

Equality and Human Rights Commission
Research report 100

Awareness and understanding of EHRC guidance on the Public Sector Equality Duty

A qualitative study

Executive summary

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Executive summary

The Public Sector Equality Duty (PSED) created by the Equality Act 2010 is a legislative mechanism to ensure public authorities consider equality and good relations in their day-to-day activities. It is made up of a general duty covering public authorities and those delivering public functions across Great Britain, and specific duties designed to help public authorities improve their performance of the general duty which are different in England, Scotland and Wales.

The Equality and Human Rights Commission (EHRC) is the regulator of the PSED. As such it 'should ensure clear information, guidance and advice are available to help those they regulate meet their responsibilities to comply'¹ with the PSED.

The EHRC commissioned this research to explore the effectiveness of some of the guidance it has produced on the PSED. The research focused on assessing the effectiveness of the following specific 'test guidance' documents:

- **Essential Guides to the PSED** from each country (England, Scotland and Wales), examples of '**general guidance**'.²
- '**Making Fair Financial Decisions**', an example of '**tailored guidance**'.³

¹ Better Regulation Delivery Office (2014), Regulators' Code, principle 5. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf [accessed: 2 March 2016]

² The Essential Guide to the Public Sector Equality Duty (England). Available at: <http://www.equalityhumanrights.com/publication/essential-guide-public-sector-equality-duty-0> [accessed: 2 March 2016]

The Essential Guide to the Public Sector Equality Duty (Scotland). Available at: <http://www.equalityhumanrights.com/publication/essential-guide-public-sector-equality-duty-guide-public-authorities-scotland> [accessed: 2 March 2016]

The Essential Guide to the Public Sector Equality Duty: An overview for listed public authorities in Wales. Available at:

http://www.equalityhumanrights.com/sites/default/files/uploads/Wales/PDFs/1._psed_wales_essential_guide.pdf [accessed: 2 March 2016]

³ For England and Wales only. 'Making Fair Financial Decisions: a guide for decision makers in Scotland' was not tested in Scotland as it was being updated during the fieldwork period.

Although the research focused on particular test guidance documents, it also considered general awareness of the PSED, EHRC guidance and PSED case studies among stakeholders.

Qualitative in-depth interviews, including cognitive techniques, were conducted with stakeholders between September 2014 and February 2015 to:

- consider how they understand and interpret selected EHRC guidance on the PSED
- investigate whether selected guidance is comprehensive, appropriate and accessible to a range of audiences, including equality specialists and non-specialists
- assess and compare the effectiveness of tailored and general guidance in improving understanding
- identify whether there is a need to clarify existing guidance or to provide additional information
- examine contextual factors that may facilitate or impede awareness, understanding and use of the PSED guidance, and
- consider differences between England, Scotland and Wales, and between sectors and type of organisation in terms of how stakeholders interpret and use the guidance.

The findings presented in this report are from 65 respondents representing 46 organisations, including **public authorities** in four sectors (criminal justice, education, health and local government), spread across England, Scotland and Wales, and a small number **public representative** bodies including trade unions, Citizens Advice Bureau (CAB), and law centres and other voluntary or community sector (VCS) organisations. Public authority respondents were employees with a significant formal role in dealing with equality issues, including responsibilities relating to the PSED (**equality specialists**) and others who need to be aware of the PSED and act on it but don't have it as part of their job description (**non-specialists**).

'Making Fair Financial Decisions' is available at: <http://www.equalityhumanrights.com/private-and-public-sector-guidance/public-sector-providers/making-fair-financial-decisions> [accessed: 2 March 2016]

Is EHRC guidance on PSED reaching its target audiences?

It found that public authority respondents generally were more aware of the PSED and EHRC guidance than public representatives; equality specialists in public authorities were more aware than non-specialists; and respondents from Wales and Scotland were more aware than those in England.

Across all of EHRC's PSED guidance, respondents in public authorities had the most knowledge of the PSED Technical Guidance⁴ and the Essential Guides. Awareness in all three countries was lowest in relation to more tailored guidance, including 'Making Fair Financial Decisions', and the case studies. In Wales and Scotland, awareness of other more detailed EHRC supporting guidance to the Essential Guides also seemed to be higher than in England.

Although the Essential Guides were better known than 'Making Fair Financial Decisions' among public authorities, many had not seen the test guidance documents prior to interview. This might be because many public authorities saw the role of mastering the details of the legislation and guidance to be for one person or a small team who would channel understanding as required to others in the organisation.

The research also picked up evidence of significant changes in equality specialist roles within public authorities. Several respondents in the sample were newly appointed equality leads with no previous PSED expertise and little time to develop it, sometimes because they had other responsibilities to deal with.

Is EHRC guidance on PSED accessible and used?

Ease of location and readability

Those who explored the EHRC website for PSED guidance often encountered frustration, even when looking for specific named documents.⁵ This may be a contributing factor affecting the current level of reach of EHRC guidance.

