



Public Sector Equality Duty Review

TUC response to GEO Call for Evidence – 19 April 2013

1. Introduction

1.1 The TUC represents 53 affiliated unions who together represent some six million members working across the public and private sectors. Our affiliates regularly represent workers suffering from discrimination or harassment, and work with employers in raising awareness of equality issues in the workplace and in developing policies and practices to stop discrimination. For union members, both as employees of public authorities and as service users, the Public Sector Equality Duty (PSED) plays a vital role in underpinning such measures, especially during the current economic downturn where budget cuts are falling hardest on those already disadvantaged.

1.2 The TUC believes that it is far too early to conduct a credible review of the PSED given that it only came into force less than two years ago, and the specific duties only one year ago. Nevertheless, trade unions have provided a wide range of evidence for this review highlighting the positive difference the PSED is making to promoting equality and how it could be improved. The key findings in this response are:

- **Positive overall impact in the public sector:** the equality duty has enabled the gathering of equality information, greater transparency and accountability, a sense of fairness and a basis for action to improve employer policies or decisions (see paragraphs 3.2-3.8).
- **Better engagement with protected groups:** the duty has encouraged public authorities to engage with and accommodate the concerns of protected groups, particularly with disabled, LGBT communities (3.9). However a weakening of the specific duty on engagement and the cuts environment was undermining engagement (3.10) and better enforcement was also required (3.11)
- **Improved employment outcomes:** the duty has enabled unions to secure improved employment outcomes for protected groups, particularly through reconsideration of redundancy processes, securing reasonable adjustments for disabled workers, and flexible working for women (3.12-3.14). But there was also evidence that protected groups were suffering in the present climate (3.15). Unions also reported that it was too early to assess the impact of the new duty (3.16).
- **Improved service delivery outcomes:** improvements for service users were recorded, particularly for disabled people (3.18), but again, it was a mixed picture (3.19)
- **Impact on procurement:** there was limited evidence from unions of the duty being applied to procurement, perhaps partly because it was not included as a specific duty as originally intended (3.20-3.23).
- **The overall importance of the PSED:** unions were adamant that the PSED played a vital role in progressing equalities. Without it any good work that had been done would be undermined (3.23).

1.3 Despite such progress, unions felt that the PSED was far from fulfilling its potential, given a range of factors including: newness of the duty (2.4-2.5); weakening of the specific duties (2.6-2.9); refusal of the government to enact a statutory code of practice on implementation (2.10-2.11); government’s undermining of the duty (2.12-2.20); roll-back on national equality standards (2.21-2.28) and cuts in staff and resourcing on equality (2.35 to 2.37). These negative factors are partly mitigated by the emerging helpful guidance from the courts on what is required to meet the duty (2.29 -2.34). Recommendations to improve the effectiveness of the duty are included in paragraphs 5.2 to 5.6.

1.4 To gather evidence for this response, the TUC together with the Labour Research Department (LRD) conducted an online survey in November and December 2012 of trade union workplace representatives and trade union officers on the effectiveness of the former equality duties and the PSED. A range of other evidence is also included in this response. The TUC would be happy to provide more details on any of the cases presented in this submission if required by the review panel or GEO. This response is structured around the four questions put in the GEO’s call to evidence.

2. How well understood is the PSED and Guidance?

2.1 There is limited and varied evidence on how well public authorities understand the PSED. The Equality and Human Rights Commission’s (EHRC) recent assessment of public authorities’ compliance with the specific duty to publish equality information concluded that “only one in two public authorities had met the requirements of the specific duty regulations”.¹ This finding accords with the views of trade unions that while there are very positive uses of the duty, effective take-up of it has been mixed.

2.2 In understanding and addressing this mixed understanding of the PSED by authorities, the review should take into account and/or address the following challenges that unions have identified: (i) the newness of the duty; (ii) the weakening of the specific duties; (iii) the refusal of the government to implement a statutory code of conduct; (iv) negative and confusing political messages about equality and equality impact assessments; (v) the general roll back of guidance on the equality duty; (vi) guidance from the courts; and (vii) cuts in staffing and resources to advance equalities.

2.3 Many of these factors explain the poor take-up of the original “due regard” duty in the original Race Relations Act 1976. As the Commission for Racial Equality noted in 1998, the duty had had a limited impact; they said that although: “local authorities [have] a duty to have due regard to the promotion of equality of opportunity in carrying out their functions, it leaves this duty unenforceable, with the result that it continues to be ignored, even flouted.”² These issues are now considered in turn.

¹ www.equalityhumanrights.com/uploaded_files/PSD/publishing_equality_information_final.pdf

² Reform of the Race Relations Act 1967: Proposal for Change, CRE, 1998 page 8.

This review is premature

2.4 The TUC believes that it is far too early to conduct a credible review of the PSED. The new equality duty only came into effect just under two years ago and the specific duties only a year ago. Compliance with the new duty was not required until 31 January 2012 (or 6 April 2012 if a school) and public authorities only had to publish objectives by 6 April 2012.

2.5 Much of the evidence needed to conduct a credible review is therefore yet to emerge. Indeed, in Scotland, the new specific duties only came into effect on 27 May 2012 and public authorities are only required to publish their first set of equality outcomes by 30 April 2013, several weeks after this call for evidence closes. In Wales, public authorities are only expected to set equality objectives by 2 April 2012 and then review them up to four years later.

