

The Public Sector Equality Duty Evidence to Fawcett's Sex Discrimination Law Review



**Dr Mary-Ann Stephenson,
Co-Director, Women's Budget Group
July 2017**

Summary

The PSED has had a positive impact on equality practice within public authoritiesⁱ. The vast majority of evidence submitted to the Independent Inquiry on the PSED contained examples of this positive impact, although this was not reflected in the report of the Inquiryⁱⁱ.

However, the aim of the duty was to bring about a transformative approach to equality by going beyond simply outlawing discrimination to tackle inequality at a structural levelⁱⁱⁱ. The duty has failed to fulfil this aim. In particular, there is still a failure to consider gender equality in a meaningful way. If the PSED is to fulfil its potential, there is a need for:

- Stronger specific duties for England including duties relating to gender equality and a duty to carry out equality impact assessments
- Strengthening the capacity of the EHRC to share best practice, monitor and enforce implementation of the PSED
- Commitment at a senior level of Government
- Improvement in the understanding and capacity of public bodies to meet the requirements of the PSED
- Restore the socio-economic duty
- Meaningful engagement with civil society including women's organisations during policy development

Specific Duties

The Coalition Government introduced two specific duties for England in 2011. These are to:

- Publish information to demonstrate compliance with the general equality duty by 31 January 2012 (April 2012 for schools and pupil referral units) and annually after that. This should include information about employees and people affected by the body's policies and practices who share a protected characteristic. Public bodies with less than 150 staff do not have to publish information on their employees.

¹ Evidence to Fawcett review of equality legislation. Mary-Ann Stephenson - Women's Budget Group

- Prepare and publish one or more equality objective that the body thinks it should achieve.

There is no duty to set out steps to meet equality objectives, no duty to consult or involve, no duty to publish specific information on the pay gap and no duty to consider equality in procurement.

In practice it is difficult to see how these two duties help to hold public bodies to account since all these bodies need to do is publish a single equality objective (not set out how it was reached, or develop a plan to deliver it) and some equality information. The removal of the duty to consult or engage makes it less likely that the public will be able to hold public bodies to account. The previous specific duties covering race, gender and disability all included a requirement to consult or consult and involve. The Gender Equality Duty also included a specific duty to address the gender pay gap.

Public bodies do not have to set objectives for every equality group. As a result, there has been a reduced focus on gender equality since the PSED replaced the Gender Equality Duty. Only a quarter of local authorities have an objective relating to gender equality for example^{iv}. Under the previous Gender Equality Duty all public bodies had to develop a Gender Equality Scheme and there was a specific duty to address the gender pay gap.

The weakness of the specific duties means that the only way in which public bodies can be held to account under the PSED is through judicial review of a failure to meet the general duty (mainly a failure to consider equality impact at all). There have been some important victories in judicial review cases, but judicial review is expensive and time consuming.

Both Scotland and Wales have more extensive specific duties. The Scottish Government has introduced specific duties for Scotland which cover:

- Duty to report on mainstreaming the equality duty.
- Duty to publish equality outcomes and report progress. These outcomes must be prepared with the involvement of people who are likely to be affected and groups representing them and based on relevant evidence.
- Duty to assess and review policies and practices. Authorities must consider relevant evidence when making their assessment and take account of their assessment in developing a policy or practice. They must also review and where necessary revise existing policies or practices.
- Duty to gather and use employee information. These must be published in an authorities mainstreaming report along with details of how the authority has gathered and used the information to better meet the obligations of the duty.
- Duty to publish gender pay gap information
- Duty to publish statements on equal pay every four years
- Duty to consider equality in public procurement

- Duty to publish equality information and assessments listed above in an accessible manner
- Duty on Ministers to publish proposals to improve performance and report on progress every four years.

The specific duties introduced by the Welsh Assembly in Wales are to:

- Prepare and publish equality objectives. If an authority does not have an objective for each protected characteristic they must say why not.
- Set out how and by when it intends to meet its objectives and monitor progress
- Publish an equality objective in relation to the gender pay gap or publish reasons why not. Publish an action plan on gender pay
- Review objectives at least every four years
- Involve people who are representatives of protected groups when drawing up objectives, strategic equality plan and equality impact assessments.
- Carry out and publish equality impact assessments
- Collect and publish equality information
- Collect and publish employment information including information about pay, grade, working pattern, internal and external recruitment, training, disciplinary and grievance procedures and those who have left the authority.
- Ensure staff are trained to be able to meet their obligations under the duty
- Draw up and publish a strategic equality plan
- Have due regard to equality in procurement
- Publish an annual report on the duty and action to meet specific duties
- Welsh ministers have a duty to publish a report on how devolved authorities are meeting the general duty
- Keep arrangements under review

New specific duties should be developed for England along the line of those introduced in Scotland and Wales. These should include:

- ***A duty to have due regard to SDG5 (relating to women's equality)***
- ***Duties to develop and report on plans to meet equality objectives***
- ***A duty to carry out equality impact assessments of policies, and for on-going monitoring of the equality impact of policies and practise.***
- ***A duty to consult and involve affected groups in the development and implementation of policy***
- ***A duty to ensure proper training and resourcing for those responsible for equality***

The EHRC

The Equality and Human Rights Commission is the body responsible for monitoring and enforcement of the PSED. It has had both its budget and remit cut since 2010.

