

The Equality Bill – Making it Work

A GMB response to the consultation document

Introduction

GMB is the third largest union affiliated to the TUC. We are a national trade union with membership spread across three broad sections and nine Regions.

GMB has over 600,000 members across the UK working in both public and private sectors. Recruitment is a key GMB priority and we recruit on average around 6,500 new members every month. Over fifty percent of our members are women.

We have members working in the areas of:

- Financial, commercial, and professional services
- Clothing and textiles
- Construction
- Furniture Manufacturing
- Energy and Utilities
- Engineering
- Food and Leisure
- Process industries
- Public services
- Voluntary and Community/Third Sector

Paul Kenny is the General Secretary of the GMB.

In 2008 we launched a new 'Equality through inclusion' strategy focusing on :-

- Increasing membership
- Driving Equality on the bargaining agenda
- Campaigning on Equality
- Enhancing Profile
- Drive organisational Equality

GMB welcomes the opportunity to respond to the Government Equality Office consultation. We support the proposals within the Equality Bill to introduce a single equality duty.

Consultation Questions:-

Q1: Do you think the criteria set out above are the right ones? Please give reasons

In the interest of parity between the different equality strands, we expect that those public bodies currently subject to the existing duties will also be subject to the new specific duties.

Q2: Are there any other criteria we should use? If so, what do you suggest?

Any contractor who has been engaged by a public sector body to provide a public service should be subject to the duties.

Q3: 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?

Yes. We welcome the call for publishing equality objectives and the supporting evidence. Our concerns are that the proposed process need to have significantly greater accountability. We suggest the following:

1. That these objectives are strictly SMART.
2. There needs to be clear, simply defined, unambiguous steps to achieve these objectives
3. That there is periodic public reporting on progress on achieving these objectives.
4. These objectives should be robustly linked to key performance targets of all departments in a public authority as well as the personal performance targets of all managers
5. Where appropriate to link outcome on delivery of objectives to bonuses.

Q4: Do you agree that public bodies should set out the steps they intend to take to achieve their equality objectives?

See answer to Q3.

Q5: Do you agree that public bodies should be required to implement the steps they have set out for themselves within the business cycle period unless it would be unreasonable or impractical to do so?

The terms 'unreasonable or impractical', cause concern to the GMB. In our experience these phrases will be used by some public bodies as 'get out' clauses and avoid delivering the fundamental aim of the specific duties. We suggest that these terms are defined clearly.

Q6: Do you agree that public bodies should be required to review their objectives every three years? If not, what time-period do you suggest instead?

Yes – this is a reasonable timescale.

Q7: Do you agree that public bodies should set equality objectives taking into account priority areas set by the relevant Secretary of State?

There is a need for a mechanism or guidance on how to achieve the appropriate balance between local needs (priorities) and the priority areas established by the secretary of State.

Q8: Do you agree that public bodies should not be required to set equality objectives in respect of each protected characteristic?

We firmly believe that equality objectives should be set on each of the protected characteristics. This will hence 'mainstreaming' of equality and avoid a hierarchy of discrimination

Q9: 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?

Yes we agree on annual reporting of progress to ensure consistency between public bodies and allow for comparative analysis between bodies.

Q10: Do you agree that public bodies with 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.

Whilst GMB welcomes the proposals as outlined in the consultation document, GMB believes that the proposals should go further. GMB believes that there should be a wider duty on public bodies to do the following:

- (a) publish information about how they will collate evidence across *all* of the protected characteristics
- (b) identify and set out equality objectives by reference to that evidence
- (c) report on progress in achieving those equality objectives

GMB believes that this is likely to produce more effective action and greater transparency in achieving the equality objectives.

Q11: 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?

GMB believes it would be more appropriate to use the mean rather than the median figure. As GMB understands it, the mean is the preferred average which is used outside of the UK, and forms the basis of international comparisons. In addition it takes account of higher earnings in jobs which are predominantly male. It is therefore a more accurate tool in measuring the pay gap.

GMB believes that separate provisions should be made for collecting evidence about the gender pay gap in respect full-time and part-time jobs. This would provide a more accurate reflection of employment trends.

GMB also refers to the work currently being carried out by the EHRC, TUC, Trade Unions, and Businesses to agree a set of gender pay statistics for both private sector and public sector employers. This is useful work which the consultation should take account of and will be of value in addressing equality

objectives. It is important to maintain a consistent reporting system across the economy in order to address discriminatory practices.

Q12: Do you have any evidence of how much it would cost to produce and publish this information, and of what the benefits of producing and publishing this information might be?