The weakening of the specific duties

2.6 The former race, disability and gender equality duties had sets of specific duties supporting them. These duties provided detailed guidance to public authorities on the steps they needed to take to ensure they were having due regard to equality. They required authorities to do such things as: equal opportunities monitoring; training managers on the requirements of the duty; developing written equality schemes setting out what actions they intended to take to meet the duty, including their arrangements for assessing the impact of their policies and practices on equality; and consulting women or people from ethnic minority groups and involving disabled people in the development of their equality schemes.

2.7 The specific duties for the new PSED have been significantly weakened. They only place two obligations on public authorities: a need to publish equality information about service users and the workforce if there are over 150 employees, and a need to publish “at least one” equality objective. This provides less guidance to public authorities than the previous duties. As the NUT report:

“Sadly, removal of some of the very useful specific duties attached to the race, disability and gender duties, such as the duty to publish the numbers of applicants for employment, training and promotion by reference to their protected characteristics, mean employers are less keen to consider the equality impact of their recruitment policies, for example. They know we can’t take them to task and support positive change without the necessary information.”

NUT Equality Officer

2.8 It may also lead to critically important equality issues getting ignored or downplayed. A key example is the former Gender Equality Duty which included a specific duty on tackling the gender pay gap. This encouraged most public authorities to take action on the gender pay gap. For example, the level of equal pay audit activity was considerably higher in the public sector than the private sector in Feb/March 2008 (43% compared to 23%), shortly after the GED took

effect.³ Yet now the gender pay gap and equal pay are presented as just one of many potential equality priorities and objectives that public authorities could select.

2.9 In contrast, the Scottish and Welsh administrations have used their devolved powers to develop specific duties that are more akin to the more detailed, previous ones. Scottish public authorities have a duty to publish gender pay gap information from April 2013 and every two years after that and they also have a duty to publish a policy statement on equal pay from April 2013 and every four years after that. In response Scottish trade unions report a positive and large increase in the interest of senior managers in narrowing the gender pay gap. In Wales, public authorities are directed to consider the need to have an equality objective related to differences in pay between employees with different protected characteristics. They must also set out their arrangements for identifying and gathering information on pay differences. Where they have identified any gender pay differences, they are encouraged to publish an equality objective to address the differences, or provide reasons for not doing so.

Refusal to implement a statutory code of practice

2.10 The government has refused to lay before Parliament the EHRC's code of practice on implementation of the duty. This has further deprived public authorities, public service users and employees of detailed and authoritative statutory guidance on what is required to comply with the general duty. As an alternative, the EHRC has just published "technical guidance on the public sector equality duty" on 15 January 2013. This is too late to influence practice that the PSED review might have been able to assess. This downgrading of the code of practice also creates the impression that the equality duty need not be taken as seriously as before.

2.11 As part of the TUC/LRD survey, an NASUWT officer explained the specific impact of not implementing the statutory code of practice:

"What the coalition ignores is that these provisions were introduced for a reason. They have produced no evidence to justify their removal and this decision is a blow to the equality duties biting and will give employers a green light to discriminate."

NASUWT officer

Government undermining of the duty

2.12 Recent statements from government ministers have sent negative and confusing signals to public authorities on how they should assess and monitor equality. Prime Minister David Cameron said to the CBI annual conference last year that:

³

http://www.equalityhumanrights.com/uploaded_files/research/2_equal_pay_reviews_survey_2008.pdf

"We have smart people in Whitehall who consider equalities issues while they're making the policy. We don't need all this extra tick-box stuff... So I can tell you today, we are calling time on Equality Impact Assessments. You no longer have to do them if these issues have been properly considered."⁴

2.13 Communities Secretary Eric Pickles also dismissed equality monitoring as "unnecessary and intrusive" and a waste of taxpayers' money back in September 2011.⁵

2.14 In a recent blog for LibDem Voice, BIS and Equality Minister, Jo Swinson seems to imply that the duty has actually held policymakers back from properly considering equality. She states:

"As Liberal Democrats we don't think equalities should be about ticking-boxes and regulatory hoops – it's too important to be relegated to an administrative duty. Advancing LGBT, gender, disability and race equality will only be achieved by putting equalities at the heart of every department."⁶

2.15 Yet, the Minister did not say how equalities would be put at the heart of the every departments' agenda.

2.16 In December 2012, following on from David Cameron's CBI speech, Brandon Lewis, Secretary of State for Local Government, wrote to all leaders and chief executives of local authorities urging them to stop doing monitoring and Equality Impact Assessments (EIAs):

"Equality Impact Assessments are not and have never been a legal requirement. Indeed, they can be resource intensive and take staff away from planning and delivering important public services.

...Local councils should be able to use their judgment to pay due regard to equality without resorting to time consuming, bureaucratic, tick-box exercises at the end of the decision-making process."⁷

2.17 Finally, the Cabinet Office has instructed Whitehall departments to stop conducting EIAs, saying this "sets an example for the whole of the public sector, which we would like to see follow suit".