⁴ Public Sector Equality Duty Technical Guidance for England, Scotland and Wales. Available at: <http://www.equalityhumanrights.com/legal-and-policy/legislation/equality-act-2010/equality-act-guidance-codes-practice-and-technical-guidance#techPSED> [accessed: 2 March 2016]

⁵ Interviews were conducted between September 2014 and February 2015. The PSED webpage was restructured in January 2015.

Some equality leads in Wales and Scotland were happy with their Essential Guides, but other respondents, including newly-appointed equality leads with no previous PSED expertise, described the Essential Guides (particularly the one for England) as too long, wordy and abstract to be engaging and to meet their needs. In contrast, most respondents found 'Making Fair Financial Decisions' more useful, accessible and engaging because it is much shorter and more practical.

Illustrative examples and checklists were welcomed in all the documents but respondents wanted to see more that were pertinent to their sector or function without adding length to the guidance documents. The Essential Guide for England was also the only general guidance with a glossary, which was deemed to be helpful by respondents in other countries.

Use

Equalities specialists in all three countries were more likely to have used the test guidance – mainly the Essential Guides – than non-specialists. Some respondents thought they might refer to it in future, having become familiar with it through the research. Equality specialists used the test guidance to help with: understanding the requirements on their organisation – either at the time the PSED was enacted or when coming into their job; preparing briefing materials for other staff; 'dipping in' to check points of detail; preparing reports or publications; supplying authoritative back-up for messages to parts of the organisation; and checking compliance.

Public authorities do not rely solely on EHRC guidance to understand the law and what is required of them – they mentioned other sources of information and support in the interviews, including guidance from other Government departments or regulators, reports of case law, professional and sector-specific journals or inter-agency groups and networks. In Scotland and Wales there was particularly strong evidence of networking and of direct contact with EHRC representatives.

In some sectors, EHRC guidance may not be a primary resource or source of advice because there are other regimes of regulation and requirements that include equality and diversity. Respondents from public authorities in these sectors indicated these were more 'front of mind' than the PSED – for example, in England the NHS Equality and Diversity System 2 or the Ofsted inspection framework.

Is EHRC guidance on the PSED comprehensive and understood?

Structure and benefits of the PSED

Most respondents understood from the tested EHRC guidance that the PSED consists of a general duty to have 'due regard' to three aims and specific duties setting out practical requirements. Most also understood that compliance with the specific duties did not guarantee compliance with the general duty, but this remained unclear for some even after reading the guidance.

The **purpose and benefits of the general duty**, as outline in the Essential Guides for England, Scotland and Wales and in 'Making Fair Financial Decisions', were well understood. Positive 'business arguments' for the general duty tended to resonate to a greater extent with public authority respondents. The risks of legal challenge and to organisational reputation were also thought to have a place in reinforcing messages about the importance of compliance. The research found interest from public authority respondents in the 'right thing to do' in terms of equality, but also in just managing risk around equalities issues. Alongside evidence of public authorities looking for the PSED's 'minimum requirements', there were examples of stakeholders understanding that the law allows and encourages more than this, and that the legislative framework lends itself to raising standards and expectations around equality.

Public authority respondents in all three countries understood that the **general duty** applies to public authorities and others carrying out public functions. Less clarity existed on how this would play out in practice through the range of joint working arrangements between public authorities, private companies and third sector organisations. More generally, there were indications that small authorities and/or those with little direct contact with the public may have difficulty finding out and understanding what they need to do to comply with various aspects of the PSED.

The **three aims of the general duty**⁶ were also familiar and well understood, especially by equality specialists. However, the standard formulation was still described by some as dense and technical. Public authority respondents generally understood that the second and third aims require them to be proactive in dealing with equality issues, and that compliance with the second could involve treating some people more favourably than others to meet their needs or encourage participation.

⁶ These are referred to as 'needs' in the Essential Guide for Scotland. They are: to eliminate unlawful discrimination and victimisation; advance equality of opportunity; and foster good relations between people.

Equality specialists in all three countries thought the case for positive action could sometimes be hard to make to non-specialists. Some public representatives appreciated the guidance going beyond just an emphasis on unlawful actions and process to cover positive actions as well.

The **specific duties** were often regarded as the main area where public authorities were likely to be monitored. They were often considered to be the responsibility of specific staff in the organisation. Respondents thought the Essential Guides succeeded in providing an overview and map of the specific duties, and did not expect those Guides to give more detail. Some public authority respondents in Wales and Scotland believed the greater spread and number of specific duties in their countries was helpful. However, they still reported difficulty making decisions on the interpretation of terms such as ‘reasonable steps’ or ‘substantial impact’. Public representatives appreciated that the specific duties provide ‘transparency’ as to what they can expect from public authorities.

Key terms

Generally the key terms in the guidance, such as ‘**protected characteristics**’, are already well understood, especially among equality specialists.⁷

‘**Due regard**’ is the key legal term underpinning compliance with the general duty. The term is open to interpretation and, since the law was enacted, its meaning has been clarified to some extent by case law. However, in general, most respondents still found it challenging to understand what ‘due regard’ requires in practical situations even after having read the test guidance.

