

POLICY PAPER

Beyond the Equality Bill: embedding equality and diversity in SMEs

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In January 2010, ACCA and the Federation of Small Businesses (FSB) brought together politicians, researchers and professional accountants in a debate on the future of the equality and diversity agenda, prompted by the controversy surrounding the Government's Equality Bill. Attendees considered the role of smaller employers in promoting equality and diversity in a non-coercive environment.

This policy paper brings together the key facts and figures emerging from that debate, and records ACCA's recommendations to policy makers, employers and their advisors.

There is still a lot of progress to be made before equality and diversity outcomes in the UK reach the levels desired by society at large,¹ and employers are generally acknowledged as key contributors to such efforts. Despite their exemption from the more onerous reporting requirements of the Equality Bill, the weight of expectation focused on small and medium-sized enterprises (SMEs) in particular is considerable.

SMEs employ 59% of the UK's private sector workforce, which implies that vulnerable groups cannot be protected without the help of smaller employers.² Numbers aside, the general public worldwide tends to look to SMEs rather than the state or larger organisations to champion and promote universal values, a trend which has no doubt been reinforced by the recent financial crisis.³

PROTECTING THE VULNERABLE

In its efforts to improve equality and diversity outcomes in the labour market, Government should count the SME sector among its closest and most powerful allies. Research suggests that, regardless of the nature of a person's disadvantage, they are more likely to find employment and fulfilment in a small business than a large one.⁴ All other things being equal, small business owners themselves are more likely than other members of the public to be concerned by equality outcomes.⁵ Finally, enterprise is known to provide a means for many to sidestep discrimination or negative employer attitudes, and a way out of disadvantage.⁶

However, as ACAS notes, small employers feel vulnerable when facing issues of equality or diversity at work.⁷ Without the benefit of specialist legal or human resource management (HRM) resources, the threat of employment tribunals is ever-present, and typical awards can cripple a small business.⁸ In this context, it is very encouraging to note that SMEs are under-represented among tribunal awards relative to their share of the workforce⁹, but we should welcome moves to make awards contingent on the organisational resources of the employer – as they affect the effectiveness of compliance as well as the ability to survive an unfavourable tribunal decision.¹⁰

Average and median tribunal awards in discrimination cases, by element of discrimination:

Type of discrimination	Average	Median
Age	£8,869	£3,000
Sexual Orientation	£23,668	£15,351
Religious Belief	£10,616	£4,291
Disability	£27,235	£7,226
Race	£32,115	£5,172
Sex	£11,025	£7,000

Source: Tribunals Service, *Employment tribunal and EAT statistics (GB) 1 April 2008 to 31 March 2009*, January 2010.

1. See for instance, Cohesion Research, *Citizenship Survey: 2008-09 (April 2008 – March 2009)*, England, Department for Communities and Local Government, 2009.

2. BIS Enterprise Directorate Analytical Unit, *SME Statistics for the UK and the Regions 2008*, October 2009.

3. World Economic Forum, *Faith and the Global Agenda: Values for the Post-Crisis Economy*, January 2010.

4. P. Urwin, V. Karuk, F. Buscha, and B. Siara, *Small Businesses in the UK: New Perspectives on Evidence and Policy*, November 2008.

5. C. Ferguson, S. Finch, and O. Turczuk, *2007-08 Citizenship Survey – Race Religion and Equalities Topic Report*, Department for Communities and Local Government, 2009.

6. P. Urwin, V. Karuk, F. Buscha, and B. Siara, op. cit.

7. L. Harris, A. Tuckman, J. Snook, S. Tailby, S. Hutchinson and J. Winters, *Small firms and workforce disputes resolution*, ACAS Research Paper 01/08, March 2008.

8. Tribunals Service, *Employment tribunal and EAT statistics (GB) 1 April 2008 to 31 March 2009*, January 2010.

9. L. Adams, A. Moore, K. Gore and J. Browne, *Research into enforcement of employment tribunal awards in England and Wales*, Ministry of Justice Research Series 9/09, May 2009. Note that this only refers to cases of discrimination on the basis of sex, age or disability. The sample size for cases involving other types of discrimination was too small for any robust analysis.

10. For a discussion of how organisational resources interact with regulation to affect business performance, see M. Hart, J. Kitching, R. Blackburn, D. Smallbone, N. Wilson and R. Athayde, *The impact of regulation on small business performance*, BERR, April 2008.