2.18 These high level pronouncements have been very damaging to the effective implementation of the PSED. Firstly, the government has sent the signal that all EIAs are bad and therefore unnecessary. Trade unions have identified cases where

⁴ Speech to CBI annual conference (November 2012). Available at www.cbi.org.uk/media-centre/videos/2012/11/david-cameron-cbi-annual-conference-speech/

⁵ DCLG press release (September 2011) www.gov.uk/government/news/a-fair-deal-for-the-voluntary-and-community-sector-from-whitehall-to-town-halls

⁶ www.libdemvoice.org/jo-swinson-mp-writesequality-is-about-more-than-ticking-boxes-32672.html

⁷ www.gov.uk/government/uploads/system/uploads/attachment_data/file/42041/Draft_Reducing_Statutory_Burdens.pdf

EIAs have been done poorly (see 3.3), but that is an argument for improving them, not abandoning them. After all, there is no legal requirement to do a poor EIA. When done well, they are a vital key tool in improving equality outcomes, as unions report (see e.g. examples in 3.2, 3.4, and 3.5). Additionally, unions have responded to poor EIAs, by engaging with the employer to secure better equality outcomes (see examples in 3.7, 3.8, 3.13 and 3.18).

2.19 Secondly, there has been no guidance from the government on what should replace EIAs. As a result public authorities are likely to be doing less, not more, to meet the PSED. As one respondent to the TUC/LRD survey stated:

“I deal with a number of employers and they are quick to point out that EqIAs are no longer a lawful requirement.”

PCS, Assistant Branch Secretary

2.20 Nevertheless, trade unions also report that many public authorities are still using EIAs despite heavy discouragement because they believe they are the most effective way to achieve improved equality outcomes and meet the duty.

Roll-back on national equality standards and supervision

2.21 The TUC is aware of a roll-back in some parts of the public sector on national equality standards and supervision. On 28 July 2010, the Fire Minister announced that he would no longer be enforcing national equality and diversity recruitment, promotion and progression targets, nor publishing annual equality and diversity reports or the National Equality and Diversity Awards. Instead, any consideration of equality was left to local services. Yet the FBU reports that a lack of guidance across the sector has led to either inconsistent or poor impact assessments being done or equalities not being considered at all.

2.22 Education unions similarly report that consideration of equalities, both for pupils and the workforce, is very low and often fragmented. This is supported by the recent inquiry into inequalities in school exclusions by the Office of the Children’s Commissioner (OCC) which found that just over a third of school respondents surveyed were aware of the equality duty.^[1]

2.23 This may be partly because key guidance for schools has been shelved. For example, a suite of documents developed in conjunction with education unions, employers and other stakeholders, entitled Safe to Learn: Embedding Anti-Bullying Work in Schools, has been removed from the DfE’s website, as has guidance on strategies for protecting school staff from cyberbullying.

2.24 Yet the need for better guidance on the equality duty was requested by 49 per cent of schools responding to EHRC research into the performance of the equality duties within schools.^[2] The OCC report also stated “head teachers, teachers and

^[1] http://www.childrenscommissioner.gov.uk/content/publications/content_654

^[2] www.equalityhumanrights.com/uploaded_files/research/rr70_equality_duties_and_schools.pdf

their organisations have consistently informed us that they would welcome further guidance on equality law”.^[3]

2.25 As the NASUWT commented:

“Teachers desperately need help and support for ensuring there is a whole-school/community approach to advancing equality. Guidance materials such as the popular ‘Safe to Learn’ online resource for schools provided a necessary gateway to guidance for head teachers, governors and school representatives. The removal of this necessary resource by the Department for Education will undoubtedly undermine and turn the clock back on tackling inequalities.”

NASUWT officer

2.26 The abolition of the General Teaching Council in March 2012 which had oversight for equality and diversity in schools and the workforce has also been very detrimental. In addition, the Ofsted inspection framework has been changed so that inspectors no longer make separate judgements about a school’s work on equality and community cohesion. According to NASUWT, anecdotal evidence suggests that inspectors are now viewing equality as a relatively minor consideration.

2.27 The government has also removed “Equality Duties at Work - A Quick-Start Guide” from its websites. This Cabinet Office publication was produced by an equality and diversity task group of the Public Services Forum (a joint public service union-employer forum) through workshops with practitioners and union representatives from within the public sector. The Guide concludes that the two key lessons learned from organisations that had made progress in preventing discrimination, advancing equality and fostering good relations, were: (i) the role leaders need to play in driving and shaping the change; and (ii) the role good quality data plays in enabling organisations to identify needs, monitor progress and create accountability.

2.28 The Guide aimed to encourage those within the public sector to better understand how the equality duties could help them deliver more efficient and effective public services, learning from others’ experiences, and to tackle the tick-box approach some had adopted. It had helpful tips and case studies from different organisations of improved equality outcomes. It was intended to be an online tool that would be kept up-to-date with current legislation and the experiences of various public sector organisations.

Guidance from the courts

2.29 While the government may have weakened the understanding and implementation of the PSED, there has been an increase in guidance from the courts in recent years on what is needed to comply with the general ‘due regard’ duty. Service users and others have cited s.149 or the former equality duties with

^[3] http://www.childrenscommissioner.gov.uk/content/publications/content_654

increasing frequency in judicial review cases challenging public authorities' decision-making.⁸

2.30 This case law that has emerged from these challenges has affirmed the importance of the equality duty.

“It is the clear purpose of section 71 [the race duty] to require public bodies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.”

