



Office of the
Deputy Prime Minister

Creating sustainable communities

*Guidance on contracting for services in
the light of the Human Rights Act 1998*

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Guidance on contracting for services in the light of the Human Rights Act 1998

Issue

Where a provider that is not a public authority provides a service to the public under contract to a public authority, that service needs to be provided in a way that takes account of the content of the Human Rights Act 1998 (“the HRA”) relevant to that contract.

Providing a service in the manner indicated above will assist in the provision of an optimized service. Not to do so may expose the public authority to legal liability and, furthermore, may infringe the legal rights of service users.

Purpose of this note

This guidance note is designed to apply to all contracts where the HRA may be engaged. It is intended, in particular, to assist mainstream (“core” or “pure”) public authorities in dealing with the issue identified above. This issue is at the heart of the Seventh Report of the Parliamentary Joint Committee on Human Rights (“the Joint Committee’s Report”) and is also addressed in the Audit Commission’s report, “Human Rights – Improving public service delivery” (“the Audit Commission’s Report”). Specifically, this note attempts to deal with the Joint Committee’s Report’s recommendation for guidance on the protection of human rights through contract. This note suggests that a specification-based approach is the most appropriate way to deliver this. When acting on this note, public authorities should take their own professional legal and procurement advice to ensure compliance with the HRA and public procurement law.

This note generally is directed towards services contracts, although brief consideration is given at the end of this note to mixed services and works contracts. Where reference is made in this document to suppliers it means suppliers of services or mixed services and works as appropriate.

Use of contractual conditions

Section 6 of the Joint Committee’s Report discusses two options for attempting to protect human rights through contractual mechanisms. The first is through contract between the public authority and the supplier; the second is through contract between the supplier and end user, for example, care home resident.

Consistency, enforceability and enforcement issues

Some very practical problems around consistency of approach, enforceability and enforcement arise under both options identified above.

Whilst creative use of the Contracts (Rights of Third Parties) Act 1999 (“the 1999 Act”) might enable end users of services to have enforceable rights against suppliers, the practical issue would remain of whether end users were in a suitable position – for example, through having the knowledge and financial resources to pursue legal action – to enforce those rights; this point is recognised in the Joint Committee’s Report. Further the supplier market will often be resistant to use of the 1999 Act to confer rights on third parties. It can result in the creation of a very large and practically, if not theoretically, uncertain class of beneficiary; this may well be perceived to increase supplier risk to an unacceptable extent, particularly if it causes difficulties for suppliers in laying off risk via insurance arrangements.

In relation to consistency, contractual terms will, inevitably, be affected by the nature of the service to be delivered and by the process by which that contract is put in place. For much public sector contracting, this will mean contracts that are put in place following EU-wide competitive tendering. The procurement process must ensure that artificial barriers to participation are not raised. In this respect the particular needs of small and medium-sized enterprises (“SME”), wherever in the EU they may be based, need to be borne in mind. SMEs may include local businesses, ethnic and minority businesses, social enterprises and voluntary and community organisations. (Whilst public authorities should not ignore the benefits offered by SMEs they must at the same time ensure that their policies comply with public procurement law, which means, in this context, not discriminating against larger organisations.) In practical terms, recognising the particular needs of SMEs means keeping the process as simple and understandable as possible. This point, and its relationship to consistency, is expanded below.

Contracting for ‘concepts’

Public authorities need to consider the commercial effects of contract conditions. An obligation simply, for example, to comply with the HRA as though the supplier were a public authority is likely to be resisted. In particular, since the HRA deals with a number of concepts whose application in particular circumstances could be a matter of legitimately differing views, suppliers may object that they cannot fully ascertain the nature of the obligations that they are being asked to undertake. This is likely to be the case, in particular, for SMEs with their more limited resources. Uncertainty as to the nature of contractual obligations would be likely to result in higher bid costs, as suppliers sought to price perceived risk; it might also mean an increased unwillingness to bid since suppliers might feel unable to price risk.

