



# Equality Bill: Making it work

TUC consultation response to Government Equalities Office proposals for specific duties

## 1. Introduction

1.1 The TUC represents 58 affiliated unions with a total 6.5 million members, working in a wide range of organisations, sectors and occupations. Our affiliates regularly represent workers suffering discrimination or harassment, and they work with employers in raising awareness of equality issues in the workplace and in developing policies and practices to stop discrimination occurring. The TUC has a long history of campaigning for equal rights and fighting discrimination both in the workplace and in wider society.

1.2 Among the TUC's campaigning objectives for equal rights in the past seven years has been the creation of a single Equality Act to ensure greater clarity, consistency and more comprehensive protection in the law. We have therefore welcomed the Equality Bill that is currently before Parliament.

1.3 The TUC has supported the introduction of a single public sector equality duty in the Bill, which will require public bodies to pay due regard to the need to address unlawful discrimination and advance equality of opportunity and good relations for all the main protected characteristics covered by the Bill (age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief, and sexual orientation). We welcomed the existing statutory equality duties on race, disability and gender and so we are pleased to see them extended to the other protected characteristics. Unlike traditional discrimination law, which relies upon individual victims coming forward to challenge individual instances of discrimination, the duties rightly place the onus on organisations to check their policies and practices and to take steps to prevent discrimination arising.

1.4 However, we recognise that, in practice, the potential of the existing public duties has not been fully realised. The TUC believes this is primarily due to a lack of adequate enforcement of the duties, although we accept that effective action has also been hindered by some public bodies taking a 'tick box' approach to some of the procedural requirements of the specific duties and lost sight of the overriding objective of the general duty which is to achieve equality in practice. This latter problem is clearly picked up on in the consultation document. Nevertheless, the TUC is concerned that the 'tick box' mentality of a few organisations should not be exaggerated and used as a reason to dilute some of the specific duty requirements which other organisations have found useful in helping them fulfil their general duty.

1.5 The TUC notes that two recent research projects, one for the Government Equalities Office and one for the Equality and Human Rights Commission, found that a majority of public bodies believed that the specific duties had contributed positively to their fulfilment of the general duty. A majority of respondents in the GEO-sponsored research rated each of the activities required by the current specific duties as either 'very effective' or 'effective', while the research for the EHRC concluded that "All respondents confirmed that the specific duties had played a crucial role in achieving change in their organisation".

1.6 It is notable that the consultation paper fails to ask any specific questions about enforcement of the new single equality duty. It merely states that the EHRC will continue to have statutory responsibility for enforcement, that the general duty will still be able to be enforced by judicial review, and that the Government wants to encourage the EHRC to work more closely with inspectorates (paras 5.6-5.8). The TUC believes it would have been helpful if stakeholders' opinions had been sought on enforcement, particularly as how the specific duties are framed will have significant consequences for enforcement and the overall effectiveness of the single equality duty. It will affect the ability of the EHRC and inspectorates to monitor public bodies' actions and will influence the ability of parties like trade unions to hold public bodies to account and, where necessary, to bring judicial review actions to enforce the general duty.

1.7 Since the existing public sector equality duties were introduced, trade unions have played an active role in raising awareness of them within public bodies by providing information on inequalities that need to be addressed, and by seeking enforcement of the duties where there has been a clear violation of them. Our affiliates have told us that a number of the existing specific duties have been invaluable in their efforts to ensure accountability and to get effective action from public bodies. These are: the duty to consult trade unions in the gender duty, the duty to involve disabled people in the disability duty, the evidence-gathering requirements that are in all the existing duties, the impact assessment requirements that are in all the existing duties, the duty to provide training to staff on the general and specific duties in the race duty, and the duty to consider the need for objectives to address the causes of the gender pay gap in the gender duty. We believe these aspects should be present in the new specific duties for the single equality duty.

1.8 In addition, our affiliates are keen to ensure that the employment function is not overlooked under the new single equality duty and the accompanying specific duties. The strong connection between workforce equality issues and service delivery should not be forgotten. The Stephen Lawrence Inquiry, out of which came the first duty on race equality, clearly made the connection between ensuring equality of opportunity in employment matters and equal treatment in the delivery of public services.

