**Fact Sheet - Equality and diversity obligations: Implications of equality and diversity legislation for public authorities and community organisation in asset transfer**

This fact sheet focuses on some important implications for authorities and community based organisations as a result of the Equality Act 2010. When considering asset transfer it is important for public authorities to be alert to the equality and diversity implications of making the transfer decision and for the transferee community organisation to be aware of its obligations; for example, in terms of access to its services, and its employment obligations.

Public authorities should be aware of the following when considering asset transfer:

**Public sector single equality duty**

The guidance for public authorities can be found on the Equality and Human Rights Commission’s website ([http://www.equalityhumanrights.com/scotland/public-sector-equality-duty-in-scotland/](http://www.equalityhumanrights.com/scotland/public-sector-equality-duty-in-scotland/%20)).

“On the 5th April 2011, the Equality Act 2010 introduced a new public sector general equality duty which became law in Scotland.

The general equality duty requires Scottish public authorities to pay 'due regard' to the need to: eliminate unlawful discrimination, victimisation and harassment; advance equality of opportunity and foster good relations.

These requirements will apply across the 'protected characteristics' of age; disability; gender reassignment; pregnancy and maternity; race; religion and belief; sex and sexual orientation.”[[1]](#footnote-1)

**Equalities and procurement**

While there is no specific duty to take account of equalities in procurement, the Act makes it clear that procurement can and should be used to drive equalities.

Driving equality and diversity through procurement can be achieved in two very different ways:

* through ensuring that procurement processes are used to check the compliance of bidders with equality law, for example, by asking appropriate questions at prequalification stage about bidders’ equality and diversity policies and processes (many (if not all) public authorities will already be doing this as a matter of course);
* through actively seeking to achieve greater equality and diversity through what is purchased and how it is purchased – for example, seeking to achieve a level playing field for people with one or more of the “protected characteristics” where it is clear within an area that this is not currently the case.

Keys to successfully tackling inequality through procurement is:

* knowing the community;

* working with others, inside and outside the organisation – cross-departmental working will be invaluable, as well as working with other key organisations within the area;
* being clear about the organisation’s strategy for how procurement will be used to drive delivery of equalities objectives, and consider how addressing equality issues can contribute to wider objectives, especially helping to deliver social and community benefits;
* building equalities into every stage of the procurement process – from the policy development and business case stages through to contract management.

In the context of a proposed asset transfer, the public authority will need to consider:

• whether the EU procurement rules apply to all or part of the asset transfer process, for example, where there are separate service agreements being considered;

• where the EU procurement rules do apply, consider what equalities issues are particularly relevant, and how these can be taken into account - this will include the procurement of any contractor or service provider that will be helping the public authority.

Public procurement can be used by public authorities to drive equality. Public procurement is already inherently linked to the three existing public equality duties, however, the new legislation creates a more explicit connection between procurement and the new public sector single equality duty.

**Socio-economic disadvantage**

The Act created a public sector duty to consider reducing socio-economic disadvantage when a public authority is making strategic decisions.

This will be particularly important for public authorities considering community asset transfer as such transfer may, depending on the particular circumstances, be a way of helping to reduce socio-economic disadvantage.

Although it is for public authorities to determine what they think are the socio-economic issues and other inequalities in their areas, community groups should take the initiative in influencing a public authority’s thinking, as well as continuing to engage through traditional consultation methods.

An example might be a public authority faced with an expression of interest in a below market transfer from a faith group, who is interested in a bigger place of worship but are open to providing some space in the building for all community use. What is the impact of the Equality Act for a public authority dealing with this matter? A decision to authorise the transfer based on the organisation being a faith group would require there to be some existing disadvantage that the public authority needs to address i.e. using either the public sector duty to "have due regard" to inequalities, or the socio-economic duty to justify positive action. The applicability of the state aid rules may also have to be considered in the context of a below market transfer.

**Obligations as an employer on the recipient of the community asset**

There are a series of further obligations imposed on the recipient of a community asset by the Act in their role as employer.

**A definition of direct discrimination and harassment** to cover “associative” and “perceptive” discrimination is introduced by the Act, for example, an employer treats an employee less favourably because they care for a person who is disabled. Such treatment would be “because of” a disability even though it is not the disability of the individual who has been treated less favourably; or, for example, an employee is not invited out for a drink because they are perceived to be a Muslim who would not drink. Even if the individual was not in fact Muslim this would be discrimination “because of” religion or belief even though it was not the religion or belief of the individual in question.

The Act also introduced **liability for harassment of staff by third parties** because of the employee’s race, gender, sexual orientation, religion, disability, age, or gender reassignment. (The employer will only be held liable where the harassment has taken place on two previous occasions, this has been reported to the employer and the employer has failed to take reasonably practicable steps to prevent the third party harassment.)

This is relevant for public authorities who second staff to work for a different organisation perhaps as a preliminary step prior to an asset transfer.

Additionally, **indirect disability discrimination** as well as a new concept of **discrimination arising from disability** were introduced.

The Act limits on the **use of pre-employment health questions**. Whilst certain enquiries can still be raised during the recruitment process, it is now unlawful to make recruitment decisions based upon these enquiries.

The Act places limits on the validity of **secrecy clauses** which prevent staff from discussing their pay and contractual benefits. A possible knock on effect is an increase in equal pay claims as employees will now more readily find out what other employees earn. Such claims will of course transfer to the new provider when employees transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) from a public authority as part of an asset transfer. The new provider may well look for the public authority to indemnify it in respect of any such claims.

1. <http://www.equalityhumanrights.com/scotland/public-sector-equality-duty-in-scotland/>

- web page accessed 25th July 2010 [↑](#footnote-ref-1)