PUBLIC SECTOR EQUALITY REVIEW: CALL FOR EVIDENCE

RESPONSE FROM LOUISE WHITFIELD[1] (DEIGHTON PIERCE GLYNN)

Introduction

I am a solicitor specialising in judicial review challenges on behalf of claimants, and I have advised extensively on the PSED (and the earlier equality duties) for several years. I worked at the Public Law Project (the leading public law NGO) from 2003 to 2009 where my practice included a large body of work advising voluntary sector organisations and their service-users on public law disputes, particularly cuts to their funding. This led to an increasing focus of my casework on the equality duties and I represented the claimants in a number of the leading cases including *R (Chavda & Others) v L B Harrow* in 2007 and *R (Kaur & Shah) v L B Ealing* in 2008. I moved to Deighton Pierce Glynn in 2009 and have continued to advise and litigate in this area since then, including acting on behalf of the claimants in *R (Hajrula & Hamza)* v *London Councils* in 2011. My firm also represented the claimants in *R (Brown) v SSWP* and in *R (RB) v Devon County Council and Devon PCT* (concerning contracting out).

I note the key themes of the review but am not in a position to comment on some aspects, so this submission is limited to the issues that have arisen in my casework which may assist and inform the review.

How well understood is the PSED and guidance

Based on the cases I have advised on, my view is that the level of understanding of the PSED and guidance is patchy. The enquiries I deal with are generally in relation to local government decision-making and reflect a very mixed picture; (it is also worth bearing in mind that clients approach me because they are concerned about decision-making, i.e. they think something has gone wrong, so the starting point of enquiries is not a representative sample of all decision-making; I do not generally get enquiries where the clients think the duty has been met). In some instances, it is apparent that the local authority has properly understood the duty; they have adopted a proportionate approach to having due regard, have gathered the right sort of information and evidence, and applied their mind to the relevant issues.

In some cases I have dealt with, it becomes apparent at the pre-action correspondence stage that the public body in question does understand its duties and has either not explained matters properly to my clients, or is still undertaking the necessary work. I have been instructed on a number of cases (for example recent proposed across the board cuts to the voluntary sector) where decisions had not in fact been taken, and the public body had already planned appropriate work to meet its duty before taking relevant decisions.

I would estimate that of the enquiries I deal with between 15 and 25% relate to instances where the duty has been met, or the public body's proposals as to how to meet it are adequate. This would indicate a good understanding of the PSED.

[1] This submission is made in a personal capacity and not on behalf of Deighton Pierce Glynn.

Of the remainder of enquires I deal with, a further proportion settle at the point at which I write to the public body to explain their breaches – or potential breaches – of the duty. I have dealt with numerous cases where the duty has not been understood but in pointing this out, the public body agrees to withdraw its decision and take it again in a way that complies with the duty; (see below for some examples in relation to the PSED; I also dealt with other similar cases under the earlier equality duties). This usually results in a much better decision-making process, as the public body then engages with those with protected characteristics and focuses more clearly on how to meet the duty. This would suggest that once public bodies get legal advice, or have matters spelt out to them, their understanding improves and they are then in a position to act lawfully. I am also aware of some instances where this has had an impact beyond the individual decision as officers dealing with one decision with then use their knowledge from that process to inform other decision-making.

Those that do not settle are then litigated with mixed results and some examples are given below.

Generally speaking about how well the duty is understood, I have seen some excellent EIAs, and some very poor ones; I have seen bad decisions based on good EIAs, and good decisions made on the basis of poor assessments. It is not clear to me why public bodies find the duty so difficult to understand or why they fail to grapple with it effectively. I provide training on the PSED for voluntary sector organisations and local authority officers sometimes attend; the feedback is often that until that session they had not understood how the duty worked or what they were supposed to be doing to meet it. There is also often a gulf between what the officers on the ground think about how to meet the duty and what the decision-making councillors understand it to mean.

I am fully aware that there is now no duty to compile an EIA; in fact there never was. The original specific duties only required public authorities to set out the means by which they would assess impact; it did not require them to assess the impact but that obviously should be a core element of meeting the duty: how can a public body have due regard if they have not assessed the impact of the proposal? The focus on EIAs grew out of the fact that this was clearly a sensible approach to information-gathering and analysis, and it is unfortunate that Government is now arguing that EIAs are not necessary. In terms of meeting the duty, the EHRC guidance and numerous court decisions have made clear that there must be some assessment or analysis of the impact of a proposal on those with protected characteristics, that it is advisable to record this in writing and that this should be considered by the decision-maker. If public bodies set too much store by producing formulaic EIAs that took up too much time, this does not mean that EIAs (or some equivalent document) are not useful or necessary to meet the duty. The approach that advocates abandoning EIAs altogether (without explaining how the duty can and should be met in practise) itself suggests a lack of understanding of the PSED.

