address unlawful discrimination and to advance equality of opportunity for all protected characteristics and to promote good relations. At their best, public services are a mechanism for transmitting opportunity, fairness and equality in society. Whether through a universal education system or a national service for health. This has worked through the provision of quality public services based on need rather than the ability to pay and also the role that public bodies play as significant employers in their communities.

Our experience of public bodies tells us that the current equality duties have made a positive contribution to both the workforce and the wider community. A positive approach to mainstreaming equality rather than a reactive one once problems arise is appropriate. It is right this responsibility rests on all public bodies.

Overview

UNISON believes that it is appropriate to take what is good from the 3 existing duties and create a modern fit for purpose single duty. We agree on the need for equality outcomes i.e. the purpose of the Duty has to be to enact change. However UNISON believes that consistent and transparent processes are also key to outcome delivery. We recognise the diverse structures and remit of different public bodies and agree that the duties must be appropriate to all.

Government's stated aim is that the specific duties provide a "clear, specific framework"; but we question if the proposals as set out can achieve this. The principles of new duty are stated as: the use of evidence, consultation and involvement, transparency and capability. Whilst we can not disagree with this list in theory, the question is will what is proposed deliver?

In addition to these general concerns, we have identified a number of issues which are omitted from the consultation paper:

- The key role of trade unions, the focus must be as much on the workforce as on the delivery of services to communities.
- The requirement in the current gender duty to address the gender pay gap must be included within the new duty, as should the specific requirement to consult trade unions. The gender pay gap remains persistent in public as well as private and voluntary sectors. The gender pay gap needs urgent action but the proposals in the consultation paper represent a regressive step, and do little to reflect the current situation within public bodies.

- The issue of enforcement is key but not covered by the consultation document. UNISON believes that the public inspectorates should have a role in inspecting and enforcing the equality duty. To do this they must be adequately resourced.
- It is extremely disappointing that the requirement within the existing race duty to train staff in regard to the general duty is not transferred across to the new single duty.

The Scope of the Duties

We welcome the statement that “Broadly speaking, we expect that the vast majority of bodies subject to the existing duties will also be subject to the new specific duties.”

UNISON believes all public bodies should be covered by the requirement together with any organisation providing a public service. We note the UK Solicitor General’s intention to extend the list of bodies covered and we look forward to seeing the Scottish Minister’s list.

However we are concerned at the proposed criteria for identifying which bodies should be covered by the specific duties. A “significant” employer is hard to define, as is the concept of having a “significant” effect on people’s lives. It is not clear how this will, or could, be defined. Also is it expected an employer has to meet simply 1 or 2, 3 or all of the criteria before having obligations under the specific duties? What weighting is to be given to any of these criteria?

These criteria appear to ignore the workforce: all employers have a significant effect on their workforce. Many public bodies are not necessarily directly outward looking, public facing but their impact on services, on equality can be great.

We believe that there should be presumption that a body is covered, not that it is exempt. We argue that there should be a full list set out within primary legislation and that Scottish Ministers should use their powers to amend and extend the list to encompass as full a list as possible.

The duties should apply to any body providing a public service or in receipt of public funds.

For example, bodies such as Glasgow Housing Association are listed as limited companies but are in receipt of substantial public funds and are not currently covered by the existing duties.

Fitting with the Electoral Cycle

Whilst we recognise the current statutory requirements to hold elections in Scotland every 4 years, we believe that the present requirement of reviewing equality schemes every 3 years is a reasonable timescale and allows public authorities to be more focussed on their objectives.

However, as stated earlier we do not accept that the focus on equality objectives alone will be adequate

Delivering on Mainstreaming

The aim should be to mainstream the duties into core work of organisations. It is of concern that a public body would not be required to consider all protected characteristics and could for instance seek some “quick wins”. For public bodies to be able to meet their general duty they must be able to understand the full range of circumstances in all their areas of responsibilities. Otherwise it is uncertain that they would be able to meet their obligations under the general duty.

