Summary

• The Public Sector Equality Duty (PSED) has been under review by a government-appointed steering group as part of the Red Tape Challenge.

• The outcome is a report short on evidence, but which shows broad support for the duty.

• The government has accepted the need for a full evaluation in 2016. In the meantime the Steering Group has made a number of recommendations.

• In general terms, the most important recommendation is for further guidance on decision-making and the publication of data. A review will also take place of the specific duty to publish data.

• The recommendations on public sector procurement are narrow and based on limited evidence, but the report’s findings include some important sign-posts for the local authorities.

• This briefing will be of interest to procurement teams, policy and equalities officers, and elected members with service and equality responsibilities.

Briefing in full

Introduction

The PSED
The PSED, which came into force in April 2011, requires public bodies to have due regard to the need to eliminate unlawful discrimination, and to advance equality of opportunity and foster good relations between people of different groups.

In parallel, the specific duties require public bodies to set and publish equality objectives at least every four years, and to publish, at least annually, information showing compliance with the PSED.
POLICY BRIEFING

The review

A review of the PSED was announced in 2012 as part of the government’s Red Tape Challenge. Inevitably the Steering Group, looking at the new legislation at the early stages of implementation, found itself without the evidence it needed. Its main recommendation, accepted by the government, is for a formal evaluation in three years time.

The Steering Group was asked to consider whether the PSED is operating as intended, in summary, to sensitise public bodies to equality while addressing the bureaucracy associated with the previous separate duties on race, disability, and gender.

It has not considered whether public bodies should be subject to the PSED, and in fact found that it has broad support.

Despite pointing to the limitations in evidence, the Steering Group has made a number of recommendations that are potentially significant, particularly in relation to equality and procurement and on the specific duties and collection of data.

One value of taking an interim view is to highlight what measures might support public authorities in tackling the issues involved. In particular, the review has exposed the need for improved guidance.

The review was led by an external Steering Group, supported by the Government Equalities Office. Within a very short time it conducted a series of round tables, issued a call for written evidence, conducted site visits, and saw the results of externally conducted telephone research. As a result of the short timescale and the relatively informal way in which the review was conducted, there were a number of difficulties with evidence; not least that very little interest was shown by businesses and the private sector.

Costs, Benefits and Burdens

A cost benefit analysis proved impossible. What evidence there was focused on implementation of the new duty. Difficulties arose in assessing benefits, because the PSED is likely to be only one of several factors that are relevant in any given situation, and perceptions will differ about its relevance. It was felt to be too early to say what benefits it might bring, although a perception that benefits could be monetised suggests that broader benefits – surely the objective of the legislation, and of which they received evidence – were given less weight.

It seems to have been easier to identify burdens, particularly on businesses and SMEs including charities, though the evidence was extremely short on this subject too. It may be right that some public bodies adopt blanket, burdensome processes in order to avoid challenge – but again there is insufficient evidence about how widespread this may be.

Equality Impact Assessments [EIAs] are not required in England, but in some circumstances may be necessary to show that due regard has been given to the
considerations required by the PSED. Despite criticisms of EIAs, there was insufficient evidence to draw conclusions.

The Steering Group concluded that it was too early to make a final judgement about the impact of the PSED and recommended a formal evaluation be undertaken in three years time.

**Compliance with the PSED**

The PSED is backed up by formal enforcement procedures, and sanctions, but there is a large question mark over how effective these are. The powers of the EHRC have been reduced, and there is no coordination between statutory regulators. It was proposed that the Information Commissioner and the main statutory regulators working together, with a Memorandum of Understanding with the EHRC. This would enable the EHRC to become involved where an inspectorate raised concerns about compliance.

The PSED has been cited in a few applications for judicial review, but so far only in cases that would have gone ahead anyway. Service users and local organisations are also calling public bodies to account using the PSED: accountability in the form of local consultation and negotiation does perhaps show how local authorities can ensure compliance with the duty and avoid challenge.

The key problem seems to be a lack of effective guidance. Most concerns arise over what to ‘have due regard’ means in practice. Some clear steps have been set out in a recent court case: it appears that this guidance is ‘filling the space of formal guidance in enabling public bodies to comply with the duty’.

The review heard that suitable guidance is seen as critical in complying with the duty, and was told that the potential of the PSED is being hampered by the lack of guidance that is non-technical, and provides a level of practical information in the form of case studies and good practice. The lack of guidance can lead to some authorities doing too much, others too little, when a proportional response would result in compliance.