1.9 The TUC is supportive of the four principles that the Government has set out for the new specific duties in the consultation paper (use of evidence, consultation and involvement, transparency and capability). However, we are not convinced that the proposals for specific duties will mean that these four principles are put into practice.

1.10 The TUC welcomes the proposed introduction of specific duties covering equality and public procurement. However, we believe there should be a stronger statement on the face of the Bill setting out that equality has to be considered in public procurement. Furthermore, we believe the suggested approach to the specific duties on procurement is too narrow to adequately cover workforce equality issues.

1.11 Finally, the TUC understands that the intention is not to publish draft Regulations setting out the specific duties until the Equality Bill has received Royal Assent next year and to then consult on them for a minimum of 12 weeks before laying the final Regulations before Parliament under the affirmative resolution procedure. The TUC believes that every effort should be made to speed up the passage of this legislation. The new single equality duty is due to take effect in April 2011 and public bodies, trade unions and other stakeholders need time to familiarise themselves and prepare for the new requirements. Furthermore, the EHRC needs adequate time for the drafting, consulting on and getting Secretary of State approval for any statutory guidance that will accompany the new duty.

## 2. Consultation questions

**1. Do you think the criteria set out above are the right ones? Please give your reasons.**

**2. Are there any other criteria we should use? If so, what do you suggest?**

2.1 It is not clear from the consultation document how the four criteria (whether the organisation is a significant employer, whether its decisions or services could have a significant effect on equality, whether it has significant direct dealings with service users, and whether the organisation is of sufficient size for the specific duties to be operated without being unduly burdensome) are intended to guide decisions about the application of the specific duties. In particular, it is not clear whether an organisation is expected to meet all four criteria. The TUC believes it should be sufficient for an organisation to clearly meet one of the criteria in order to have the specific duties apply to them.

2.2 In particular, the third criteria, which asks about “significant direct dealings with service users”, should not obscure the fact that there are numerous public sector organisations that may not have direct dealings with the public but which have a significant impact on equality in terms of employment opportunity in the public sector, or in the impact they have on equality for service users indirectly as policy-forming, regulatory or funding bodies. We recognise that such bodies could be captured by the first or second criteria provided these criteria are given sufficient weight in the assessment.

2.3 The TUC is reassured by the statement in the consultation document that the Government expects that “the vast majority of bodies subject to the existing specific duties will also be subject to the new specific duties” and by the following comments made by the Solicitor General at the Public Bill Committee stage: “By the time the duty comes into force, we envisage that Schedule 19 [the schedule outlining which public bodies the specific duties will apply to] will list the same bodies that are subject to the current duty... but there will be no reduction in the coverage of the duty across the full range of public bodies”. Given, these stated intentions, the TUC would urge the Government to amend Schedule 19 to include the full range of bodies that it intends the specific duties to apply to at the earliest opportunity in the parliamentary process.

**3. Do you agree that public bodies should have a specific duty to publish**

## **equality objectives with reference to the relevant evidence and their wider general Equality Duty obligations?**

2.4 The TUC agrees with this proposal, but we believe that there should be an additional specific duty on public bodies that requires them to gather evidence for each of the protected characteristics to ensure that they have “relevant evidence” upon which to base decisions about what their objectives should be. It must not be forgotten that the general duty outlined in the Bill will require public bodies to pay due regard to the need to prevent unlawful discrimination and advance equality of opportunity for each of the protected characteristics. In order to do this, the public body will need to be aware of what the main issues are for each of the protected characteristics. The TUC fears that without a specific evidence-gathering duty, public bodies will only look at the evidence which is easiest to access when setting and then publishing their equality objectives, which will mean only the most immediately apparent inequalities will be addressed.

2.5 The TUC is also concerned by the questions presented in paragraph 5.10 of the consultation document, which a “public body may find it helpful to ask” when developing their equality objectives. The questions focus exclusively on what evidence there is of inequality in service use or what the state of inter-group relations are in the local area. There is no mention of the employment function and what evidence there may be of inequalities in employment, promotion and training opportunities within the public body.