Arden LJ in *Elias v Secretary of State for Defence* [2006]

“...inattention to [compliance with the equality duty] is both unlawful and bad government”

Sedley LJ in *R (BAPIO) v Secretary of State for the Home Department* [2007]

“Although [breach of the equality duty was] here characterised as a procedural defect, it is a defect in following a procedure that is of very substantial, and not merely technical importance”

Buxton LJ in *R(C) v Secretary of State for Justice* [2009]

“Even when the context of decision-making is financial resources in a tight budget, that does not excuse compliance with the PSEDs, and there is much to be said for the proposition that even in straitened times the need for clear, well informed decision-making when assessing the impacts on less advantaged members of society is as great, if not greater.”

Blake J in *R (Rahman) v Birmingham City Council* [2011]

2.31 The case law has also confirmed that to have due regard to equality a public authority needs to: gather sufficient information about the impact on equality; give such information proper consideration at a formative stage of decision-making; and consider whether any negative impact can be eliminated, mitigated or justified. Authorities are also advised to have some kind of audit trail to show the actions that they took to comply with the duty.⁹

2.32 The courts have never held that there is a requirement to complete an EIA or that having one itself is sufficient to show compliance with the duty (especially if it has been completed with a purely ‘tick box’ or ‘form-filling’ mentality). However, the main components of a good quality, substantive EIA process is what the courts have held to be necessary to have due regard to equality. It is therefore harmful to

⁸ The Prime Minister in his CBI speech announced his intention to make judicial review less accessible.

⁹ For further information on this see TUC Equality Duty Toolkit at www.tuc.org.uk/extras/EQUALITY_TOOLKIT.pdf

discourage public authorities from conducting EIAs, especially where no alternatives have been proposed.

2.33 There is also no sign of the courts going too far in the demands and expectations they are placing on public authorities. Recent case law has shown that, while still recognising the fundamental importance of complying with the equality duty, judges have been wary of following a “nit-picking”¹⁰ or “unduly onerous”¹¹ approach to what is required of a public authority when analysing and considering the impact of their decisions on equality.

2.34 Case law has also affirmed that the equality duty can provide the legal underpinning for positive action. For example, in *Core Issues v TfL* [2013], Lang J found that Transport for London would have been in breach of the PSED if it had allowed homophobic ads to be run on its bus service.

Cuts in staffing and resources on equality

2.35 In the current economic climate trade unions have reported a loss of staff and resources dedicated to addressing address equalities in public authorities. For example, a community engagement team at a local council with responsibility for equalities, among other things, was reduced from 12 staff, down to just three.

2.36 There have also been significant cuts in staffing to both the GEO and the EHRC, the key public bodies promoting effective implementation of the duty. By 2014/15 the EHRC will have had its budget cut by 62 percent and will have lost 72 per cent of its staff compared to when it was established in 2007.

2.37 Trade union workplace representatives can play a vital role in promoting equalities in the workplace. Research by Nottingham University Business School found that, where employers actively involve trade unions on equality issues, equal opportunities policies are much less likely to be ‘empty shells’. For example, in such workplaces, recruitment and selection is more likely to be monitored and reviewed from an equality perspective and special procedures are more likely to be in place to encourage disabled people into work and to help women returning to work after having children. A survey of TUC-trained equality representatives found that the amount of time equality representatives get to spend on their duties has a corresponding impact on how effective they believe their efforts are in the workplace. However, more than a third of equality representatives feel they are not given nearly enough time to do the things their role requires them to do. This led the researchers to conclude that: “statutory rights to time off denied to equality reps in the Equality Act, would have contributed significantly towards helping them perform the role more effectively”.¹²

¹⁰ Elias LJ in *The Staff Side of the Police Federation v Secretary of State for Work & Pensions* [2011]

¹¹ Davis LJ in *Bailey v London Borough of Brent* [2011]

¹² Nicolas Bacon and Kim Hoque (2013) “The role and impact of trade union equality representatives in Britain”, Cass Business School at

What are the costs and benefits of the PSED?

3.1 This section includes responses to the TUC/LRD survey of trade union workplace representatives and trade union officers on the effectiveness of the former and current equality duties which are presented below. It also includes other union examples as well as more general evidence on the effectiveness of equality duties.

Positive overall impact in the public sector

3.2 On the whole respondents provided positive examples about the impact of the equality duty on gathering equality information, creating greater transparency and accountability, a sense of fairness and a basis for action to challenge policies or decisions. There were also examples of how better equality data and analysis had led to improvements in employment practices and service delivery as a result.

“We used the public sector duty to develop alongside the MOD [Minister of Defence] a Diversity Dashboard which gives us quarterly information on how the MOD is achieving (or not in some cases) its equality and diversity objectives. This shows welcome progress in some areas, e.g. gender equality (as does a recent pay audit which we are currently analysing) but significant failure in others e.g. race equality. At least it gives us a target to point to in equality discussions with the MOD. The Diversity Information is used now as a ‘model’ which many divisions of the MOD use as an equality monitoring tool.”