The Steering Group recommended that:

- **Guidance must be clearer on the minimum requirements placed on public bodies.** Building on its technical guidance, the EHRC should produce shorter, more bespoke guidance clearly setting out what is necessary for compliance.

- **Sector regulators have an important role in supporting implementation.** Regulators, inspectorates and relevant ombudsmen services should integrate the PSED in their core functions and collaborate closely with the EHRC with respect to compliance action. In some cases there may be a case for co-production of tailored sector-specific guidance where required, although it is recognised that some functions are so broad as to make such guidance virtually impractical.

- **Public bodies must ensure they adopt a proportionate approach to compliance and not seek to “gold plate”**. Public bodies should seek to benchmark their approach and compliance with the PSED with their peers, with a view to reducing unnecessary paperwork.
• Enforcement of the PSED needs to be proportionate and appropriate. In light of the findings around Judicial Review, the Government should consider whether there are quicker and more cost-effective ways of reconciling disputes relating to the PSED.

**Compliance with the Specific Duties and Data Issues**

The specific duties require public bodies to set and publish equality objectives at least every four years, and to publish, at least annually, information showing compliance with the PSED. This must include information relating to employees for organisations of 150 or more, and relating to people, such as service users, who are affected by the organisations policies and practices.

There are two purposes for publication: to highlight inequality issues and target resources, and to measure progress against the equality objectives.

It became clear that both public and private sector see this type of data as important. Even without the PSED, both sectors would be collecting some data on grounds of corporate social responsibility, transparency, and a need to understand their customer base.

There are challenges in collecting and publishing relevant data in a proportionate way that also complies with data protection legislation. The review received some important illustrations of good practice, but also heard that data collection was frequently patchy, and response rates varied. It was felt that organisations need to communicate a clear rationale for data usage and to be equally clear about how and whether data would be published.

An EHRC assessment in 2011-12 showed a wide variation in performance between public bodies, with more on information being provided about employees than service users. The Review concluded, from what evidence it had, that in the absence of precise guidance there is a tendency to publish ‘everything’ to protect against the risk of litigation. Inevitably, in these circumstances, collection of data can be perceived as resource intensive and burdensome, although there is no clear data available on the resource implications of data-collection for public bodies. In the private sector, unsurprisingly, SMEs delivering public sector contracts have capacity concerns when required to provide information about service users.

From a data protection perspective, there are fears it may be possible to identify individuals where large amounts of data are collected and published, by cross-referencing. Private sector organisations are also fearful of breaching data protection legislation.

The Steering Group found, once again, that an absence of guidance was critical. It made a number of recommendations:

• **Public bodies should not collect diversity data** unless it is necessary for them to do so. The EHRC and Information Commissioner should work together to provide greater clarity on the role of data and its collection, the use to which data is put, and what is
necessary for compliance with the PSED. In respect of both data collection and procurement, public bodies should take a genuinely proportionate approach.

There was no consensus among the Steering Group on the effectiveness of the specific duties that apply to English and non-devolved bodies. Some members thought the specific duties have embedded equality within the business processes of public bodies. Other members thought the specific duties do not help public bodies give effect to the general Duty and that their aims might be achieved in other ways. The Steering Group’s recommendation is that:

• Public bodies must be proportionate in publishing information about their equality objectives and performance. Although consensus was not reached in the Steering Group on the effectiveness of the specific duties, the Chair’s view is that these duties do not serve their intended purpose and that the Government should consider their removal or modification.

Procurement
The Steering Group acknowledged that equality considerations form a small part of the procurement process; that public and private sector alike have a strong view that equality considerations are part and parcel of good service delivery; but found evidence of a ‘tick-box’ approach and that such practices create a barrier for SMEs and charities.

The findings and recommendations on procurement have to be treated with great caution for several reasons:

• In assessing evidence from the business community, there is an open acknowledgment that there has been ‘limited engagement’; the report then proceeds as though it is relying on extensive evidence. It is worth bearing in mind that the review is drawing on participation by one small and one large business in a round table, one private sector legal advisor in a roundtable, one site visit to a private sector contractor, and telephone interviews with the British Chamber of Commerce and a recruitment agency.