2.6 Without a specific evidence-gathering duty, the proposals will be a regression on what is currently in place and will undermine the good practice that many organisations have established in recent years in implementing the race, disability and gender duties. All these duties have specific duties on evidence gathering. We note that among the conclusions of the recent research report to the GEO on the effectiveness of the specific duties are: “Stay with the strong data-driven approach” and “Don’t change the core requirements too much as this could undermine the learning that has gone on to date”.<sup>1</sup>

2.7 The TUC recognises that the kind of detailed monitoring requirements set out in the race duty may not be appropriate for all the protected characteristics in the single equality duty. In which case the approach of the disability and gender duties should be adopted, i.e. public bodies should be required to set out what their arrangements are for gathering evidence. This could then be supported by guidance from the EHRC that explains different methods and the appropriateness of the different methods for the different characteristics (e.g. see the guidance from the former DRC on this issue).<sup>2</sup>

## **4. Do you agree that public bodies should set out the steps they intend to take to achieve their equality objectives?**

---

<sup>1</sup> Schneider-Ross, “Costs and cost effectiveness of the public duties” (June 2009, GEO), p.4

<sup>2</sup> DRC, “The Disability Equality Duty: Guidance on gathering and analysing evidence to inform action” and EOC

2.8 Yes, this is vital, otherwise insufficient attention will be paid to the practical actions that are needed to realise the equality objectives and there will be a lack of public accountability and transparency.

2.9 The TUC accepts some of the criticisms from the research findings that suggest that setting out equality objectives and actions within a separate written equality scheme is not always the most efficient way of publishing information for public bodies and it may discourage mainstreaming of equality across all their functions. However, written equality schemes have benefits in terms of aiding public accountability and enforcement. For example, the ability to check that a written equality scheme had been produced and that it contained the relevant steps needed to fulfil the general duty was used by the former DRC (which is widely credited as having been the most effective of the former equality Commissions in terms of enforcing the duties) as a starting point for its action on assessing compliance and enforcing the disability duty.

2.10 Without a requirement to produce a written equality scheme there would have to be sufficient prescription in the duties to ensure that information about a public body's actions is easily accessible to all stakeholders. The information would have to be easy to locate, identify and read. For example, there would have to be clear signposts to the relevant information (and not just to large documents that contain it) and all the information would have to be accessible from one place so that stakeholders did not have to request multiple documents or carry out multiple searches in order to find it.

2.11 Given the importance of having easily accessible information for accountability and enforcement purposes, the TUC would like to hear more from the Government about how it thinks enforcement will work under a new specific duties framework that did not include written equality schemes. In addition, we believe the EHRC as the primary enforcement body should publish its plans for how it will assess compliance and carry out enforcement of the new single equality duty, preferably alongside any Code of Practice or guidance it produces.

**5. Do you agree that public bodies should be required to implement steps they have set out for themselves within the business cycle periods unless it would be unreasonable or impractical to do so?**

2.12 Yes, we support this approach. It is already the approach taken in the gender and disability duties and has helped to focus organisations on the need to take action to achieve equality.

**6. Do you agree that public bodies should be required to review their objectives every three years? If not what time-period do you suggest?**

2.13 Yes. This has the advantage that it is in line with the existing duties' review requirements so public bodies will be accustomed to working to this timetable.

**7. Do you agree that public bodies should set equality objectives taking into account priority areas set by the relevant Secretary of State?**

2.14 Without a specific evidence-gathering requirement on public bodies as outlined in our response to question 3, we believe there is a risk that public bodies will place too much weight on the priority areas set centrally by the relevant Secretary of State when setting their own equality objectives, which could result in evidence of inequalities in the local area being overlooked. If there was a specific duty on evidence gathering and appropriate guidance from the EHRC on the weight to be given to different factors when objective setting, we would be more assured that this was a good proposal.