Prospect, Equality Officer

“Being able to ask for equality impact assessments has been very helpful as part of the various change programmes. On occasions, this has actually led to the employer deciding not to close an office, or to manage the closure and transfer in a different way. There used to be an annual award in the civil service for ‘transformative equality impact assessments’, which recognised impact assessments that had been mainstreamed into the organisation, achieved transformational change and positive outcomes for service users, employees and stakeholders. In fact, the FDA sponsored this award. The award was quietly removed from the list once the coalition government came in, which was hugely disappointing!”

FDA National Officer and Equality Officer

“Yes... our employer asks its workers for information on ‘protected characteristics’, with an option ‘prefer not to say’. Employer was able to supply me with details of those granted or refused voluntary redundancy based on protected characteristics listed in my request.”

UNISON representative, Welsh public authority

“UCU Wales recently had an issue with an EIA in relation to a redundancy exercise. In challenging the EIA, UCU Wales worked directly with the Diversity and Equality Manager to create a process and guidelines on the completion of EIAs... When the EIA was re-considered a number of issues in relation to modules was identified, including the discovery that the modules that were considered for closure were mainly chosen by female students, whilst those that were ‘safe’ traditionally recruited mainly male students. Once this was identified steps were taken to ensure that there was not a disproportionate effect on one gender.”

UCU Wales Support Official, example from Welsh university.

“...it has allowed us to request suitable adjustments to ensure [disabled] people perform at their best in a recent departmental refit”

PCS representative, civil service department

“The various existing Civil Service Pension Schemes are being replaced by a new Career Average Scheme, and (apart from those with transitional protection) members of the current schemes will be moving into the new scheme.

As part of the EQIA process the FDA identified a problem for those people moving from the Premium scheme to the new scheme, because their death in service protection would fall from 3 times salary to 2 times salary. This would have an unintended impact on those with potentially life-shortening illnesses. The Cabinet Office has agreed that some additional safeguards are needed for this group of people and are now working with the unions on the detail. This would not have been identified were it not for a structured process to consider potential impacts on particular groups of staff.”

FDA

3.3 There were, nevertheless, some complaints from trade unions that public authorities were not undertaking adequate equality monitoring or proper equality analysis. For example:

“They do Equality Impact Assessments... but the assessments are done very badly.”

UNISON representative, local authority

“The EQIA is done after the policy has been developed.”

PCS Branch Secretary

3.4 However, despite complaints that the duty was not always properly complied with a number pointed out that the existence of the statutory obligation gave them an important lever for challenging public sector bodies on their poor practice and outcomes for different groups. For example:

“The use of the Equality Impact Assessment has been repeatedly raised with the employer by PCS in order to ensure that the effects on disabled and minority groups are considered prior to implementation. Had the PSED not

been in place it is likely that significant detriment would have been imposed on some groups.”

PCS representative, civil service department

“Proper monitoring of the process has been required by the trade unions. The legal framework as well as an agreed process has enabled the unions to circumvent any poor practices and/or attempts to evade the duties.”

PCS representative, civil service department

3.5 An NASUWT representative, recently interviewed for a TUC/Runnymede Trust project¹³, explained how they had used the duty and the equality information the Local Education Authorities (LEAs) were required to gather to hold them to account over the impact of cuts on the diversity of teachers and service users. At one point she explains the importance of equality monitoring and how it need not be a complicated exercise:

“I think we’ve got something that’s concrete to help us to evidence our arguments and our discussions... Our LEAs... made a very simple, straightforward document – there is a template that can be easily adapted for any... service provider.”

3.6 A Unite Branch Secretary in Lambeth, interviewed for the same project, explained how with each phase of job cuts they had checked to see whether there had been a disproportionate impact on different groups and had found that women, especially BME women, and the disabled had been particularly badly hit, and the union’s ‘policing’ of the duty had led to engagement with the employer in a joint union-employer equality workshop to discuss the best way forward. She comments:

“When we ‘police’, we find that there is a discrepancy in things we need to address and that is what we are going to go forward and address”

3.7 In 2011, Hampshire County Council proposed cutting overtime rates for staff in certain pay grades. It conducted an EIA which stated that the new policy would not have a discriminatory impact. However, based on an analysis of the data in the EIA, UNISON was able to show that women were more adversely affected by the cuts losing 3.33 per cent of their earnings compared with a 1.96 percent loss for men. Affected women already earn nearly £6,000 less than men. Further, only 12 percent of the white workforce was affected by the cuts compared to 52 per cent of BME workers.

3.8 UNISON asked the council to withdraw these proposals and to consider a number of potentially less discriminatory alternatives. UNISON also wrote to the EHRC seeking its intervention. Unfortunately the EHRC replied that it had to

¹³ The full interviews are available at: <http://www.runnymedetrust.org/projects-and-publications/projects/employment-2/in-this-together/section-5---how-to-use-the-information-to-hold-your-employer-to-account.html>

prioritise resources across the tens of thousands of public bodies covered by the equality duties, and that this case did not meet its current strategic objectives. In the end the council agreed to implement a less discriminatory alternative proposed by UNISON.