GMB believes that it is likely to be relatively inexpensive to implement the proposals in the consultation paper, and recognizes that there will, of course, be more costs involved in providing the wider information that we would like to see published. However, GMB believes that once these procedures are established, any additional costs will be justified by the more effective action in achieving equality that will flow from obtaining this more detailed information.

Q13: 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?

No – We believe employment data is key source of evidence for identifying actual and potential discrimination and should be included. Though we do recognise the limitation of the information on sexuality and possibly faith / religious belief.

Q14: Do you agree with the move away from an emphasis on describing process, to requiring public bodies to demonstrate how they have taken evidence of the impact on equality into account in the design of their key policy and service delivery initiatives and the difference this has made?

No – the requirement for conducting impact assessments should be strengthened. This could be done by a concerted communication strategy to raise awareness of impact assessments – their benefits, process and benefits.

Q15: 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 it carries out its 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?

Yes. It should be clearly stated that recognised trade unions.

Q16: 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?

GMB welcomes the commitment from Government in the Equality Bill to impose specific duties on contracting authorities in relation to their public procurement activities to deliver equality objectives. The potential for achieving positive equality outcomes through procurement is immense if strong and effective legislative measures are taken to improve performance in this area. Such an approach is long overdue, and should be put into effect as soon as possible.

GMB has long campaigned for stronger measures to promote social considerations in public procurement, and hopes that Government will maximise the scope in the Equality Bill specific duties to really make a difference, and ensure a necessary culture change in the public procurement process across government and other public authorities. Contracting authorities should be encouraged to develop structures where equality specialists within the authority are routinely consulted and involved in procurement procedures.

GMB welcomes the reference in point 5.40 of the consultation text of the need to *ensure contracting authorities spend their money with organisations that treat their employees fairly and equally*, and would wish to discuss this in more detail with Government. Too often in public contracting, as well as private contracting, workers' terms and conditions are being squeezed in price competition for contracts. This race to the bottom will benefit no-one, the quality of public works and services will suffer, as will the people in the communities using or relying on them. We draw attention to the draft 'Guidance on Best Value and Procurement Workforce Matters in Best Value Authority Contracting', which states that procuring authorities will need to recognise *"the connection between service quality and handling of workforce issues. Good quality services depend on appropriately skilled, healthy, safe and motivated workforces. Neglecting relevant workforce matters in order to drive down costs can have adverse effects on the desired quality and value for money of the service."* GMB urges Government to use this wording in the specific duties.

Our members call on the government to use the Equality Bill to take measures to stop the undercutting of collectively agreed terms and conditions, and to create a level playing field for workers, ensuring they benefit from rights, protections, good terms and conditions, and that public money is not used to fuel inequality or exploitation in the workplace. The EU Public Procurement Directives (Art 27 2004/18/EC) include provisions for providing information on obligations relating to employment protection provisions and working conditions applicable to the works or services provided during the performance of the contract, and urges this to be taken up in the specific duties.

In relation to this point, GMB calls for the specific duties to include provisions to include the London living wage and other regional living wage criteria in their procurement procedures to prevent wage inequalities and the instance of working poverty.

GMB has concerns that the consultation text point 5.36 appears to rule out including contracts below the EU thresholds in relation to the specific duties. EU jurisprudence in relation to public procurement confirms that governments can extend certain requirements to contracts below the thresholds. GMB suggests that in the interests of improving equalities performance, duties should apply to contracts below the thresholds too.

Recognition of the need for culture change in procurement practices across all contracting authorities stated in the impact assessment policy objectives in Annex C is welcome, and this challenge should not be underestimated by Government. This needs to be seriously addressed if the specific duties in procurement are to have the desired positive effect.

GMB has direct experience of a widespread trend towards conservative procurement practices in our longstanding campaign to promote reserved contracts for supported employment factories and businesses for people with disabilities. Despite major commitments given at Labour Party Conference in 2007, and the policy apparently being promoted by the Prime Minister in cabinet, GMB members in Remploy and other supported employment workplaces have seen little work come to them through reserved contracts, where the number of contracts awarded under this procedure to date, across all levels of public authority contracting in the UK, can still be counted on one hand.

Though the Public Contracts Regulations allowing reserved contracts have been in operation in the UK since 2006, GMB is still involved in awareness raising activities at local, regional and national level. It is of considerable concern to us how many procurement officers and officials in public authorities involved in procurement decision making remain unaware of these procedures. Sadly, other procurement officers aware of the procedures have found it difficult to move away from the Compulsory Competitive Tendering/lowest price mind set, and show reluctance in considering more imaginative approaches to contracting to achieve positive social goals.