Even if suppliers felt able to accept the commercial consequences of contractual provisions of the type identified above, this would not necessarily mean that service provision in a particular area would be uniform as between private sector and public sector delivery. This would be because the private sector supplier might legitimately determine that the HRA obligation should be discharged in one way, with the public authority taking a different view. The public authority could seek a contractual power to determine the nature of the HRA obligation with which the supplier would have to discharge, but it is likely that a bare right of direction such as this would be unacceptable to a large number of suppliers since it would create a secondary area of contractual uncertainty. Even if a public authority were able to secure such a provision, it would be likely to be linked to contractual change procedures, and thus introduce cost uncertainties for the public authority.

The Audit Commission's Report suggests that ensuring the human rights protection of service users should lead to improved services. In connection with this, it is noted that preserving a wide and active supplier base, and thus a competitive marketplace for the delivery of those services, is a driver towards improved delivery. The contractual approach taken needs to reflect both of these points.

An approach based on contract specifications

For the reasons set out above, it is suggested that the most fruitful way for public authorities to proceed when attempting to contract to secure the protection of human rights for service users is via the specification of services. The specification provides potential suppliers with a statement of the public authority's requirements and will form a key part of any contract with the supplier. It is critical to get the specification right.

It is suggested that the public authority should detail in the specification the activities which it considers will be required to be performed by the supplier, including output specifications relating to processes where these help to define the performance characteristics of the service.

Advantages

There are several advantages to such an approach.

First, it provides all potential suppliers with a very high degree of certainty as to what will be required from them. This should find itself reflected in competitive bids from suitably qualified suppliers. A competitive supplier base can provide opportunities for greater innovation, efficiencies and higher quality services.

Secondly, it enables the public authority to ensure that there is a mutual understanding as between itself and the supplier that the services will be delivered in a particular, HRA compliant way.

Thirdly, it enables the public authority to fully reflect the needs of relevant stakeholders in the service delivered. Where appropriate, users of the service could be invited to feed into the process of drawing up the specification, thus making the service delivered more responsive to their needs and aspirations, including end user expectation that human rights issues have been satisfactorily addressed.

Fourthly, it provides transparency as to the way in which the public authority has sought to secure the discharge of the HRA obligations it has. Flowing from this, it assists the public authority in monitoring and enforcement of those obligations (and auditing bodies similarly).

Fifthly, it may be possible to adopt greater commonality on key service delivery issues via this route, than via contract terms. For example, a public authority consensus view as to the way in which certain issues should be dealt with could be fed into all relevant contracts. In this way, the culture of respect for human rights can be fostered, particularly if the views of end users are sought as part of that consensus building process, for example through the input of representative groups. It has to be recognized, however, that even with commonality between specifications, some differences may emerge in terms of the practical effect given to them during service delivery.

Sixthly, such an approach is consistent with the need to view the HRA as part of a package of legislation designed to secure rights and freedoms. This picks up a point made in the Audit Commission's Report that few links between equalities and human rights legislation are made by public authorities. It may well be appropriate to deal with aspects of equalities legislation as they impact service delivery by means of a specification-based approach. It is suggested that a specification-based approach enables public authorities to properly integrate the requirements of all relevant legislation in a way which delivers a service that meets the needs of end users, provides certainty of obligation for suppliers and maximum value for the public purse.

(Public authorities should also consider the broader legal framework applicable to support them in meeting requirements under the HRA. For example, under the Local Government Act 2000, local authorities are required to prepare a 'community strategy' and have powers to promote the economic, social and environmental well-being of their communities. They must, of course, comply with Best Value and, when relevant, public procurement law in so doing.)

Contract terms to support a specification-based approach

Where a significant degree of certainty is provided to suppliers as to the scope of their obligations, they may be more willing to accept some residual contractual powers of direction from public authorities in 'grey' areas at the margins. If public authorities are able to include these in their contracts their ability to ensure that service delivery reflects the public authority's view as to what is necessary to secure compliance with the HRA will be enhanced.