FROM ADHOCRACY TO REAL FLEXIBILITY

Taking fear out of the equality and diversity agenda is, of course only part of the task ahead. What is even more important is to shift SMEs' preoccupation from compliance and its costs to good practice and its benefits. In its recent review of flexible working in small businesses, the All-Party Parliamentary Small Business Group (APPSBG) noted a paradox. The APPSBG found that the flexibility of perceptions and working practices in small businesses which so benefits vulnerable groups coexists with a surprising degree of rigidity when it comes to translating this into consistent policies.¹¹

Much of the sector's prized flexibility originates with the ability of (owner-) managers in small businesses to see employees as individuals and tailor their treatment to their individual needs and characteristics. This advantage is compounded by the very short chains of accountability in small businesses.¹² Government should not allow these advantages to be compromised by imposing on SMEs equality reporting requirements based on simplistic dichotomies. However, small employers also need to realise that dealing with issues as they arise in an ad-hoc manner not only leaves them vulnerable to litigation but also makes it difficult for them to signal their credentials as good employers to employees, customers and the state.¹³

FIT-FOR-PURPOSE POLICIES

While it is possible, even likely, for a small business to deliver good equality and diversity outcomes for its employees without a written commitment or a mechanism for its enforcement¹⁴, outcomes for the business itself are rarely optimal without explicit, managed equality and diversity policies.¹⁵ And while we do not believe there is a need for government to mandate such policies directly or indirectly, small employers and their advisers must give them serious consideration. Contrary to perceptions, policies do not have to be any larger or more complicated than the business itself. But they do need to be backed up by commitment throughout the organisation and simple, rule-of-thumb tests of their effectiveness should be performed regularly.

By bringing together multiple strands of employment regulation, the Equality Bill should, in theory, make it easier for small employers to develop fit-for-purpose policies and for government to develop definitive and comprehensive guidance.¹⁶ The latter should include sample policy templates, available on www.businesslink.gov.uk, which will be applicable to a range of 'typical' small businesses. Small employers may never be entirely at ease with legal matters but there is evidence that a risk-based approach to equality and diversity outcomes might be more familiar and reassuring.¹⁷ The model of HSE risk assessment case studies is one worth emulating in this case.¹⁸

Independent research confirms that government guidance is not the primary source of advice on employment regulation for small businesses.¹⁹ In fact, it confirms accountants as the top advisers to micro-enterprises,²⁰ have a role to play in optimising equality outcomes. In order to do so, they need to build on the stimulus provided by the Equality Bill to develop demand among their clients, and acquire sufficient knowledge to either provide support themselves or point out appropriate third-party resources.

14. For instance, N. Connell, *Social and environmental responsibility and the small business owner*, FSB, December 2007.

15. For instance, S. Dickens, M. Mitchell and C. Creegan, *Management handling of sexual orientation, religion and belief in the workplace*, ACAS and CIPD, February 2009.

16. Government Equalities Office, *Equality Bill – Impact Assessment*, April 2009.

17. The risks in question would include not only the risk of litigation, but also – crucially – the risks of under performance, staff turnover and reputational damage. For principles of accounting for risk in a small business, see T. Morton, *The Risk Register: Basic Principles for Smaller Companies*, ACCA, July 2009.

18. Health and Safety Executive, *Example Risk Assessments*.

19. ORC International, *Employment law admin burdens survey 2008*, BIS, December 2008.

20. Ibid.

11. All Party Parliamentary Small Business Group, *Flexible Working: Challenges for Business*, January 2010. This particular finding echoes those of academic research, including for instance, C. Woodhams, B. Lupton and S. Raydon-Rennie, *Gender-based equal opportunities in SMEs: Establishing Policy and Practice*, July 2004.

12. For instance, L. Harris, A. Tuckman, J. Snook, S. Tailby, S. Hutchinson and J. Winters, op. cit.

13. For instance, *Talent not Tokenism*, EHRC, TUC and CBI, June 2008.

PASSING THE BETTER REGULATION TEST

In at least one respect, the Equality Bill is a good example of regulatory simplification, as it brings together into one document various strands of regulation that small employers could previously not hope to keep up with.²¹ The government should continue to consider whether additional areas of regulation might be improved by similar efforts at consolidation.

First, however, SMEs and particularly micro enterprises should be given time to adapt to existing employment regulation (including the Equality Bill), as per the recommendations of the All-Party Parliamentary Small Business Group.²² While recovering from a very deep recession, the UK cannot afford to jeopardise its most reliable engine of job creation.²³

It is of some concern that the Equality Bill would, if passed, still leave a great deal of detail to the discretion of ministers and courts.²⁴ The Government could make the Bill much more compatible with the principles of better regulation and its own principles of good regulatory practice, by clarifying its intentions in full and at the earliest opportunity.²⁵

The final test of the Equality Bill from a better regulation perspective will be the extent and quality of the associated guidance. In keeping with its broad support for the recommendations of the *Anderson Review*,²⁶ the Government should aim to drastically improve on the status quo, which entails over 2,500 pages of guidance.²⁷ The Government should also anticipate a great deal of demand for such guidance from its insured advice service, and ensure adequate resources are in place.