Better engagement

3.9 The TUC Equality Duty Toolkit¹⁴ explains that one of the advantages of the equality duty is that it requires public authorities to listen with an open mind to the voices of the most vulnerable and historically disadvantaged at a formative stage of decision-making or policy review. In response to the online survey, a good number of trade union representatives were able to give positive examples of public authorities taking steps to engage in this way as a result of the duty. For example:

“Yes, when it comes to contracts affecting disabled people, our disability network, unions and others have had the opportunity to voice their concerns”

PCS representative, civil service department

“More engagement with LGBT community [a new group covered by the equality duty in the Equality Act 2010], and formation of new LGBT staff and student groups”

UCU representative, FE College

“The Equality Duty has over the period helped the Council to improve its interaction with minority groups within its administrative area.”

UNISON representative, Scottish local authority.

3.10 However, some mentioned a recent deterioration in engagement and involvement following the weakening of the specific duties and pressure to make cuts:

“The previous duties led to better engagement with employees and service users from protected groups than the current duties... This has led to some people not being as involved as they were previously. The specific duty to involve disabled people that was in the Disability Equality Duty was particularly important for making sure some of the most excluded people in society were able to fully participate in consultation and engagement processes. Although both the employers where I represent people are still committed to doing this, the cuts to the public sector and reduced duty means it is not always carried out as effectively as previously. This means that the most educated, articulate and vocal in society are now having a disproportionate influence in how, when and where services are provided and employee support is available.”

UNISON Disabled Members Officer

¹⁴ <https://www.tuc.org.uk/publications/viewPub.cfm?frmPubID=636>

“There was an improvement, but when the need to impact assess things ended, the department reverted back to its old ways more or less instantaneously, and now engagement is worse, if anything.”

PCS representative, civil service

3.11 One union officer said the equality duty had led to some improvement in engagement but commented there was still much more that could be done and this would only come about if the duty had more teeth:

“I agree the duties have led to better engagement with employees but still a long way to go. All this will only be effective if departments are accountable to someone, and if they have not adhered to the PSED, then there are penalties or consequences.”

PCS, Branch Secretary

Improved employment outcomes

3.12 Union representatives and officers had some examples of improved employment outcomes for protected groups as a direct result of the equality duties. However, a number commented that in the current climate of cuts and a perceived weakening of the equality duty framework they thought things were worsening for protected groups. A few also noted that, in their opinion, it was too early to say if the duties had led to significant outcomes as it would take time to improve things or the employer was not gathering the necessary data to monitor progress.

3.13 Among the examples of improved employment outcomes were:

“An example of how we have used equality monitoring to help compliance with the equality duties is our work on the Redeployment Pool. We receive information every quarter on its operation.... and we monitor by equality and diversity categories. In recent years, this has shown that contrary to MOD policy and the public sector duty requirements MOD disabled employees are twice as likely as others to find themselves in the RDP. In fact when we started digging it became apparent that disabled employees were not more likely to be placed in the RDP but it was taking longer for them to be redeployed than other staff. This was because of the way the cost of reasonable adjustments fell entirely on the new employing division. It was agreed that these costs would be better shared and where necessary covered by a central pool to encourage better employment opportunities for disabled people within MOD.”

Prospect, Equality Officer

“A small example – recently, the Ministry of Defence decided, as part of its green initiative, to shut down two of their banks of lifts in the headquarters building, and to reduce the time over which these lift were operating. The unions challenged this, as part of the PSED, and pointed out the impact this would have on disabled members of staff, as a result of which the policy was reversed.”

FDA, National Officer and Equality Officer

“Part-time contracts have been secured in higher proportions than previously benefiting women more (as they are more likely to have caring responsibilities)”

PCS representative, civil service department

3.14 Again, a number commented that at least with the duty in place they had greater leverage to ensure outcomes were improved or at least the position of protected groups was not worsened. The following was typical:

“Management action still discriminates but the framework allows the union to raise and address issues more quickly in order to get them resolved.”

PCS representative, civil service department

3.15 Among the comments suggesting that things were worsening in the current climate and under the new duty framework were:

“The original equality duties led to improved outcomes... [X] Council provided support for staff groups with protected characteristics including a dedicated HR Adviser for disabled employees. This role is vital to disabled employees who need advice on reasonable adjustments and workplace practices. It also helps managers understand their responsibilities and reduces the level of complaints being made. This role is now at risk as the equality duty relating to disabled people has been weakened and public sector cuts are being implemented.”

UNISON, Disabled Members Officer

“People with disabilities actively being targeted on capability and attendance management”

PCS representative

3.16 Finally, the following show how slow progress can be in some public authorities or the lack of data on outcomes (which should exist if the duty was being properly complied with):

“UCU has supported and assisted the employer to draw up a reasonable adjustment policy in April 2011 but it has taken the employer 18 months to implement”

UCU representative, FE College

“Not enough data at present to assess if changes have led to improved outcomes.”

PCS representative, government agency

Improved service delivery outcomes

3.17 There was a similar picture in terms of what trade union representatives and officers had to say on the equality duty and improved service delivery outcomes – although a greater number of respondents felt less able to comment as they lacked information on the service delivery side.

3.18 Among the positive examples received were:

“On balance the legislation has improved outcomes for service users ... the Council works very closely with transport providers to improve accessibility and services.”