All the Essential Guides include principles drawn from case law to clarify what ‘due regard’ means. Many respondents found these principles dry, legalistic and not very accessible, especially non-specialists and public representatives.

In England, where there are fewer specific duties for listed authorities to comply with, the twin concepts of **relevance and proportionality** are particularly important to an understanding of due regard. Some public authority respondents struggled to think of functions where the PSED was not ‘relevant’. They preferred to consider decisions or policies on a case-by-case basis and knowledgeable equality specialists were confident of their ability to do so, though they recognised this could be more difficult for others ‘who don’t know what they don’t know’. Proportionality was understood commonly by public authority respondents to mean resources should be

⁵ Although not everyone could list all the protected characteristics, and some thought an overarching definition of ‘protected characteristics’ would be useful.

concentrated on policies likely to have the most equality impact. This made sense to them, but decisions about proportionality can be hard to make and there was little in either the Essential Guide for England or 'Making Fair Financial Decisions' that was thought to be of practical help.

Across all three countries, public authorities are expected to publish information and objectives in ways that are **accessible to the public**.⁸ Accessible publishing is a specific duty in Wales and Scotland, and respondents in all three countries mentioned a preference for more guidance on what 'accessible' means in practice.

Compliance and meeting the duty in practice

Assessing equality impact is a specific duty in Wales and in Scotland but not in England. Although the case law principles make it clear that the equality impact of policies and decisions must be assessed,⁹ there is little detail in the Essential Guides about what this entails in practice. 'Making Fair Financial Decisions' focuses on assessing equality impact, but solely in the context of financial decision making. For equality specialists, both the Essential Guides and 'Making Fair Financial Decisions' made it easy to understand some important aspects of assessing equality impact, but neither document seemed to be able to help specific operational understanding for less knowledgeable respondents. This suggests that alternatives to guidance documents may need to be explored with these audiences. The particular success of 'Making Fair Financial Decisions', whether seen prior to the interview or not, seemed to be attributable to its explanation of the law in a more practical way. As such, it provides a potential model for future approaches, especially when communicating to equality specialists in public authorities and with public representatives what could be done to comply with the PSED in specific different circumstances.

Respondents in all three countries reported difficulties in judging what is required in practice for compliance in different situations. A larger number of specific duties did not automatically equate to more clarity. Where respondents felt they were left with a degree of autonomy on what is required because of the way the law has been framed, some were comfortable with this, but others wanted more guidance on how to achieve compliance. Some respondents indicated that there was little to distinguish between compliance and good practice. There was concern about minimum requirements alongside good practice; respondents were generally keen to

⁸ In the specific duties for Wales this is worded as 'information and objectives published in a format that is accessible to people from protected groups'.

⁹ Where relevant and proportionate.

achieve both. 'Over-compliance', in the sense of good practice beyond compliance, was not a concern, but 'overdoing' it to reduce the risk of challenge rather than to genuinely promote equality was a concern. Practical context-specific guidance such as 'Making Fair Financial Decisions' may prove helpful in avoiding this.

Implications

This report provides insight into the current challenges faced by public authorities and public representatives in understanding the PSED and in accessing, understanding and using guidance. Respondents provided a number of suggestions of how these challenges might be addressed and where changes and new approaches to guidance on PSED may better meet their evolving needs:

- Producing guidance resources that are more interactive, visually appealing and engaging than the current written documents. Documents remain helpful, but where it was deemed necessary to produce further guidance respondents indicated a preference for short, tailored and practical publications related to broad functions or specific circumstances. Some suggested that 'Making Fair Financial Decisions' could be used as a model for this.
- Targeting any new guidance resources at specialists or non-specialists in different roles, or developing them specifically to help those with responsibility for equalities or the PSED to disseminate important messages within their organisations.
- Consulting and engaging in dialogue with relevant audiences through activities such as the co-production of guidance could offer an opportunity to properly reflect their evolving needs and to draw on their experience and expertise.
- Satisfying the demand for information about different authorities' experience (good and bad) of trying to apply the law in different sectors and circumstances, including:
 - updates about case law relevant to the PSED, including information on the facts, context, legal arguments used and outcomes, and
 - raising awareness of the case study examples already published on the EHRC website¹⁰ and considering publishing new ones, again drawn

¹⁰ Available at: <http://www.equalityhumanrights.com/private-and-public-sector-guidance/public-sector-providers/public-sector-equality-duty/case-studies> [accessed: 2 March 2016]

from 'real life' and covering different sectors, functions and circumstances.

- Addressing gaps in understanding or areas of uncertainty by placing a greater emphasis on the positive arguments for the PSED, as well as reworking existing sections of the guidance that were found difficult to understand, and by further unpacking specific terms such as 'due regard', 'relevance', 'proportionality', 'substantial' or 'reasonable'.

Contacts

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