3 Evidence to Fawcett review of equality legislation. Mary-Ann Stephenson - Women's Budget Group

The 2011 Public Bodies Act gave the Government to modify the ‘constitutional arrangements’ of a range of public bodies (including the EHRC). This included the power to change the chair, powers to employ staff, constitution and role and the ‘extent to which the body exercises its functions on behalf of the crown’. The government also gained the power to amend the funding arrangements for a number of public bodies (again including the EHRC) and to modify their functions. This means that the Government can now change the functions of a range of public bodies without the need for primary legislation.

In addition, the EHRC budget has been reduced from £70 million when it was launched to £17.1 million. It has had its duty to promote good relations and the power to make grants removed. Advertising and public information campaigns are only allowed where the EHRC has a legal duty to provide people with information, where critical to the effective running of the EHRC or where there ‘is robust evidence that marketing and advertising delivers measurable outcomes that meet ERHC objectives’. It has been prevented from producing statutory guidance on the Public Sector Equality Duty.

Taken together these cuts to budget and changes to its role significantly reduce the power of the EHRC. Although all the mechanisms for enforcing the PSED and other parts of the Equality Act remain in place, the cuts to its budget means that the EHRC now has far fewer resources with which to carry out this work. The reduction in the role of the EHRC has resulted in an information and enforcement gap around the PSED. Even equality officers express uncertainty about what is required of them and the EHRC lacks the resources to ensure that impact assessments are meaningful.

The fact that the Government can now make significant changes to the EHRC’s role through secondary legislation may make the organisation wary of public challenges to Government policy. The removal of the ‘good relations’ function and the limitations on advertising and public information spending restrict the ability of the EHRC to run campaigns to encourage members of the public to hold public bodies to account under the PSED.

If the PSED is to fulfil its potential this requires an increase in the role and resources of the EHRC to educate, monitor and enforce.

Commitment at a senior level within Government

One of the main complaints from public authorities in their evidence to the Independent Review of the PSED was confusion over what the duty required them to do⁴. There were complaints about mixed messages from Government Ministers, including the former Prime Minister who announced he was ‘calling time’ on equality impact assessments and Brandon Lewis, former Minister of State for Local Government, wrote to all local authorities to emphasise that Equality Impact Assessments were not a legal requirement, describing them as ‘time consuming, bureaucratic, tick-box exercises’.

4 Evidence to Fawcett review of equality legislation. Mary-Ann Stephenson - Women’s Budget Group

More recently the Women and Equalities Committee criticised the refusal of the Treasury (under both the current and the previous Chancellor) to reveal analysis of how the 2015 Spending Review affected women, black and minority ethnic people and disabled people. Such analysis is possible, as shown by the work of the Women's Budget Group^{vi}.

These actions, along with the reduction in the role and resources of the EHRC, send a message that national Government does not take the Public Sector Equality Duty seriously. This has an impact on the attitude of other public bodies. My own research with equality officers in local government showed that they were committed to meeting the obligations of the PSED but sometimes had difficulty persuading their colleagues to prioritise this work, in part because of a belief that national Government was not committed to enforcement of the duty.

Leadership on the PSED from the top of Government and from powerful departments such as the Treasury can have a powerful impact on the priority given to the PSED across the public sector.

Action within public bodies

Compliance with the PSED varies across and within public bodies. There are examples of good practice, but also of public bodies which still treat the PSED as a 'tick box' exercise rather than an opportunity to ensure equality throughout the organisation and its work.

My research within local authorities showed that fear of judicial review had led to a focus on ensuring Equality Impact Assessments were carried out, but that lack of understanding of equalities issues and resources for equality work, meant that the quality of these impact assessments were often poor. There were some examples of good practice but there are still too many examples of impact assessments that are carried out late in the day, based on limited data and limited or poor consultation with those likely to be affected by proposals.

Many impact assessments demonstrate a poor understanding of gender equality. Among those I have reviewed these include impact assessments of a carers strategy where the only mention of gender was a statistic showing the number of men who were unpaid carers, an assessment of cuts to sure start centres which stated under gender impact that there was likely to be an equal number of boys and girls among the children affected and a strategy on local apprenticeships that did not mention gender at all. These are not isolated cases.