UNISON representative, Scottish local authority

“Disabled access and audio loops have been installed in all public buildings”

Prospect representative, Scottish public authority

“Improved antisocial behaviour policies, improved services to disabled tenants who may need rehousing for reasons relating to their disability, increased awareness of issues for all groups and improved community cohesion...”

UNISON, Disabled Members Officer

“Raising awareness across the organisation of minority groups and equality does challenge stereotypes, and will mean some service users have a more positive experience as a result”

UNISON representative, Welsh NHS Trust

“The Ministry of Justice (MoJ) consulted over the planned closure of 103 Magistrates Courts and 54 County Courts across England and Wales in July 2010. The MOJ indicated that it would rely on an initial screening process on equalities and only conduct a full equality impact assessment after the consultation had taken place. PCS did not consider that this met the equality duties because the initial screening was perfunctory, and the EIA would not be undertaken in a way that might influence proposals under consideration. At worst, the EIA risked being a tick box exercise done after the fact.

In response to union concerns, the MoJ conducted more work on assessing the equality impact which did address some concerns about access to justice services for protected groups.

Without an impact assessment, the workforce and public service users would have no evidence trail to demonstrate that there had been due regard to equalities when public bodies are considering decisions regarding delivery of services.”

PCS

3.19 Again, the following comments illustrate the impact of the changed political climate in some authorities:

“Yes - there is a good level of discussion regarding outcomes for service users in the protected groups. But the relaxing of equality laws in relation to our outward roles means that there is also an equal level of discussion from management on not taking action when impact is identified as ‘it would be overstepping our roles as a light-touch organisation’”

PCS representative, government agency

Impact on procurement

3.20 Trade unions did not provide many examples of the impact the equality duty was having on procurement, largely because the specific duty relating to procurement in England has never been enacted. This is despite the governments earlier claim that, “Achieving procurement and equality objectives go hand in hand”.¹⁵

3.21 Accordingly, unions have reported cases where commissioned or contracted out services do not meet the requirements of the equality duty and where EIAs could have played a crucial role in avoiding unfairness.

“A domestic violence refuge recently had its funding cut and carried out large scale redundancies to its counsellors. No impact assessment was carried out. No attempt to work with other agencies to save/ adapt/ reduce the service. No similar service is available to service users within the geographic area and the knock on effect of redundancies to the wider workforce has not been assessed or received. Staff work above the working time regulations and line working/ health and safety is being compromised.”

UNISON

One positive example of equality being built into a procurement process comes from union representative at a Scottish local authority, which is under a specific duty on procurement.

“The Council’s Procurement Section is very much aware of the Equality Duty. To date any contractor doing work on behalf of the Council should comply with the Duty when carrying out work.

UNISON representative, Scottish local authority

3.22 The TUC is also aware of a range of positive examples of using procurement to achieve positive equalities outcomes in the EHRC’s Buying Better Outcomes guide for public authorities.¹⁶

The overall importance of the PSED

3.23 Trade unions were asked for their views on what would happen if the equality duty were repealed or replaced by a non-statutory scheme. Respondents overwhelmingly said that they would see this as a significant backwards step for equality and that it would make it even harder for practical improvements to be made. Even those who felt that the duty had led to little significant improvement within their own public authorities tended to believe the situation would worsen further still if the duty were repealed or replaced by a voluntary scheme. Below is a selection of these comments:

¹⁵ <http://www.secamb.nhs.uk/pdf/procurementEqualityOGC.pdf>

¹⁶ www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-procurement.

“This would be an entirely negative step putting the equality agenda back decades. In the current climate protected groups are the most affected by the cuts agenda so a voluntary scheme is highly likely to make matters worse.”

PCS representative, MOD

“Standards are dropping already, and basically, much that is in place is simply paying lip service to equality. If PSED were repealed this would be a huge backward step, and many of the improvement we have seen would vanish”

PCS representative, government agency

“Higher levels of discrimination which can only be addressed by going through the tribunal system, which is going to be much harder to access, given the changes that are being implemented [e.g. tribunal fees and abolition of statutory discrimination questionnaires].... the workplace will become a more unfair place”

PCS representative, civil service department

“I think that a voluntary scheme would risk being used only where it’s easy and unchallenging. Whereas, of course, the value of the PSED is where it makes employers confront problems”

Prospect representative, government agency

“We’d have even less leverage to protect our members from protected groups”

UCU representative, FE college

“Catastrophic for both users and staff. A step back to the dark ages with students and staff being unprotected by the wider community.”

UCU representative, FE college

“[It would] undermine the good work that is being done and has been done to ensure that workplaces and society do not discriminate either directly or indirectly. It is not possible to have a ‘quick win’ when it comes to challenging systemic discrimination and therefore any duties should have an appropriate period of time to create the required cultural change around discrimination. Equality should be a central process that underpins all other work, it should not be a voluntary or peripheral add on to the everyday work that an organization undertakes.”

UCU Wales Support Official

“I fear that particularly given the cuts for local government it would have massive consequences for different equalities groups because a voluntary scheme would lead to councils not taking equality issues into account when faced with such massive cuts to their funding... If anything the equality duties need to be strengthened”

UNISON representative, local authority

“Disaster. With the changes in the law we have already seen a reverse in attitude to tackling equality issues in the workplace and for LA residents. Trying to bring documents that say they are committed to equalities to practical and real life are hard enough without it being voluntary.”