**8. Do you agree that public bodies should not be required to set equality objectives in respect of each protected characteristic?**

2.15 The TUC believes there are inherent risks in this approach, not least that it would mean that public bodies would be encouraged to be complacent about what the single equality duty requires. If public bodies did not set an equality objective for one of the protected characteristics they would have to be in a position to justify with reference to relevant evidence why they considered it unnecessary to do so.

2.16 Again, we are concerned that without at least a specific duty to gather evidence for each of the protected characteristics, certain protected characteristics will be unjustifiably prioritised over others and the general duty will not therefore be met.

2.17 If this proposal were to go ahead, the accompanying Code of Practice from the EHRC on the duty must have at its core very strong and repeated reminders that the general duty that appears in the Bill requires them to pay due regard to the need to tackle unlawful discrimination and advance equality of opportunity for **each** of the protected characteristics and so public bodies must be able to show that they have indeed paid due regard to each characteristic when objective setting.

**9. Do you agree that public bodies should be required to report annually on progress against their equality objectives, but that the means by which they do so should not be prescribed in legislation?**

2.18 We agree that public bodies must be required to report annually on progress against their equality objectives. While we accept that it may not be appropriate to prescribe in legislation the format in which this is done a Code of Practice and guidance from the EHRC should set out the kind of information that should be published, examples of appropriate vehicles for reporting, and the need to present it in an easily accessible format for service users and employees, as the existing DRC Code of Practice on the disability duty does.<sup>3</sup>

**10. Do you agree that public bodies with more than 150 or more employees should be required to publish their gender pay gap, their ethnic minority employment rate and their disability employment rate? We would welcome views on the benefits of these proposals in encouraging public authorities to be more transparent.**

---

<sup>3</sup> Paras 3.111 to 3.114 of DRC Disability Duty Code of Practice for England and Wales.

2.19 No. We do not believe that publishing three simple statistics for just three of the protected characteristics will encourage sufficient information gathering, consultation and monitoring by public bodies to encourage them to meet the general duty for all the protected characteristics. Furthermore, we believe these three statistics will not provide meaningful enough information on race, disability and gender for stakeholders to assess the performance of public bodies; nor will these statistics significantly assist public bodies to plan and take effective action that addresses unlawful discrimination and advances equality of opportunity and good relations. In fact, a focus on these three headline statistics may distort public bodies' actions, encouraging them to do things that might look like progress or encouraging them to be complacent about their performance. For example, a public body could achieve reductions in its overall gender pay gap by outsourcing a large group of low-paid women workers, which would directly undermine the objective of achieving equal pay for work of equal value for the women. Similarly, a public body may report a high BME employment rate and congratulate itself on having a 'representative' workforce, but closer inspection could reveal that there is a significant problem with job segregation, with BME workers concentrated at the bottom of the organisation and failing to progress to higher level jobs.

2.20 We also believe that such a specific duty would be regressive, which would be against the assurances from the Deputy Minister for Equality at the beginning of the consultation document that there is a "firm commitment not to weaken the protection we have already put in place" (p.4). Nor is it clear what evidence or advice from experts this simplistic statistical reporting duty is based upon, even though the consultation paper says that the proposals for the new specific duties "are based on research and the input of experts" (p.4).

2.21 The TUC is particularly concerned by the duty to merely report on the overall gender pay gap in an organisation as we believe it would have less potential to assist in securing meaningful action to address equal pay when compared to the specific gender pay gap duty in the gender duty. The existing specific duty requires public bodies to "consider the need to have objectives that address the causes of any differences between the pay of men and women that are related to their sex". We would prefer to see this duty retained and even strengthened to require action by public bodies – rather than just the consideration of action – to address pay gaps and we believe there is a strong case for this given the obligation in Article 141 of the EU Treaty that Member State governments "shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value **is applied.**"

2.22 But even given the weaker wording of the existing gender pay gap duty, it has proved to be a useful lever for trade unions in the public sector to press employers to do things such as full equal pay audits which enable them to better understand the factors behind any differences in pay and to plan action accordingly. For example, research by the Labour Research Department for the TUC's Equality Audit 2009<sup>4</sup> has found that employers in the public sector were