Without the requirement to do this via evidence gathering it is unclear how they can appropriately decide what objectives to pursue. This should be done in full consultation with the workforce, recognised trade unions and service users. Public bodies are already used to the evidence gathering requirements of the 3 existing duties – the proposals for the single duty can only be viewed as a retrograde step.

Further, without Equality Impact Assessments we question how satisfactory evidence can be gathered prior to any outcome? Equality Impact Assessments (EIAs) can identify institutional discrimination – the process is therefore very important.

Setting Equality Objectives

We agree with the proposal to set equality objectives, subject to caveats set out in mainstreaming equality. It is also questionable why equality schemes are to no longer be required. They can assist in users and the workforce understanding the actions of a public body and aid clarity on how they can be involved. It is an essential and identifiable first step. It is a simple and increasingly understood concept and could offer a one stop accessible document. Without the requirement for an equality scheme it is questionable as to what tests would be used in enforcement? Equality schemes have been found invaluable for making progress in race, gender and disability equality in local government. There are numerous examples of how current equality schemes have helped mainstream equality in the public sector.

UNISON therefore strongly urges the Government to maintain the requirement for public bodies to publish equality schemes, using evidence on all protected characteristics and setting out all steps it intends to take to meet its equality objectives.

In respect of question 8, we concur with the Scottish Government that equality objective setting should be linked to the corporate and/or business planning mechanisms of public authorities

The purpose of the duties has to be to effect change i.e. to do more than is currently done. This will place pressures on public bodies to alter actions from the past and any new actions should be factored into future business planning.

Reporting on Progress

We agree with annual reporting on objectives but suggest that there should be reporting on all protected strands. Public bodies should have to consult on the methods/process of reporting in order to ensure maximum transparency.

Equality Schemes allow for information, targets, actions, objectives and outcomes to sit in a timetabled framework enabling monitoring and review and measurable progress reports to be published transparently. The reporting needs to be linked to an external standardised auditing procedure in order that comparable measurements of progress can be assessed with more objectivity. For example the processes and mechanisms for managing and overseeing the actions to achieve the equality objectives need to be in place and are not separate from achieving equality objectives. In other words the means are just as important and integral as the ends. External auditing linked to annual progress reports ensures robust equality practices, policies and measurable progress in objectives. The annual reports need to have a standard or framework to report against and these needs to be linked to external auditing or appraisal or subject to scrutiny procedures.

We agree that the Scottish Government should prescribe in legislation how Scottish public authorities should report on progress.

UNISON agrees that there should be such a specific duty. This duty must spell out the need to consult and involve recognised trade unions.

Employment Reporting

We do not believe the argument as to why there should be a threshold of 150 employees is persuasive. We would argue that the threshold should be lower.

The proposed reporting on the gender pay gap would be a serious retrograde step from what most public bodies already do. A single gender pay gap figure is meaningless in large organisation or for difference between full and part time workers. The test has to be: can an organisation and an individual know how their pay compares relatively to others in an organisation, identify the reasons and know what will be done to rectify the situation? UNISON believes that only a full pay audit can satisfactorily answer these questions.

(An equal pay audit involves comparing the pay of men and women doing equal work, investigating the causes of those pay gaps and planning to close any pay gaps that cannot be objectively justified. An equal pay audit is concerned with a specific but important aspect of the gender pay gap – unequal pay for equal work. Equal pay audits are recommended in the Code of Practice on Equal Pay as the best means of ensuring that pay systems are free from sex bias.)

The requirements of the existing race duty already go further. A single figure on reporting on minority ethnic employment could conceal a range of other issues: such as segregation into lower grades, excessive focus on disciplinary/capability procedures for some ethnic groups of staff. It ignores training and promotion i.e. moves away from detailed monitoring, much of which is now in place.

Finally we note that the Equality and Human Rights Commission is currently consulting on gender pay reporting in the private sector. This consultation considers options beyond that proposed in this consultation i.e. reporting on a single figure. It is unclear how these processes relate to each other.