However, where there was a commitment at a senior level, equality staff who were properly trained and resourced and meaningful engagement with civil society groups equality impact assessments could be a powerful tool to analyse how policy and practice impacted on different equality groups. EIAs were more likely to be tick box exercises when carried out in organisations where there was not an institutional commitment to equality^{vii}.

Public bodies should ensure:

5 Evidence to Fawcett review of equality legislation. Mary-Ann Stephenson - Women's Budget Group

- ***A commitment at a senior level to promoting equality.***
- ***Sufficient training and support for all staff on equality***
- ***Properly resourced equalities teams***
- ***Meaningful engagement with external interest groups***
- ***Strong relationships between those working for equality within the authority (as officers/councillors for example) and those working outside.***

Restore the Socio-economic duty

It was intended that the PSED should cover ‘socio economic status’ (social class) among the other ‘protected characteristics’. This provision was removed by the Coalition government. However, some local authorities, such as Islington Borough Council, have made a decision to consider socio-economic status when carrying out Equality Impact Assessments. This means that they analyse their policies and practices for the impact on the poorest people and consider whether these policies will increase or reduce economic inequality.

The socio-economic duty provided an important opportunity to ensure that the impact of policies on economic inequality was considered and should be restored.

Engagement with civil society including women’s organisations during policy development

Under the previous equality duties covering race, gender and disability there were specific duties that contained a requirement to consult or consult and involve. This led to an increase in engagement with groups representing people with protected characteristics. Levels of consultation with equality groups appear to have fallen since these duties were replaced by the PSED.

Civil society organisations have direct experience of the actual and likely impact of policy, the barriers to equality and the policies that would best overcome these. Grassroots organisations in particular can help ensure that public authorities connect with the most marginalised and disadvantaged and that policies meets these people’s needs.

The local authorities with the best record on considering the impact of their policies on gender equality were those where there was a well-established local women’s voluntary sector, with good relationships with both officers and councillors. These groups helped ensure that officers were aware of the likely gender impact of policies and were able to highlight the actual impact on an on-going basis.

For engagement to be meaningful public bodies need to ensure:

- ***Consultation processes are designed to be accessible, widely advertised and with sufficient time for organisations to respond***

- **Civil society organisations are involved from an early stage in developing policy, rather than being presented with a policy for comment shortly before it is finalised**
- **Civil society organisations are properly resourced to enable them to take part in consultations**
- **Engagement is not limited to formal consultations but includes opportunities for on-going dialogue.**

Sources

This submission draws on findings of a research project into the implementation of the PSED in local government. The research consisted of in-depth case studies in three local authorities (a London borough, a metropolitan authority and a largely rural county council) which included interviews with equality officers, senior managers responsible for equality, trade unionists and local equality organisations; interviews with equality officers from ten other authorities, interviews with national trade unionists and equality campaigners and a review of current evidence on the implementation of the PSED in practice.

www.wbg.org.uk

ⁱ See: Clayton-Hathaway K, 2013a, *The Public Sector Equality Duty: Empirical Evidence Base*, Oxford Brooks Centre for Diversity Policy Research and Practice, Oxford

Clayton-Hathaway K, 2013b, *The Public Sector Equality Duty: Analysis of Supporting Evidence*, Oxford Brooks Centre for Diversity Policy Research and Practice, Oxford

ⁱⁱ Stephenson M, 2014, 'Misrepresentation and Omission—An Analysis of the Review of the Public Sector Equality Duty', *Political Quarterly*, 85:1 75

ⁱⁱⁱ Hepple B, Coussey M and Choudhury T, 2000, *Equality: A new framework*. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation, Hart, Oxford

^{iv} EHRC 2013, *Assessment of the publication of equality objectives by English public authorities*, Equality and Human Rights Commission, London, available on line at: <https://www.equalityhumanrights.com/en/publication-download/assessment-publication-equality-objectives-english-public-authorities>

^v Stephenson M, 2014, 'Misrepresentation and Omission—An Analysis of the Review of the Public Sector Equality Duty', *Political Quarterly*, 85:1 75

^{vi} http://wbg.org.uk/wp-content/uploads/2016/12/AFS2016_Briefing_WBG.pdf

^{vii} Stephenson, M-A, *Mainstreaming equality in an age of austerity: What impact has the Public Sector Equality Duty had on work to promote gender equality by local authorities?*, Thesis submitted in the fulfilment of the requirement for the degree of Doctor of Philosophy, University of Warwick School of Law, Faculty of Social Sciences