• The report demonstrates little awareness of procurement law and practice – for example making basic mistakes about the use of pre-qualification questionnaires [PQQs]. The report shows no understanding of the practical issues and responsibilities involved in private sector organisations carrying out public functions, and the need for this to be monitored to ensure compliance. Nor does it refer to the existing body of research, including that on public sector procurement.

• Guidance on procurement and the PSED was published by the EHRC in early 2013. It could have had no impact on awareness or on procurement practice at that point, but has the potential to support organisations in making a proportionate response to the PSED – yet it is not referred to in the report.
The review makes some concrete observations that could have led to positive recommendations if built on what it heard of good practice and guidance.

Findings on procurement

1. Equality and diversity requirements are a small component of the public sector procurement process.

2. Equality considerations are increasingly important in bidding for private sector contracts. This is due to a need for corporate responsibility and transparency, for the reputation of businesses among customers and suppliers.

3. Businesses are committed to equality considerations, strongly build them into their bids, and are ‘keen to consider ways of doing this more effectively’.

4. Public bodies see equality considerations as important in terms of social responsibility and understanding their communities, and benefitting service users.

5. The PSED is one among a number of equality drivers – such as the Stonewall Workplace Equality Index – having an impact on services.

6. It is more effective to include equalities questions in tender procedures where they are relevant, rather than treating equalities as an add-on with a separate set of questions.

7. There are questions about whether the equalities information required in public sector contracting procedures is proportional and relevant and whether the answers are always fully considered, even when the contract is awarded.

8. There are doubts that equality considerations are fully carried through into the provision of the contracted service, and contract management. There are issues to be addressed about success in achieving equality outcomes, and in ensuring that equality objectives are filtered down to contractors’ front-line staff.

9. There are significant issues for SMEs in bidding for public sector contracts, in consortia with larger businesses, when subcontracting, and in responding directly to invitations to tender.

10. There is some support for a minimum standard for equality compliance in the public sector though no consideration of what that might mean.

SMEs and procurement

The real difficulties for SMEs arise in bidding for contracts directly, although the review heard that large contractors may be more ready than previously to support SMEs in dealing with paperwork.
Earlier contact with SMEs during roadshows run by the Government Equality Office had shown a lack of understanding of why equalities considerations were relevant and are required by local authorities. SMEs find public sector contracting bureaucratic and disproportionately burdensome.

The review heard evidence from local authorities of their efforts to support SMEs by building different requirements into their bidding processes in order to address potential barriers. This reflected the concerns of other contributors who had said that local authorities should be encouraging a diverse and competitive local market for SMEs. No evidence was available on these initiatives from the business sector, and the Steering Group did not take up the opportunity provided by the review to investigate existing local authority support for SMEs to test how widespread it might be and whether successful.

Observations from qualitative research
Within their broader overview of public sector responses, the researchers identified some initiatives and experiences that are of particular relevance to procurement:

a. It helps to demonstrate having had due regard to the PSED that relevant questions about distinctive needs are integrated into commissioning and contracting processes. It also helps to give oversight of equality performance of contracts to an internal commissioning group. Understanding of PSED among procurement officers varies greatly but improves with their engagement with equalities staff.

b. Publication of procurement policies is believed to create greater transparency, reduce the risk of challenge, and is widely seen to be good practice.

c. A proportionate approach to compliance with the duty can be found by targeted training in PSED for procurement staff and clear and proportionate requirements for contractors and providers. Not all authorities display these characteristics: some are characterised as including the PSED in tender requirements without a clear indication of what is required, or as displaying little if any knowledge of the requirements. [It may be noted that the proportionate approach accords with the current EHRC guidance on procurement.]

Recommendations
The Steering Group focused on burdens inspired by the PSED on private and VCS contractors, particularly SMEs, by some public authorities, and recommended:

* Public bodies must reduce the burdens placed on small employers.
  o Public bodies should remove Pre-Qualification Questionnaires (PQQs) for contracts below £100k and utilise the government’s core PQQ, which does not include equality requirements, for contracts over this amount.
  o Public bodies should not impose onerous or disproportionate requirements on contractors delivering services (particularly those with fewer than 50 employees) to provide equality data on workforce and service users.
• Public bodies should be challenged where their procurement processes creates barriers for small businesses and charities. Private and voluntary sector employers in England should refer any potentially inappropriate equality requirements that have been applied to a particular procurement exercise to the Cabinet Office Mystery Shopper scheme.