Finally, the treatment of the Equality Bill should be noted as an example of poor communication by any government seeking to improve perceptions of regulation.²⁸ By focusing, for political reasons, on macro-level statistics and metrics on discrimination (eg the gender pay gap) that tar all employers with the same brush,²⁹ by interpreting all departure from equal treatment as active discrimination and by focusing its rhetoric on the government's ability to make life difficult for 'sexist' or 'racist' organisations, the Government may have lost much of its ability to relate the benefits of the Bill to employers.

21. Government Equalities Office, op. cit.

22. APPSBG, op. cit.

23. *Better Regulation: What it Really Means*, ACCA, January 2009.

24. For an overview, see HC Deb, 11 May 2009, c553.

25. BIS, *Code of Practice on Guidance on Regulation*, October 2009.

26. BIS, *Government response to the Anderson Review*, March 2009.

27. Government Equalities Office, *Framework for a Fairer Future – The Equality Bill*, June 2008.

28. Better Regulation Executive, *Better Regulation Supports Better Outcomes*, October 2009.

29. While any incidence of discrimination is unacceptable, it must be noted that no more than 7% of the UK population claim to have been discriminated against in whichever way when applying for a job or competing for a promotion, and there is no simple demographic of which more than 20% claim to have ever been discriminated against. Communities and Local Government, op.cit.

FOCUSING ON EARLY INTERVENTIONS

Smaller employers have an obligation to play a part in equality and diversity outcomes and are subject to the law as much as larger ones. However, in considering new levels of protection or new policy levers, Government must be realistic in what they expect of SMEs – not in terms of compliance but in terms of outcomes.

Successive governments have focused on different factors affecting outcomes for disadvantaged groups, such as access to employment, higher education or, lately, the professions, even while acknowledging that they themselves are the outcomes of much more important processes, most of them playing out outside the workplace. There is evidence that a great deal of the disadvantage associated with some characteristics (for instance in the case of social class, although apparently not race or gender) has already been embedded before an individual reaches the labour market.³⁰

Ideally, the Government should not try to rectify through employment regulation injustices that do not originate in the workplace. It is in employers', employees' and the taxpayer's interest that Government should instead aim to remedy disadvantage at the earliest instance, when such action will be more effective, less divisive and less expensive. In this respect, we believe that reforming the education and benefits systems must be a major priority³¹ and that the effects of such reforms can only be complemented, not substituted by equality law.

30. National Equality Panel, *An anatomy of economic inequality in the UK*, January 2010.

31. For estimates of the benefits of reforming the education system to equalise education outcomes, see E.A. Hanushek and L. Woessman, *The high cost of low educational performance*, OECD, January 2010. On proposals to reform the benefits system, see APPSBG, *op. cit.*

RECOMMENDATIONS FOR GOVERNMENT

- In its efforts to improve equality and diversity outcomes in the labour market, Government should count SMEs among its closest, most powerful allies.
- Government should consider a brief moratorium on employment regulation, allowing small employers to adapt to the provisions of the Equality Bill and other recent regulation.
- Government should clarify its intentions on the implementation of the more vague aspects of the Equality Bill and use the Bill as an opportunity to drastically simplify Equality guidance.
- Government should develop simple, case-study-based guidance and sample policies for typical small businesses and build on the risk-assessment model in order to help small employers improve their performance.
- Government should learn from its failures in communicating the benefits of the Equality Bill to employers for the benefit of its Better Regulation programme.
- Faced with injustices that do not originate in the workplace, the Government should aim to rectify these not through employment law but rather at the earliest instance. Alongside equality law, reforming the education and benefits systems must be its major priorities.
- Government should look into the possibility of making employment tribunal awards more proportionate to the organisational resources of the employer – reflecting not only their ability to survive an unfavourable decision but also their capacity for dealing with regulation.

RECOMMENDATIONS FOR SMALL BUSINESSES AND THEIR ADVISERS

- Smaller employers have an obligation to play a part in equality and diversity outcomes and are subject to the law as much as larger ones.
- Smaller employers need to realise that dealing with issues as they arise in an ad-hoc manner not only leaves them vulnerable to litigation but also makes it difficult for them to signal their credentials as good employers to employees, customers and the state.
- While there is no need for government to mandate such policies directly or indirectly, small employers and their advisers must give them serious consideration.
- Private sector advisers on employment regulation need to develop demand for equality guidance among their clients, and acquire sufficient knowledge and network resources to meet their needs.

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