Further, public authorities may wish to seek to promote the human rights culture, and the equalities legislation, by adopting an approach which requires the supplier to use all the care, skill and diligence to be expected of a suitable, skilled and experienced supplier providing services of the type to be performed under the contract. This is wording used in many professional appointments, and would provide the public authority with additional tools to ensure performance of the specified services to a generally accepted industry standards. This may, in turn, support a virtuous circle of raised standards.

Procurement processes to support a specification-based approach

Sign-off procedures

First it is suggested that a public authority's contractual sign-off procedures should indicate that the provisions of the HRA and equalities legislation have been considered. Whilst it is impossible to provide hard guidance on the stage at which this should be done, because of differences in public authorities' procurement models, it is suggested that this sign-off should be achieved pre-tender.

Checklists

Secondly, it may well be helpful for public authorities to develop checklists of issues to be considered before any form of sign-off can be given. These checklists should not be exhaustive, in the sense of precluding consideration of issues relevant to a particular procurement. Issues that public authorities may wish to consider include:

- whether the delivery of the particular service is likely to engage the HRA (and/or equalities legislation), and if so which rights (parts) in particular. A good example of a service that might engage the HRA (and equalities legislation) would be the provision of care services to vulnerable members of society. Another would be the delivery of an administrative service; the latter would need to recognise the physical or linguistic accessibility needs of particular service users;
- identifying the steps that have been taken to define those needs to ensure that the relevant rights are respected (and other legal duties fulfilled), for example consultation with professional advisers and/or representative end users. The results of this process would be reflected in the specification;
- identifying any decisions taken which may lead to those rights not being respected and/or needs not being met, in whole or in part (for example because of competing requirements of other services or other service users), justifying those decisions by reference to the HRA (and/or equalities legislation, as appropriate) and setting out any alternative strategies for respecting those rights and meeting the relevant needs;
- specifically identifying contract monitoring arrangements for any areas of particular sensitivity; and
- identifying the consideration that has been given to enforcement mechanisms in the event of supplier underperformance, so as to avoid situations where the public authority is left without an effective remedy (and thus cannot meaningfully act in relation to the contract to secure the rights and meet the needs of end users) and to create a situation where the supplier always has an incentive to deliver.

Whether or not a checklist approach is adopted, public authorities should ensure that appropriate weighting is given to the relevant parts of the specification at evaluation.

Reference back to the public authority

Thirdly, linked to the point made above about suppliers potentially being willing to accept some residual contractual powers of direction from public authorities in 'grey' areas when the basic scope of supplier obligations is clear, public authorities may wish to consider specifying that identified decisions, which the public authority regards as being likely particularly to engage the HRA (and/or equalities legislation), need to be referred back to the public authority for determination.

Detailed contents of specifications

Specifications could require suppliers to perform certain tasks as part of the delivery of relevant parts of service to ensure that relevant human rights considerations have been taken into consideration. For example, a public authority might choose to require the supplier to consider and record certain matters as part of the preparation of a care plan. This might take the approach of requiring the supplier to work through certain checklist items; the approach might be much the same as for the internal processes of the public authority. It is worth repeating that there is a need here for the public authority to ensure that the specification remains within permissible bounds, from a public procurement law point of view, so far as specifying the method of delivery is concerned. In short, this means that processes must be specified in output terms, and limiting the specification of processes to those matters that help to define the performance characteristics of the service.

Other fruitful areas for detailed specification could include, for example, output specifications in relation to ensuring that those engaged in service delivery are aware of the implications of the HRA and equalities legislation relevant to the performance of the contract. This would help to ensure that where a supplier is to determine certain operational policies relating to service delivery it does so in a way that is compliant with the legislation, for example by recognising that that policy may need to be applied flexibly to accommodate particular circumstances.

In preparing specifications for a mixture of services and works, public authorities should extend their consideration of HRA (and equalities legislation) issues to practical matters relevant to the design of the works, as well as to process output specifications. For example, physical characteristics of, for example, a prison, might combine with process to result in infringements of the HRA. The standard of what was required would depend upon the circumstances. This lends support, however, to a tailored, specification-based approach, rather than an attempt at blanket coverage of issues via uniform contractual terms and conditions.

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