---

<sup>4</sup> To be published September 2009



much more responsive to calls to carry out equal pay audits because of the statutory duty. It would be a disappointment to the TUC if this specific duty were to be replaced by a duty on public bodies to merely publish an overall gender pay gap statistic. We do not believe that such a duty would provide the degree of leverage that the current specific pay gap duty has to press for a more detailed assessment of the causes of the pay gap and for action to address them. Having calculated and published the overall gender pay gap, the public body may too easily dismiss it by stating that it simply reflected women's choices to do different kinds of work or to work part-time in the organisation. More is needed to encourage public bodies to look behind the figure to the causes of the pay gap. Furthermore, we are concerned, as shown by the earlier example we gave of an organisation contracting out the jobs of low-paid women, that the focus on a simple headline statistic could encourage action to be taken which is actually contrary to the interests of working women.

2.23 The TUC has similar concerns about the signals that a new duty to publish a single BME employment rate statistic would send when compared to the existing specific duty requirements on monitoring by race. At present, organisations with over 150 employees are required to monitor and publish information annually on staff in post, applicants for employment, training and promotion, numbers receiving training, numbers benefiting or suffering a detriment as a result of performance assessment procedures, those involved in discipline or grievance procedures and those leaving the organisation. As previously stated we are aware that such detailed monitoring requirements may not be appropriate for all the protected characteristics covered by the new single equality duty and we recognise that the current requirements in the race duty could be improved upon by linking the gathering of data to the need to set equality objectives and take action with reference to the data. However, given that many public bodies will now have such monitoring and reporting mechanisms in place a new specific duty that just required the publication of one headline employment rate statistic would risk giving the impression that more comprehensive evidence gathering is no longer necessary.

2.24 In addition, one of the justifications given for proposing a 150-employee threshold for the reporting of data in the consultation paper is that "150 employees is also the threshold currently used for race equality reporting, so those organisations affected will already be accustomed to publishing equality data", but the race equality duty actually requires **all** public bodies to carry out monitoring and to publish information on the racial composition of their workforce and the number of applicants from different racial groups for employment, training and promotion. The 150-employee threshold only applies to the requirement to gather and publish the additional information on training, performance assessment, discipline and grievance procedures, and leavers. So again this proposed duty could be seen as a backward step.

2.25 Finally, to reiterate the TUC's previously stated position, we would prefer to see this proposal for a specific duty to publish three headline statistics replaced by a duty on public bodies to publish information about how they will gather evidence for each of the protected characteristics, together with a

specific duty to set equality objectives with reference to that evidence and a requirement to report regularly on progress in achieving those objectives. As this will mean having to highlight how the data or other evidence the public body has gathered on the inequality has altered over time we believe that this will be a more relevant way of ensuring transparency and accountability.

**11. Do you agree with the proposal to use the overall median gender pay gap figure? Please give your reasons. If not, what other method would you suggest and why.**

2.26 As stated above, the TUC does not believe that there should be a specific duty requiring publication of a single gender pay gap figure. Furthermore, we would like to express concern at the proliferation of gender pay gap measures in recent years. This proliferation has not helped promote transparency or a wider understanding of what the pay gap represents and what the long term trends are. Several years ago, the ONS abandoned the long-standing mean measure of the gender pay gap and shifted to using the median as its preferred measure. This was despite the fact that the mean is still the internationally preferred measure and is regularly used for international comparisons. Key stakeholders, including the TUC and the former EOC, continued to use the mean measure as they believed that it was more appropriate to use a figure that included all of the earnings distribution and therefore reflected the high concentration of men in top paying jobs. However, this means that in recent years at least two figures are regularly quoted in discussions of the pay gap and progress in narrowing the pay gap is sometimes exaggerated as comparisons are wrongly made between the current preferred ONS median measure and the old mean measure which was in use when the Equal Pay Act was implemented over 30 years ago. The TUC believes that creating a new measure which puts part-timers' pay in with full-timers' pay will simply add to the confusion. It also has the added risk that the steady improvement in the wages of women working full time, which has been a well-established long-term trend, will mask the complete lack of improvement in the relative wages of women part-timers. Therefore, the TUC believes that it is more beneficial to retain separate measures for the full-time and part-time gender pay gaps.