Progress towards more socially responsible procurement has, in GMB's view, been hampered over the years by the fact that public procurement policy has been influenced and developed by a number of Government departments (OGC, DEFRA, DWP, ODPM, DTI/BIS), often with insufficient communication between departments, resulting in disjointed and sometimes conflicting objectives. GMB would wish to see GEO taking lead responsibility in this area for ensuring continuity and a positive approach across all government departments and public authorities in achieving equality objectives through procurement.

In our experience, where there is any uncertainty about the legal scope or political will to be more socially responsible in their procurement practices, public authorities will err on the side of caution and avoid being more imaginative and ambitious in terms of equality and wider social considerations when tendering. The specific duties therefore need to be clear, and provide

legal certainty and positive encouragement to public authorities to pursue these objectives.

We urge the Government not to undermine these objectives, either in the specific duties or accompanying guidance, with negative phrases suggesting that pursuing equality objectives may “add costs”, “create further bureaucratic burdens” or are objectives that “could be better achieved by some other policy means outside procurement”, which have appeared in other Government guidance on issues relating to social aspects of procurement, and are extremely unhelpful. Instead, the focus should be on positively promoting the benefits of achieving greater equality in procurement practices.

GMB would wish to see Government asserting that Value for Money/Best Value aims and promoting equality through procurement can and should go hand in hand. It should emphasise that value for money does not mean lowest price. This is particularly important as procurement decisions too often continue to be decided by lowest price rather than on wider value and policy objectives as public authorities continue to struggle with budget pressures. This needs to be addressed in the specific duties effectively.

GMB has raised its concerns with the OGC about the lack of visibility on its website of positive provisions relating to social procurement including the reserved contracts regulation and equality measures, and has received a commitment that this will be looked at. As a key portal for procurement practitioners it is vital that this website maximises the scope for positive promotion of the equality specific duties, guidance and related provisions such as the reserved contracts provision. We urge GEO to take this up with OGC in this respect.

It is also vital to ensure that the specific duties are promoted clearly and visibly through all other relevant channels, and that procurement decision makers receive training on maximising their positive use. For this reason, GMB is concerned to see the consultation paper suggest in 4.27 that Government does not plan to propose a requirement for equality training under the new duty. GMB believes effective training is an important means of achieving culture change. Training need not be a “sheep dip” approach, as perhaps ungenerously suggested, if it was targeted and applied more practically to workers’ everyday work. Public authorities should have a responsibility to provide relevant and practical equality training.

GMB believes that procurement officers and decision makers should definitely receive training on specific duties, and that procurement organisations such as the Society of Procurement officers in local government (SOPO), and other related associations dealing with procurement should include positive equality duty training in their programmes, and be encouraged to promote best practice in their publications and magazines.

GMB would like to see the Regulation 7 (Public Contracts Regulations 2006), Regulation 10 (Utilities Contracts Regulations 2006) on the provision for reserving contracts for supported factories and businesses referred to in the

Equality Bill specific duties and associated guidance relating to procurement, as an effective means of achieving positive equality outcomes for people with disabilities.

The consultation (5.42) highlights the importance of guidance as a key element of implementation of these duties, and GMB urges GEO to ensure trade unions are consulted and involved from the earliest stages of preparation of guidance.

Q17: 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?

GMB supports the proposal for a requirement on contracting authorities when setting out their equality objectives to ensure equality factors are considered as part of their public procurement activities in contributing to the delivery of these objectives. They must form an integral part of the contracting authorities' earliest assessment of its procurement needs.

It is essential that equality factors are built in and visible at the earliest stages of the procurement planning process, to maximise the scope for them to influence the procurement procedure through all the various stages. This is an important element in creating culture change in how procurement choices are made by establishing a procedure where consideration of equality factors becomes a matter of common practice.

To this end, GMB believes that the proposal in the consultation document for equality objectives to be published is a positive approach, and will help to achieve positive equality outcomes in procurement by providing a solid basis for assessing procurement needs in an equality context. It will establish a valuable reference point for justifying the equality requirements in award criteria, contract conditions and the performance of a contract.

Q18: Do you agree that contracting authorities should be required to consider using equality-related award criteria where they relate to the subject matter of the contract and are proportionate?

GMB believes this is a crucial stage of the procurement process, and it is vital that equality factors are allowed to play an influential role in the decision process at this stage. However, GMB is very concerned about the subjective use of the term "proportionate" in this context, as it is likely to create problems with definition, and be a potential source of litigation. Furthermore, there is no precedent for introducing this word in the context of award criteria - it is not included in Article 53 (Contract award criteria) of the EU Public Procurement Directive 2004/18/EC, nor the equivalent Directive relating to Utilities 2004/17/EC. GMB therefore calls for this word to be removed from the proposed text of the specific duties.

