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Sourcing: UK Public Authorities and their Service Providers' New Duty to Promote Gender Equality

May 2007

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Under the Equality Act 2006, public authorities have a statutory duty under UK law to eliminate unlawful discrimination and harassment on grounds of gender and to promote equality of opportunity between men and women. This shifts the burden of ensuring compliance with equal opportunities legislation from employees to employers, in recognition of the fact that, despite 30 years of individual legal rights, there is still, regrettably, widespread inequality in the workplace.

The definition of “public authority” is wide and includes any employer which has functions of a public nature, i.e. private sector employers carrying out functions on behalf of a public authority. Accordingly, a public authority outsourcing its functions will have to ensure both that it has due regard to gender equality in the procurement process and that the contractor discharges the duty throughout the contract.

The Gender Equality Duty

From 6 April 2007, UK law imposes a general duty on all public authorities, when carrying out their functions, to have due regard to the need:

- to eliminate unlawful discrimination and harassment; and
- to promote equality of opportunity between men and women.

Some employers are also subject to various specific duties to help them meet the general duty, namely:

- to prepare and publish a gender equality scheme, showing how employers will meet their general and specific duties and setting out their gender equality objectives;
- in formulating their overall objectives, to consider the need to include objectives to address the causes of any gender pay gap;
- to gather and use information on how the employers’ policies and practices affect gender equality in the workforce and in the delivery of services;
- to consult stakeholders (i.e. employees, service users and others, including trade unions) and take account of relevant information in order to determine the employers’ gender equality objectives;
- to assess the impact of the employers’ current and proposed policies and practices on gender equality;
- to implement the actions set out in their schemes within three years, unless it is unreasonable or impracticable to do so; and
- to report against the scheme every year and to review the scheme at least every three years.

The duty applies to all public authorities (see below as to precisely **who is covered?**) in respect of all of their functions (with limited exceptions), for example, policy-making, service provision, employment matters and in relation to enforcement or any statutory discretion and decision-making. In addition, it applies to private and voluntary bodies which are carrying out public functions, but only

in respect of those functions.

Public authorities must have due regard to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women in all of their functions. The Equal Opportunities Commission has published a Gender Equality Duty Code of Practice (the "Code") to help public authorities meet the duty. According to the Code, due regard comprises both proportionality and relevance. The weight which public authorities give to gender equality should therefore be proportionate to its relevance to a particular function: the greater the relevance of a function to gender equality, the greater regard which should be paid to it.

Who is covered?

"Public authority" includes any person who has functions of a public nature. This includes private organisations carrying out public functions on behalf of a public authority. An organisation will be exercising a public function where it is in effect exercising a function which would otherwise be exercised by the state and where individuals have to rely upon that person for the exercise of that function.

A private organisation may be held to be performing public functions and thus subject to the gender equality duty in relation to those functions if, for example, its structures and work are closely linked with the delegating or contracting-out state body or there is a close relationship between the private body and any public authority.

Additional factors which may be relevant in determining whether or not a body is carrying out a function of a public nature include the extent to which the private body is supervised by a state regulatory body and the fact of supervision by a state regulatory body. For example, private security firms managing contracted-out prisons are likely to be deemed to be performing functions of a public nature in relation to their public functions and therefore subject to the gender equality duty in relation to those functions. However, in relation to a particular act, a person is not a public authority if the nature of the act is private. For example, a private company running a prison will not be covered by the duty in relation to its private activities such as providing security guards for supermarkets.

Application to outsourcing

In an outsourcing, a public authority contracting out services will always remain subject to the duty. Where a service provider is carrying out a public function on behalf of a public authority, the legal liability for the gender duty in relation to that function remains with the public authority which contracts out the function. As a result, public authorities will build relevant gender equality considerations into the procurement process, to ensure that all the public authority's functions meet the requirements of the statutory duty, regardless of who is carrying them out.

If the service provider is providing a service of a public nature it, too, may be subject to the duty. Even if a service provider is not subject to the duty, the fact that the public authority with which it is contracting is subject will affect the outsourcing arrangements. In particular:

- public authorities must ensure that any unequal pay issues are not passed on to private sector service providers who do not have the funds or a plan to rectify them;
- private sector service providers contracting with public authorities are required to publish details of staff pay, thereby highlighting any pay inequalities that were previously hidden and possibly leading to equal pay claims; and
- either as a result of equal pay claims being brought or with a view to avoiding such claims by standardising salaries across the board, there may be an increase in wage bills for private sector service providers contracting with public authorities and a consequential increase in the cost to public authorities of outsourcing services to the private sector, thereby reducing the cost savings outsourcing offers.

Effect on procurement

One area in which it will have a significant impact is procurement as the National Audit Office is subject to the duty to promote gender equality and eliminate discrimination between men and women. The NAO must consider whether the duty to promote gender equality is relevant to the goods, works or services being procured, and to reflect this in the procurement requirements. The weight given to gender equality should be proportionate to its relevance to a particular procurement.

The Code recommends that public authorities take steps to assist them in meeting the gender equality duty where service providers provide goods, works or services on their behalf, including the following:

- requesting that tenderers/candidates indicate, in preparing their tenders or in negotiating the contract, that they have taken into account their employment obligations under the relevant UK and EU discrimination and equal pay legislation;
- excluding tenderers/candidates who have serious findings against them in an Employment Tribunal or County Court under the relevant UK and EU discrimination and equal pay legislation, unless those tenderers/candidates can show, where appropriate, that effective steps have been taken to resolve the issue;
- ensuring that the duty is appropriately addressed and given due weight in the selection and award criteria in a way which is consistent with EU procurement rules; and
- including contractual terms to address breaches of the gender equality conditions, for example, a requirement to develop an action plan to address any shortcomings.