2.27 The TUC is also concerned by the lack of read across in this consultation to the work that is currently underway with the EHRC, TUC, trade unions and business, to try and agree a set of gender pay gap metrics – not a single figure – for private and voluntary sector employers to report on. If there is going to be gender pay gap reporting across the economy then there should be consistency in what is required, not only to ensure some comparability between sectors, but also because of the existence of an increasing number of hybrid organisations that operate in both the public sector and private or voluntary sectors.

**12. Do you have any evidence of how much it would cost to produce and publish this information, and of what benefits of producing and publishing this information might be?**

2.28 We believe it would be relatively inexpensive to produce and publish headline statistics on the gender pay gap, the BME employment rate and the disability employment rate when compared with what might be required to establish more detailed monitoring or evidence-gathering mechanisms. However, we believe it will reap few benefits in comparison. It may be more costly to establish mechanisms for gathering more detailed information but it is likely that once an initial set up cost has been met, the organisation will reap significant benefit in the years that follow as the information will enable more targeted and effective action to improve public sector employment and public service delivery to all parts of society.

**13. Do you agree with the proposal not to require public bodies to report employment data in relation to the other characteristics protected under the Equality Duty? If not, what other data do you think should be reported on?**

2.29 The TUC's concerns about the potential lack of attention to other protected characteristics and the need for a specific duty on evidence-gathering which applies to all protected characteristics have already been outlined above.

**14. Do you agree with the move away from an emphasis on describing process, to requiring public bodies to demonstrate how they have taken evidence into account in the design of their key policy and service delivery initiatives and the difference this has made?**

2.30 No. It is the TUC's view that changing the nature of the specific duty on impact assessment could lead to worse outcomes and could risk public bodies not fulfilling their general duty. The centrality of properly conducted impact assessments to achieving fair outcomes and ensuring performance of the general duty was highlighted in the recent Southall Black Sisters judicial review case,<sup>5</sup> in which it was found that by not conducting a proper race equality impact assessment Ealing council ended up making a decision that was detrimental to BME women and not compliant with the race duty.

2.31 By changing the specific duty from one that focuses on how the impact assessment was carried out to one that requires a public body to demonstrate how the evidence of impact on different groups led to a particular decision, public bodies could be encouraged to view impact assessment as an after-the-event rationalisation of the decision that was taken rather than engaging in a genuine and objective assessment of impact at the stage when policy is being formed. In the case of *R (on the application of BAPIO) v Secretary of State for the Home Department*<sup>6</sup>, LJ Sedley emphasised the importance of equality impact assessment "not as a rearguard action following a concluded decision but as an essential preliminary to any such decision" (para 3). This was added to by LJ Moses in the Southall Black Sisters case when he said: "What is

---

<sup>5</sup>*R (on the application of Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin)

<sup>6</sup> [2007] EWCA Civ 1339

important is that a racial equality impact assessment should be an integral part of the formation of a proposed policy, not justification for its adoption” (para 24).

2.32 We further believe that there are benefits in terms of transparency and accountability in requiring public bodies to describe the process taken. LJ Moses in the Southall Black Sisters case emphasised the importance of this: “Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage. They further tend to have the beneficial effect of disciplining the policy maker to undertake the conscientious assessment of the future impact of the proposed policy, which Section 71 [the race duty] requires” (para 25).

2.33 The TUC is further concerned that a change in this specific duty, which has been central to assessing compliance with the general duty, will weaken enforceability. In particular, it would risk breaking continuity with existing case law on the public duties, which has taken some years to establish.

2.34 We believe that the problem of some public bodies taking a disproportionate and overly bureaucratic approach to how impact assessments are carried out could be addressed through guidance and in the Code of Practice from the EHRC.

**15. Do you agree that public bodies should have a specific duty, when setting their equality objectives, deciding on the steps towards their 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 the body carries out its functions – or where appropriate their representatives; and in particular take reasonable steps to consult and involve protected groups for whom the duty is designed to deliver benefits?**

2.35 The TUC agrees that there should be a specific duty covering involvement and consultation. However, we think that it will be important to distinguish between the two and to provide guidance on when involvement is required and when consultation would be sufficient.