We do not agree with the use of the overall median pay gap figure. The use of the median figure to calculate the pay gap is contrary to the approach recognised in other European countries. The mean was traditionally used. It is obviously not possible to compare the median figure for the pay gap with the mean figure for the pay gap in order to identify any trends. Further, the overall gender pay gap may include pay and reward packages where benefits are bought out by other benefits.

UNISON does not believe the overall median gender pay gap figure is acceptable as it can be distorted according to the pay distribution. If there is a high percentage of low paid staff, the median figure will be accordingly lowered and vice versa if there is a high percentage of high paid staff. Further the part time pay gap must be disaggregated from the full time pay gap. The median figure can not accurately reflect what may be happening in terms of pay, for example it can obscure the full time/part time pay differential, and can, as stated, ignore concentrations of low pay in some areas.

It is essential for comparative purposes to use a standard measurement. Eurostat, the European Commission statistical service, uses average hourly pay when calculating pay gaps. The calculation should include both hourly basic pay and hourly total pay. Using hourly pay rates removes the distortion in comparing part time and full time rates of pay.

Calculating the overall gender pay gap will not tell an employer where equal pay risks are; it will only indicate that there may be an issue. Information on a grade by grade basis, where such structures exist, will pinpoint more accurately any equality issues. An audit of like work jobs will also identify any equal pay disparities, taking into account service or performance.

The overall gender pay gap reflects the gender distribution throughout the grades, but it does not show where there might be grade pay disparity. The ECJ decision in Danfoss illustrates the need to have the average pay for those who have been rated as equivalent in order to assess whether men are being paid higher. In this case, performance pay was at issue and men tended to have a higher average pay than women in the same grade. The overall gender pay gap will not tell us where equal pay cases could be identified. It will only indicate that there may be an issue.

In respect of collating information on the gender pay gap, we believe that computerised payroll and employment systems should mean this is a relatively inexpensive exercise.

It is good HR practice to update workforce information on a regular basis. A pay modeller will enable organisations to make accurate predictions on the future shape of the workforce and put in the appropriate training and development schemes to support workforce development in addition to equal pay auditing.

Nevertheless, we would argue that the Scottish Government needs to address the need for more streamlined pay bargaining structures, e.g. in Non Departmental Public Bodies and Further Education Colleges that can also approach a consistency approach and support smaller employers.

The Government are proposing to exclude small employers, presumably on grounds of administrative burden. However, if it is a small employer, the information that needs to be garnered will be quite limited.

We believe that measures to establish occupational segregation would be useful.

We believe it is essential to require public bodies to report employment data in relation to other characteristics protected under the Equality Duty.

The duty is across all protected characteristics. However, confidentiality, difficulty in gaining some sensitive personal data such as sexual orientation or religion or belief is recognised.

More importantly, the collation of such data provides the base line for undertaking equality impact assessments and gives a clear picture of the workforce.

The Scottish Government has indicated in paras 4.30 and 4.31 of the consultation document that the reporting of employment rates for all protected characteristics may not be appropriate. It is not clear why they believe this to be the case. Under the current Race Equality Duty and Gender Equality Duty, they are required to gather this type of information already.

UNISON believes that the Scottish Government should set out clearly how public authorities should gather information on employment rates on all the protected characteristics. The guidance produced by EHRC for the Gender Equality Duty should be used as an initial template. This process should be monitored in order that the reporting of employment data can be improved upon for the future.

Demonstrating the Impact on Equality of Policies and Services

A key feature for public authorities in demonstrating how they have considered the impact of equality on their policies and services is to undertake an Equality Impact Assessment (EIA).

We know the benefits of impact assessments and therefore as previously stated the removal of the requirement for public bodies to conduct impact assessments is a retrograde step. Impact assessments must be carried out before any decisions are taken. They add transparency and clarity. Guidance on how to conduct impact assessments appropriately is essential. The argument in favour of equality impact assessments is not, however, an argument against a focus on outcomes and change.

We believe the Scottish Government should prescribe for all public authorities the requirement to undertake EIAs as part of their responsibility under the new duty. They should be required to:-

- Provide details of all EIAs
- The role and involvement of key stakeholder

This duty must spell out the need to consult and involve recognised trade unions.

