

## **The Single Equality Act and the public sector**

### Manifesto pledge

Tucked away as the penultimate paragraph of the Labour Party's 2005 Manifesto, was a commitment that - "In the next Parliament we will establish a Commission on Equality and Human Rights to promote equality for all and tackle discrimination, and introduce a Single Equality Act to modernise and simplify equality legislation." Never accuse the Government of failing to deliver on its promises. The CEHR is only a couple of months away from its proposed launch and consultation has now begun on the Government's proposals for a Single Equality Bill. Those proposals have developed out of the Discrimination Law Review, launched in February 2005 to explore opportunities for creating a clearer and more streamlined legislative framework for discrimination.

### Public sector equality duties

The Single Equality Bill consultation has particular relevance to in-house lawyers and law firms advising public authorities. Those authorities are affected not only by all of the proposed general harmonisation issues to the law but in particular proposals affecting the public sector equality duties. Let's recap. In the aftermath of the February 1999 Macpherson Report (the Stephen Lawrence Inquiry), the Race Relations (Amendment) Act 2000 introduced a general duty on a comprehensive list of public authorities when carrying out their functions to have due regard to the need to eliminate unlawful racial discrimination; promote equality of opportunity; and promote good relations between persons of different racial groups. This was supplemented by secondary legislation introducing specific duties to prepare a 'Race Equality Scheme' and monitor employees by ethnicity.

A similar approach has now been introduced for the disability and sex "strands" of discrimination. From 5 December 2006 section 49A of the Disability Discrimination Act introduced a disability general duty and section 76A of the Sex Discrimination Act 1975 introduced a gender general duty from 6 April 2007. These are significant developments, "the biggest change in sex equality legislation in thirty years" according to Jenny Watson, Chair of the Equal Opportunities Commission in her forward to the accompanying Gender Equality Duty Code of Practice.

There are a number of similarities between these three equality duties. Each has as its objective the "mainstreaming" of equality considerations into public authority functions. Each has a general duty which acts like an equality mission statement. Each has specific duties requiring designated public authorities to produce an Equality Scheme setting out the steps they will take to comply with the general duty. Each has a statutory Code of Practice from the relevant equality Commission. But that is pretty much where the similarities end. Given the piecemeal way in which the legislation has developed and the lack of an overarching Commission with a harmonising frame of mind, a confusing list of anomalies has been allowed to develop:

- the race general duty applies only to listed authorities whilst disability and gender have eschewed the list approach for a more generic description of public authorities, although each is worded differently;
- monitoring obligations exist only in the race specific duties, reporting obligations on Secretaries of State only in disability;
- consultation would be good practice when producing a Race Equality Scheme, mandatory for a Gender Equality Scheme and inadequate for a Disability Equality Scheme which instead requires the active involvement of disabled persons;
- and each set of duties operates on a different review and publishing timetable.

#### Harmonisation?

But wait, a Single Equality Act will sweep away these anomalies in favour of one simple integrated equality duty. Well ..... maybe not quite. First, there is no drafting so lawyers are unable to see how a harmonised equality duty might appear. The consultation is also decidedly lukewarm on the concept of extending public sector duties to the “age” “sexual orientation” and “religion or belief” strands. It is difficult to know whether the Government has genuine reservations or whether it is mindful of the potential for such changes being misinterpreted in the media as proposals to “promote homosexuality” or “ban Christmas”! Either way, a Single Equality Act which aims to harmonise and simplify the law should try to avoid creating a hierarchy of strands with some strands more equal than others.

#### Statement of purpose

The consultation floats the idea of an integrated general duty for race, disability and gender being supported by a “statement of purpose” with four dimensions (i) addressing disadvantage (ii) promoting respect for the equal worth of different groups and fostering good relations within and between groups (iii) meeting different needs while promoting shared values (iv) promoting equal participation. It is easy to see how public authorities struggle with the distinction between permissible positive action and unlawful positive discrimination when even a proposed clarifying statement of purpose talks in terms of “taking steps to counter the effects of disadvantage so as to place people on an equal footing with others” (i.e. treating people differently in order to achieve equality). This is recognisable in terms of the provision of reasonable adjustments for the disabled, rather less so in relation to race and sex.

#### Priority areas

The consultation also asks us to consider whether the public duties would be more effective if they required public authorities to focus action on a limited number of priority areas. Were such a model to be adopted public authorities would need to decide on their priority equality objectives in the context of local and national priorities. The obvious advantage of focusing time and resources on specific areas needs to be balanced against the potential damage to the concept of “mainstreaming” equality into everything the authority does. Those areas that are not priority could therefore be ignored. However, the

current equality duties require authorities to have “due regard” to be need to promote equality which in itself suggests that some areas will be more of a priority than others.

#### Amendments to specific duties

The Government is proposing to replace the existing specific duties with four key principles: consultation and involvement; use of evidence; transparency; and capability. This would appear to make the law more intangible and potentially, severely weaken the enforcement powers of the CEHR: it is much easier to enforce a tangible specific duty than a key principle. Of course, equality is never going to be achieved simply by following the process. Ethnic monitoring for example, is not an end in itself. What is needed is a combination of tasks and principles. But a reliance simply on principles risks a major step backwards.

#### Procurement

Public authorities have the potential to deliver equality through their functions including through procurement which is worth over £125 billion each year in the UK. Public authorities can influence equality outcomes in part in the way they select private sector contractors but more importantly through the terms of service contracts. The consultation recognises that this is a difficult area and proposes clearer guidance, but the Government has rejected the idea of specific duties relating to procurement.

#### Closing date

Consultation closes on 4 September 2007. This is potentially the biggest shake up of equality law in thirty years and all lawyers are encouraged to participate now or miss the opportunity for another thirty.

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