2.36 The TUC strongly believes that trade unions should be specifically mentioned as stakeholders in a consultation and involvement duty, as they currently are in the gender duty. On workforce matters, we believe it will always be appropriate and proportionate to involve or consult trade union representatives where trade unions are recognised. In addition, given that trade unions represent the workers who are responsible for delivering public services, it is important for organisations to recognise that they should include them in any evidence gathering, objective setting, action planning and reviews. The reference to trade unions in the gender duty has been immensely helpful in getting public bodies to understand the important role trade unions can play in helping to engage the workforce and achieve the organisational and cultural change that was intended when the equality duties were introduced.

**16. Do you think that imposing specific equality duties on contracting authorities in relation to their public procurement activities are needed or are the best way to help deliver equality objectives? Do you think such an**

### **approach should be pursued at this time?**

2.37 Yes, we agree that there should be specific duties on contracting authorities to encourage them to pay due regard to the need to tackle unlawful discrimination and advance equality of opportunity and good relations in public procurement activities. The market for public services is expanding and unless there are clear statutory duties requiring public bodies to take equality into consideration in procurement then there will be a race to the bottom as public bodies seek to contract out of their equality responsibilities.

2.38 We recognise that the general duty states that a public body must pay due regard to equality in “in the exercise of its functions” and public procurement is one of these functions. However, it is trade unions’ experience that those responsible for public procurement are not always aware of the statutory equality duties and how they should apply to procurement. Having a set of specific duties, together with new guidance, would help raise awareness and set out what steps should be taken. We believe such an approach is long overdue and it is more important than ever to ensure that procurement budgets are being spent in a way that does not support unlawful discrimination and promotes effective delivery of services to an increasingly diverse society.

2.39 The TUC is concerned that the proposals for the specific duties do not include a requirement to equality impact assess procurement policies. As the former Equal Opportunities Commission and trade unions have shown decisions to contract out public services have had a disproportionately negative impact on equality for women workers.<sup>7</sup> A requirement to carry out an equality impact assessment should be an integral part of the decision-making process on when to buy in service provision. If any negative impact were identified then steps could then be planned to ameliorate that impact or to keep the services in house.

### **17. Do you agree that contracting authorities should be required to state how they will ensure equality factors are considered as part of their procurement activities to help contribute to the delivery of those objectives?**

2.40 Yes, such a statement would give a strong message to all those involved in the procurement process that they need to take equality into consideration at all stages. In particular, as mentioned in response to the previous question, we believe this should include a requirement on assessing the impact of procurement activities on different groups. The specific duty should also be drafted in a way that makes clear that consideration of equality factors incorporates workforce equality issues.

### **18. Do you agree that contracting authorities should be required to consider incorporating equality-related award criteria where they relate to the subject matter of the contract and are proportionate?**

---

<sup>7</sup> Whitfield, D and Escott, K “The Gender Impact of CCT in Local Government” (EOC, 1995) and see M Jaffe, B McKenna and L Venner “Equal pay, privatisation and procurement” (IER, 2008).

2.41 The TUC believes that where equality is relevant to the subject matter of the contract and it would be proportionate to include equality-related award criteria, a contracting authority should be required to incorporate such criteria and not just to consider incorporating them.

2.42 The TUC further believes that any guidance on equality and procurement should make clear how equality-related award criteria that relate to the workforce can be used and how they fit with the subject matter of the contract.

**19. Do you agree that contracting authorities should be required to consider incorporating equality-related contract conditions where they relate to the performance of the contract?**

2.43 Again, we believe that the proposed duty should be stronger and should require incorporation of equality-related contract conditions where it relates to the performance of the contract and would be proportionate. In addition, any guidance should include examples of equality-related contract conditions that can be applied to the workforce and how they might be important to the performance of the contract.

2.44 Where contract conditions are used the contracting authority will have to adequately monitor how the contractor is meeting them in practice.