<u>The impact of the PSED as a statutory duty</u>

Based on my experience, particularly working with voluntary sector organisations and their service-users, it is vital that the PSED can be enforced by way of legal challenge, i.e. that it is a statutory duty and that there is legal aid available for those with protected characteristics to bring challenges when the duty is not met. The fact

that public bodies will reconsider their position once they receive a letter threatening a legal challenge is evidence of how important this aspect of the duty is. I am often referred cases where organisations have made the case well for the PSED (and that a public body is in breach), but the public body refuses to change its position; on receipt of a letter before claim, they get legal advice and become aware of the implications of the court finding that they are in breach of a statutory duty.

Examples of cases in which the public body has agreed to re-take a decision (and the main argument raised against them was the breach of the PSED) include:

- A YOI agreed to reinstate funding for a project working with young black prisoners;
- A City Council agreed to withdraw a decision to cut funding to carers' services and to consult and do an EIA before re-taking the decision;
- Dept of Health agreed to introduce "preferred reading format" as a mandatory "data standard" for all healthcare providers so that visually-impaired patients are provided with accessible information; (there is currently no national provision for this and most healthcare providers do not provide accessible information);
- MoJ agreed to keep legal aid for immigration cases brought by women fleeing domestic violence.

In terms of cases that go to trial and the impact of the duty having statutory force, some decisions do lead to a better understanding of the duty (even when unsuccessful such as the case of *Brown*) and to a marked shift in the behaviour of the public body: for example in the London Councils case, the defendant reinstated funding to a large number of projects, re-ran its decision-making process and mitigated the adverse impact of cuts on protected groups by increasing the pot of money available by a very considerable sum. The Southall Black Sisters case coincided with central government consulting on draft guidance of its "community cohesion" policy which promoted a stance of generic services for all; the litigation revealed the inherent flaw in this approach and the guidance was dropped. The court case was only one part of the picture (there was widespread lobbying against the policy at the same time), but it clearly gave government pause for thought and illustrated starkly the need for specialist services in some circumstances to enable a public body to meet the PSED. After *R (Chavda) v L B Harrow*, the Council abandoned any attempt to restrict care services to those with critical needs only and social workers told us that they were relieved the case had been successful as without it they had been faced with making cuts to care they did not agree with; the judgment put them in a strong position to promote equality for disabled people within the provision of care services.

A number of voluntary sector organisations that I have worked with have described how they have been able to use the results from court cases to explain to public bodies how they should meet the duty; they do this as lay people without input from lawyers, but they need the decisions to help them to do this and for the public bodies to understand that they are in breach of a law, not just a policy or some guidance.

Is the PSED working as it was intended and what are the benefits?

The PSED grew out of the race equality duty which was a response to the institutionalised racism in the Met Police that emerged from the Stephen Lawrence enquiry. In many instances I have seen the duty work well to address the fact that the discrimination and disadvantage faced by those with protected characteristics cannot be addressed through private law discrimination claims. The benefit of the duty is that it requires public bodies to think about equality throughout their decision-making in two ways: so that they do not inadvertently worsen the position of those with protected characteristics, but also to use their decision-making to have a positive impact on equality. The City Council referred to above will not now cut carers' services without finding out what the impact will be on disabled people and taking this into account, whereas before we wrote to them they thought there was no need to do an EIA as their decision would only affect carers. Another City Council seeks to cut its grants to the voluntary sector by 50%; it knows it must consult, so it is building its equality analysis into the consultation process; it intends to look specifically at the impact on those with protected characteristics when it takes its decisions on cutting grants; this simply would not happen without the PSED.

The benefits are that those who are already disadvantaged and discriminated against do not face further disadvantage and discrimination. As the judge commented at one stage in the hearing of the London Councils case, when funds are short, it is all the more important to look carefully at the impact on the most vulnerable. In that case, the duty clearly worked as intended when London Councils came to re-take their decisions on grants; they had to think again and look at the impact on those with protected characteristics and they changed their approach, presumably on the basis that they could, after all, find more money to address the adverse impact on vulnerable groups which they had decided could no longer be justified.

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