Procurement

UNISON welcomes the emphasis in the Bill on ensuring that public sector equality standards are not diluted when public bodies purchase goods or services and we applaud the progressive approach to procurement that seeks to use public purchasing power positively as a mechanism for promoting equality of opportunity and preventing discrimination.

UNISON believes that the imposition of specific equality duties on contracting authorities in relation to their public procurement activities is essential to their success. A voluntary approach will inevitably become a partial approach. We have evidence of how even statutory guidance on procurement is frequently evaded by contracting authorities, especially where there are cost implications, e.g. Section 52 provisions. There is a need to ensure that the Bill does not contradict Government and EU policy on procurement and commissioning. Both the EU and UK Government have stated that decisions on procuring services should be made on a level playing field between competing service providers. If in-house bids for services are required to comply with equality duties, but the private and third sectors are exempt, then clearly this creates an inherent unfairness. UNISON is concerned that the equality duties should equally apply to those parts of the third sector that are not already covered. The third sector has a very close relationship with the public sector and is increasingly running public services for the public sector. It therefore undermines the public sector duties if the third sector is not included. Further, we strongly believe that the economic downturn should not be used as an excuse to exempt the private sector from a responsibility to promote equality through the delivery of public services.

Equalities must be about raising standards and ensuring application across the economy and not letting organisations that do not wish to prioritise equalities off the hook. We have seen where such an approach leads. The market for public services has been growing steadily for the past two decades and is set to expand further. Without the imposition of clear duties we will see the outsourcing of equalities responsibilities and a consequent fall in standards.

Some public authorities have explicitly stated that they have already resorted to outsourcing to avoid their equal pay obligations.

UNISON believes that for this to be successfully applied, the reference to procurement on the face of the Bill needs to demonstrate a clearer intention, so that there can be no question about its purpose. Procurement is constrained by EU law which has often been interpreted in a very conservative manner, especially when it comes to social and environmental issues. It is therefore essential for the Scottish Government to give a powerful and clear steer to procurement officers as to what is expected of them from the equality duties.

Similarly contracting authorities will need to include their equality objectives in all their policy documents and then consider how they can be applied at each stage of the procurement process.

UNISON believes that the role of the public sector as employer and its obligations to those carrying out public services must be clearly expressed in the equalities guidance on procurement. The public sector has achieved a great deal for the groups identified in the equality strands and much of public sector practice acts as an exemplar. UNISON would therefore like to see clear and explicit reference to fact that the equality duty applies equally to the workforce undertaking public services as to those receiving services, particularly if they are employed by the private or third sectors.

The Scottish government introduced regulations, including Section 52 and the PPP Protocol, with the aim of ending the two tier workforce, where employees work alongside each other doing identical jobs, but on varying terms and conditions, haphazardly determined by the stage of a contract at which they were employed. Any two or more tier workforce is inherently unequal and will ultimately be open to challenge on equality grounds. This could be averted if the provisions were applied, without exception across the entire public sector.

There has been a great deal of discussion of how to ensure that small and medium sized enterprises (SMEs) get a share of public contracts and UNISON supports this. However, UNISON would not agree with any watering down of equality principles in order to get SMEs on board. It would be no consolation to employees or service users to know that they were experiencing any degree of discrimination in order to facilitate the economic inclusion of an SME. Rather there is plenty of good practice of positive engagement with SMEs in order to ensure they are supported to achieve the equality standards envisaged in the Bill.

Finally UNISON sees procurement as an area where thorough and comprehensive Equality Impact Assessments have a strong role to play, again both from the perspective of service users and employees. Once the Bill has passed into legislation then UNISON believes EIAs will need to be applied to previous and current decisions to outsource public services.

UNISON strongly agrees that contracting authorities should be required to state how they will ensure that equality factors are considered as part of their procurement activities. Procurement is a complex process and equalities need to be considered at every stage. A clear statement will assist authorities in the planning and implementation of their equality objectives. Indeed, public authorities should see their procurement processes as an essential part of their equality objectives.