UNISON representative, local authority

“We are already seeing a rise of far right groups which target people from protected groups and this is likely to rise if the public sector is not promoting equality. The consequences of this would lead to more people being in crisis and the need for additional community safety and policing resources in communities.”

UNISON Disabled Members Officer

“I don't believe that would help. I think that the PSED should be strengthened by better enforcement and a more rigorous regime. It seems that employers can rarely be brought to account.”

UNISON Branch Secretary

Other evidence of impact in the public sector

3.24 Other research shows many examples of where the equality duty or former duties have been complied with and made a positive difference. For example, an EHRC report into the equality duties and schools concluded that “there are clear signs that the duties are having some impact on their actions and pupil outcomes”.

“What [the duties do] is bring a sense of structure and [say] “Look – we know that you all think that all pupils should have equal access, but have you thought about equality in these terms?” And it's a set framework by which we were able to then look at: ‘Have we provided appropriate access for our disabled students?’”

Secondary school, South East

“[The formal process informed by the equality duties] has led to a plan, a plan that we can go back to and look at and say, ‘right, what can we do better next time?’ It's given us a structure to build on.”

Primary school, South East¹⁷

3.25 Research across a range of public sector organisations, carried out for the GEO in 2008,¹⁸ on the effectiveness and costs of the former specific duties under the race, disability and gender duties found that:

- 97% of respondents had seen ‘significant’ or ‘some improvements’ in at least one specific outcome (either in relation to service provision, employment or community relations)

¹⁷www.equalityhumanrights.com/uploaded_files/research/rr70_equality_duties_and_schools.pdf

¹⁸www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/geo_schneider_ross_research_2009.pdf

- Over 80% reported that they had seen improvements in the way that their organisations made decisions or allocated resources
- Only between 17% and 33% felt that any of the activities required by the equality duties required greater resources than the value they could deliver and over half rated each of the activities as ‘very effective’ or ‘effective’.

3.26 However some authorities are still taking a ‘tick-box’ approach to compliance rather than properly turning their minds to equality impacts when making decisions or developing policies. For example, a recent EHRC report on the performance of a sample of strategic health authorities and primary care trusts concluded that “the majority of organisations in the sample focused their performance on the equality duties through equality schemes and seemed to adopt a tick box approach.”¹⁹ Some of the examples and views from trade union representatives and officers cited above reveal similar experiences too.

3.27 Finally the EHRC’s recent assessment of public authorities’ compliance with the specific duties to publish equality information found that only 32 per cent of bodies had provided online evidence that they are assessing the impact of their activities on equality.²⁰

4. How are organisations managing legal risk and ensuring compliance with the PSED?

4.1 This question was not put directly to trade unions as part of the TUC/LRD survey. Nevertheless at a recent roundtable discussion on the PSED, trade unions provided the following general observations about compliance with the duty:

4.2 Where “over compliance” with the duty existed, it tended to be a result of a lack of knowledge and inexperience. However it was far more common for unions to experience a lack of compliance with the duty by public authorities. Indeed, the GEO’s claim that an “overly-bureaucratic and burdensome approach” is “often used” by public bodies is overstating the case.²¹

4.3 Unions expressed frustration at the inadequate enforcement of the PSED. As the example in 3.7-3.8 shows, unions have been frustrated by the EHRC’s inability to assist, given its lack of resources. Yet, unions report that even a letter of compliance from the EHRC to public authorities can be helpful in encouraging appropriate action.

4.4 Taking out a judicial review for potential breach of the duty is also a risky and costly exercise. The deadlines for initiating a review are also too tight, especially where unions want to first exhaust non-legal avenues of engagement with a public authority.

¹⁹ www.equalityhumanrights.com/uploaded_files/research/psed_health.pdf

²⁰ www.equalityhumanrights.com/uploaded_files/PSD/publishing_equality_information_final.pdf

²¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85019/equality-duty.pdf

4.5 Other regulators such as the Information Commissioner and Ofsted could be used to complement EHRC efforts to ensure better levels of compliance with the duty.

5. What changes, if any, would ensure better equality outcomes (legislative, administrative and/or enforcement changes, for example)?

5.1 To improve the compliance with the duty and to ensure better employment and service delivery outcomes for all in our society, the TUC believes the following needs to be addressed:

5.2 The implementation of a statutory code of conduct of implementation of the Public Sector Equality Duty, as well as supporting sector-level guidance;

5.3 A detailed review of the different specific duties legislation in English and non-devolved authorities compared to their devolved Scottish and Welsh counterparts, with a view to amending the former, if the latter duties are more effective in delivering positive equality outcomes;

5.4 The government should provide high-level leadership to ensure that equality is mainstreamed across public authorities. This includes political support for: the collection of good quality information on equality, engagement with those who have been traditionally disadvantaged or under-represented and the need to consider impact on equality at a formative stage of decision-making in a structured and transparent way (i.e. something akin to a proper impact assessment);

5.5 A better resourced and independent Equality and Human Rights Commission, willing to use its powers and to work with other regulators and stakeholders to support compliance with the duty and to take action against those who fail to meet it; and

5.6 Provide statutory right for time off for workplace union equality representatives to perform their duties.