The case for introducing a requirement to consider using equality-related award criteria is clear, and GMB only regrets that the scope for introducing

such equality or other social criteria has not been introduced earlier. The European Directives on public procurement 2004/17/EC and 2004/18/EC are very clear in relation to contract award criteria that the list of possible criteria for consideration in relation to the most economically advantageous tender is not an exhaustive list. It states....*various criteria linked to the subject matter of the public contract in question, for example....* The Government should therefore feel confident in taking this step. Furthermore, the recitals to the EU Directives further reinforce the case for making use of this requirement in relation to equality and wider social factors in the award stage: Recital 46 2004/18/EC ...*a contracting authority may use criteria aiming to meet social requirements...of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.*

GMB is concerned that the Evidence Base in the consultation document (p75 Private sector costs) suggests that the specific duties will only apply to lead contractors. GMB believes that this would be a mistake, and that the equality related criteria should be extended to all subcontractors, and that the main contractor should be given responsibility for ensuring these are met to limit avoidance and non-compliance.

In the context of this specific duty, GMB believes the Government should promote the fact that there is a degree of flexibility for the contracting authority to justify what constitutes *the most economically advantageous tender from the point of view of the contracting authority* (Article 53 contract award criteria 2004/18/EC in the European Public Procurement Directive, and in the equivalent Utilities text). Having clear and firm equalities objectives established will help support the justifications in relation to the subject matter of the contract.

Q19: 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?

Yes. GMB feels that it is important for equality-related factors to be incorporated in all the key stages of the procurement process, including contract conditions. Furthermore, as stated above, these conditions need to be extended to subcontractors involved in public procurement contracts as well, to ensure that positive equality outcomes are achieved and to prevent avoidance. We draw attention, again, to our concerns relating to the use of the word *proportionate* which appears in point c) p36 of the consultation relating to contract conditions, though not in the question wording above. In line with our arguments above relating to its use in award criteria, we call for this word to be removed from specific duty texts.

Q20: 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?

GMB would support a specific duty relating to breaches of discrimination law, and urges Government to pursue this regulatory proposal. In our view it will be an important means of reinforcing equality policy and will put a more serious focus on the need for suppliers to meet these requirements. GMB has been concerned about the low priority that has been given to this in the past, and the limited scope contracting authorities that wish to take robust action in relation to such breaches have at their disposal.

GMB has similar concerns about the existing weakness of provisions relating to dealing with abnormally low tenders, where compliance with employment protections and working conditions in force may be undermined. GMB urges GEO to consider and include provisions on the issue of abnormally low tenders in relation to equality objectives in its specific duties for public procurement.

Pre-award auditing of bids in relation to discrimination breaches and respect for employment protections and working conditions in force would be a useful measure in relation to implementing this specific duty and GMB urges Government to include such a proposal.

Q21: 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?

GMB believes that a national Equality Standard would be a useful means of assisting public authorities and suppliers to understand what is expected of them in relation to equality factors, and would welcome such a provision. As identified in the consultation, it would be a useful tool in the pre-qualification stage. GMB anticipates that GEO will involve trade unions in the development of such a standard. In our view, an unregulated approach on the basis of existing independently developed equality standards is not sufficient, as there is no uniformity of criteria against which to measure them, the status and integrity of some standards is often questionable, and auditing and monitoring of the standards is seldom independently assessed. GMB would urge GEO to make a specific duty requiring recognition of the standard once it is established to reinforce its status, and provide an incentive to suppliers to meet this standard.

Q22: 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.

GMB would support the first model. As we believe that this would increase transparency and accountability of senior managers in 'owning' the equality outcomes.

Q23: 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?

We believe the term 'unnecessary burden' needs to be defined clearly as this may be used by some public bodies to avoid delivery or deliver 'watered-down' equality outcomes. Further we would suggest a linkage between equality outcomes and personal performance indicators of senior managers.

Q24: Are there any 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?

One of the learnings of the existing duties is that they are process focused as opposed to outcome focused and along with users of public services, trade unions are the other key stakeholder and should be engaged as a partner in the delivery of the equality objectives.

The GMB would go further and advocate the statutory support for the establishment of local equality representatives (equality reps) to deliver the changes needed in any public body. Equality Reps are union reps with a specific brief for putting equality at the heart of the workplace, trained to know the law on equality and jointly working to change workplace culture. (briefing attached)

Q25: 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?

We expect EHRC to have a key role in providing guidance, raising awareness and enforcing the new duty. We would like to see the EHRC using its enforcement powers to drive the duty to achieve meaningful and actual change.