Comment

Critics who said that the review was being undertaken too early have been proved right. One commentator has observed that this is cold comfort, given that a lack of evidence has not prevented the Steering Group from making some important recommendations.

The government has agreed that a full evaluation should be undertaken in 2016. This should be a formal evaluation, carried out by academics rather than government appointees.

Another strong point to come out of the review is the current lack of non-technical guidance of an appropriate depth, aimed at decision-makers, those responsible for designing and providing services, or for devising policy and collecting and managing information. If economies have been made with the EHRC, they have been at the expense of good practice and sound public policy elsewhere. It is surprising that the Steering Group did not consider whether the EHRC’s guidance on procurement would help sort out the problems it identified: perhaps it is not sufficiently minimal to meet their standards. The guidance they now recommend should be effective, compliant with the legislation, and produced rapidly.

There is a suggestion that some information of value – for example on SMEs, and on publication of data – was submitted to the review: written submissions were made by a large number of local authorities, and there were a small number of expert round tables. This material has just been published, so that there is an opportunity to trawl through for illustrations of good practice.

Nationally, local government organisations need to take the lead in providing support and guidance on resolving issues about which there is uncertainty, and in providing good practice. As a start, the Local Government Association is running a conference on developing a sector-led response to the review on 4 November 2013.

Compliance with the PSED

EHRC guidance is clearly badly needed. Guidance doesn’t as the Steering Group seems to expect, set out what is necessary for compliance, but it can explain, illustrate, and guide through a process of decision-making that will support compliance. Strengthening the framework of enforcement and sanctions through collaboration of inspectorates, regulators, and the EHRC has the potential to mainstream equality considerations: we must wait for the organisations to respond to this particular recommendation.

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‘Gold plating’ is a misleading phrase. It suggests an element of deliberation in doing more than is necessary. Effective guidance and shared good practice, plus a commitment by public bodies to tackle internal communications and failing practice, should result in more proportionate and reasonably funded activities.

The PSED has so far not been a significant factor in judicial review. The Steering Group misses the point that the effect of judicial challenge should be improved decision-making among authorities: this seems to be the case at present, with public bodies referring to the Brown case for the skeleton of guidance on making decisions. Local authorities want to avoid the cost of JR: local accountability, through consultation and negotiation, seems to provide the answer.

Compliance with the Specific Duties and Data Issues

The Chair of the Steering Group recommends that as in his view these duties do not serve their intended purpose they should be removed or modified, though he is not supported by all members of the Steering Group in this. Some believe that the specific duties have embedded equality in the business processes of public bodies. It would be mistaken to act without further evidence. It is clearly urgent that guidance is issued by the EHRC and Data Protection Commissioner. The government will keep these duties under review, and the EHRC is to conduct a more detailed assessment.

Procurement

A rational set of recommendations would be based on the findings and research conclusions, would build on the common public and private sector commitment to providing for equality and diversity by making effective use of existing procurement processes, and could be as follows:

- All - Use the EHRC guidance on procurement which will help organisations take a proportionate approach to dealing with equality considerations, guidance which has recently been supplemented by the addition of training materials and a case study.

- Public bodies - promote understanding of PSED among procurement officers through training and operational engagement with equalities staff.

- All - share and promote local good practice in reducing the obstacles for SMEs to tender for local authority contracts

- Public bodies - give oversight of equality performance of contracts to an internal commissioning group.

The Steering Group’s Recommendation (1) ignores the possibility of addressing SME concerns by learning from and applying practical local measures. It risks an increase in work at later stages of the bidding process. It overrides key elements of the procurement framework, which allow public bodies to include social factors in PQQs, and so assess suitability on the grounds of relevant experience in appropriate cases.
Recommendation (2) takes a wholly negative attitude and is unlikely to produce constructive results. While public authorities must be prepared to be challenged, the value of locally-devised solutions, on which evidence is available, is ignored.

These are recommendations not requirements. What local authorities cannot afford to do is to ignore the underlying themes, in particular the need to ensure that equality considerations are embedded in contract management. It is a good starting point to ask – how can we be satisfied that we are meeting the equality duty if we don’t monitor what is happening under our contracts?

For more information about this, or any other LGiU member briefing, please contact Janet Sillett, Briefings Manager, on janet.sillett@lgiu.org.uk