It will also ensure that all parties – within contracting authorities and amongst contractors – are clear at the outset about the equality policies being pursued and how they relate to particular contracts.

Procurement and equalities can exist in different parts of organisations without being properly joined up, so that procurement can be isolated from mainstream equalities.

At the outset, public authorities will need to consider how their equality duties must be taken into account when they determine the appropriate definition for the 'subject matter of the contract'. Too often the 'subject matter of the contract' is treated almost as a separate entity, divorced from and acting as a constraint on equalities. A holistic approach to procurement would consider how to include equalities at this crucial stage of procurement.

The use of equality-related award criteria is the best way to follow through the equality policies and intentions of contracting authorities and to clearly signal intent to potential bidders. Furthermore they will form an indispensable tool for contracting authorities in the discharge of their equality duty. Without it authorities will be hard pressed to differentiate between the equalities policies and practice of different bidders.

There will also be a need to differentiate equality in employment from equality for service users and to have separate award criteria for each. Furthermore it will be really important to provide clear guidance and examples of exactly what equality-related award criteria will mean in relation to the workforce, and how the workforce fits in to the 'subject matter of the contract'.

Equality-related contract conditions are the key mechanism by which contracting authorities can hold contractors to account and ascertain that they are indeed fulfilling the obligations laid out in the contract, provided that the equality provisos have first been included in the specification.

Equality-related contract conditions may apply to any kind of contract and can be about the employees on the contract as well as the service users in a service contract. So for example, equality related contract conditions might apply to the recruitment, selection and terms and conditions of the workforce employed to deliver the contract. Or they may be to do with the adoption of an equal opportunities policy by the contractor.

Such conditions will need to be followed through into the monitoring of the contract if they are to have any effect.

It will be important to follow the equality duty through and have some way of distinguishing between contractors that accept the equality duties and those that do not.

Clarity in this area will help to enforce the equality duty and to avoid litigation, especially at EU level.

It will not be sufficient to form an opinion based on a snapshot – but rather to produce a full, evidence based picture of the supplier attitudes and behaviour which will have the benefit of encouraging and rewarding improvement and compliance.

Evidence will require a picture over time, of at least 3-5 years, with the aim of identifying serious and repetitive breaches and of identifying policies, processes and procedures to deal with any breaches.

Any regulatory proposal of this type must empower a regulatory body to act decisively to deal with breaches. Only a strong enforcement body which has the resources and powers to deal with contractors who breach discrimination law will be successful in this role. The powers of the regulatory body should include the ability to halt any public sector procurement process which is deemed to have breached discrimination law.

Leadership by Scottish Ministers

We agree that Scottish Ministers should continue with their role of identifying and reporting on progress being made on equality in Scotland.

Nevertheless, we have considerable concerns in relation to para 4.53, that the proposal to report three months before the next Scottish Parliamentary elections is too close and believe nine months is more appropriate to allow parliamentary scrutiny.

We would also reiterate our view that progress should be reported every three years.

Documentation

Public Authorities should be required to support their equality objectives with:-

- Details of Equality Impact Assessments
- Consultation with relevant key stakeholders, including trade unions
- Equality Schemes, Objectives and timetables
- Annual Progress Reports
- Three yearly reports

The Scottish Government should also consider introducing a pro forma that all public authorities would be required to complete.

Enforcement and Scrutiny

The EHRC has a key role to play in monitoring, guiding, supporting and where necessary enforcing the duty. Codes of practice will be essential so that there is clarity for public bodies on how to meet their obligations. The EHRC will need to spell out what is meant by proportionate etc.

The recommendations of the Crerar Review will play a key role in the scrutiny and progress of equality objectives. The role of Audit Scotland could be of significance where further scrutiny is required.

We also believe that Parliament should take a more proactive role in scrutiny to ensure independence from Ministers. This will require adapting existing reporting and governance arrangements.

UNISON believes that crucial to this process is the development of appropriate performance measures. These must be sophisticated enough to take into account all relevant factors in service provision. Any targets or key indicators should be designed to improve overall services.