**20. What would be the impact of a regulatory proposal aimed at dealing with suppliers who have breached discrimination law? What might be the benefits, costs and risks?**

2.45 The TUC supports the inclusion of an explicit duty for public authorities to ask suppliers about breaches of discrimination law. As stated in the consultation paper, this is currently recommended as best practice by OGC and the TUC believes it is an important indicator of a suppliers' performance on equality. However, we recognise that some organisations which have had a finding of discrimination against them will have taken steps to amend their policies and practices to prevent such a situation arising in the future and therefore may have better current equal opportunities practice than some organisations that have never had that experience. It appears from looking at publicly available PQQ templates and guidance from public bodies that where organisations currently ask suppliers about breaches of discrimination law in the previous three years, they also ask them for supplementary information about what steps they have taken to amend their policies and practices. We believe this is a fair and proportionate approach and provides highly relevant information to the contracting process. Public money should not go to organisations that have been found to be in breach of discrimination law and have done nothing to address that breach.

**21. Do you support the proposal to establish a national equality standard which could be used in the procurement process? If so, do you believe this is achievable through a specific duty or is this better tackled through a non-legislative approach? Are there any practical issues that would need to be considered?**

2.46 As the TUC explained in our response to the Discrimination Law Review Green Paper, we would prefer any national equality standard to be externally accredited rather than employers simply self-certifying that their policies and practices meet a certain standard as is currently the case with many of the existing voluntary standards.

2.47 However, we believe it could be difficult and would take some years to develop a suitable externally accredited national equality standard. The use of equality standards in public procurement may therefore be better addressed through non-legislative guidance initially rather than through a specific duty.

**22. Which of the above four models do you consider achieves the best balance between joined-up working and senior accountability for equality outcomes, while avoiding unnecessary burdens? Please explain why.**

2.48 The first option which requires Secretaries of State to report every three years on progress against the national equality priorities for their policy area appears to be the best approach. It would result in senior accountability for performance against the national equality priorities and encourage regular reviews of them. It would also aid transparency as the information would not be buried in other routine reports.

**23. Do you have any other suggestions how this duty could be remodelled to retain the valuable features of senior accountability and joined-up working, whilst avoiding unnecessary burdens?**

2.49 Clearly 'unnecessary burdens' should be avoided. However, tackling inequality is an important economic and social goal; the benefits of reducing inequality, including for employers, will far outweigh any extra resources that have to be committed to proper process.

**24. Are there any other specific requirements, other than those that we have proposed, which you think are essential to ensure that public bodies deliver equality outcomes in an effective and proportionate manner?**

2.50 As previously stated, the TUC believes that the following specific requirements should also be included: an evidence-gathering duty, a duty to train staff on the general and specific duties, a duty to involve and consult trade unions, a duty to take action to address the causes of the gender pay gap that are related to sex, and a duty to carry out equality impact assessments of procurement activities.

**25. What role do you think the guidance from EHRC should play in helping public bodies implement the specific duties in a sensible and proportionate manner? What do you think it would be helpful for such guidance to cover.**

2.51 EHRC guidance and a statutory Code of Practice on the public duty will play an important role in interpreting the requirements and encouraging activity that is not just about 'tick-box' compliance but actually fulfils the objective of the general duty in the Equality Bill. The primary importance of meeting the general duty should be emphasised throughout the guidance and clear connections

made between the specific duty requirements and how they assist with performance of the general duty.

2.52 There is also a potential role for the inspectorates and regulatory agencies in supporting the monitoring and enforcement aspects of the duties. This would require equalities knowledge being integrated into their existing specialist expertise but if that capacity issue were to be overcome this could add an effective enforcement tool.

2.53 Specific guidance and examples of appropriate, effective and proportionate action should be given on: evidence-gathering; involvement and consultation, including with trade unions; training of staff; impact assessment; setting of equality objectives; public procurement (we believe this would have greatest impact on procurement professionals if EHRC could get OGC support); reporting on progress against equality objectives; and enforcement, including the EHRC's approach to encouraging compliance and carrying out enforcement activities.