

SECURING

EQUALITY

A guide to using the
Public Sector Equality Duty
to fight local cuts

Introduction

This guide aims to help UNISON activists and staff to campaign more effectively against cuts, attacks on pay and conditions and discrimination by councils and other public service employers, by using the Public Sector Equality Duty (PSED). It explains what the duty is and how you can use it, drawing on successful campaigns to date.

The Public Sector Equality Duty (PSED) was introduced in 2010, as part of the Equality Act. The PSED replaced previous public sector duties covering race, gender and disability, and created a new approach to equality. Rather than simply outlawing discrimination, it places an obligation on public bodies to consider how they can promote equality in all areas of their work.

The PSED is an instrument that requires public sector organisations to consider the impact on equality when they are planning to change, cut or introduce services, right from the start. Similarly, when public sector employers propose changes to pay, conditions and working hours or are planning redundancies, they have to consider the impact on equality. This means thinking about the impact on workers delivering services, people receiving services, and the wider community – including those who may have to take on more unpaid work if services are cut. The duty requires public bodies to monitor how changes are implemented in practice and the impact this has on equality.

The influence of the PSED on public bodies has been varied so far. Many organisations have changed their policies and practices but unions are concerned that others have simply paid lip serviceⁱ. Consequently, UNISON has a key role to play in making sure that the PSED fulfils its potential within local government.

This briefing is designed as a practical guide for UNISON activists, members and staff to use the PSED to reduce inequality and discrimination in their workplaces and via the services they deliver. It draws on research into how the duty is working in practice in local authorities, and how unions and equality organisations have used it to bring about change.

A note about devolution

The PSED consists of two parts – a general duty, contained in the Equality Act 2010, which applies in England, Scotland and Wales, and specific duties. There are different specific duties in England, Scotland and Wales. The PSED does not apply in Northern Ireland (Section 75 of the 1998 Northern Ireland Act includes a public sector duty to promote equality). For more information about equalities work in Northern Ireland see <https://www.unison-ni.org.uk/>. The specific duties in Scotland and Wales are more extensive than those in England. This briefing concentrates on how UNISON members can use the General Duty and the English specific duties. The Equality and Human Rights Commission (EHRC) has published guidance for public authorities in Scotland and Wales <https://www.equalityhumanrights.com/en/publication-download/technical-guidance-public-sector-equality-duty-scotland> <https://www.equalityhumanrights.com/en/advice-and-guidance/guides-psed-wales>.

Contact your regional office if you live or work in Wales, Scotland or Northern Ireland – they may also be able to guide you in using your nation's equalities legislation to challenge inequality at work.

Sources

This guide draws on findings of a research project into the implementation of the PSED in local government. The research consisted of in-depth case studies in three local authorities; a London borough, a metropolitan authority and a largely rural county council. The project included a review of current evidence on the implementation of the PSED in practice and interviews with equality officers, senior

managers responsible for equality, local and national trade unionists, equality organisations and campaigners.

What is the Public Sector Equality Duty?

The Public Sector Equality Duty (PSED) is contained in the 2010 Equality Act. It replaced the previous equality duties covering race, disability and gender with a single duty covering eight 'protected characteristics'. These are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The duty also covered 'socio-economic status' (social class) but this was removed by the Coalition Government. However some local authorities have decided to consider the impact of their work on socio-economic status.

The PSED consists of a general duty, set out in the Equality Act, and specific duties, introduced through secondary legislation.

The general duty

The general duty states that:

'A public authority must, in the exercise of its functions, have due regard to the need to

- (a) eliminate all forms of discrimination, harassment and victimisation that is prohibited by or under this act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it;
- (c) foster good relations between persons who share a relevant characteristic and persons who do not share it' (Equality Act 2010, section 149, 1)

Due regard to the need to advance equality of opportunity is defined 'in particular having due regard to the need to:

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low' (Equality Act 2010, section 149, 3)

The duty highlights an obligation to respond to the specific needs of disabled people; 'The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities' (Equality Act 2010, section 149, 4).

Due regard to the need to foster good relations includes in particular 'the need to -

- (a) tackle prejudice, and
- (b) promote understanding

Compliance with the general duty 'may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited under this Act' (Equality Act 2010, section 149, 5).

What does this mean?

The Public Sector Equality Duty goes beyond simply outlawing discrimination. It places an obligation on public bodies to consider positive steps to promote equality and good relations. This includes thinking about ways to reduce disadvantage and

meet the different needs of different groups. So public bodies should think about how they can promote equality at all stages of their work, from developing policy to on-going service delivery.

There have been a number of court cases which have established a series of principles about what 'due regard' means in practice.

Decision makers should:

- Be aware of the duty. This means not only those responsible for making a decision on policy (for example councillors) but also those responsible for making decisions about how the policy is implemented (for example a teacher implementing a school uniform policy).
- Keep records of how they have had due regard to equality when making decisions. If records are not kept it will be harder for a public body to demonstrate that they have had due regard.
- Gather and consider sufficient evidence to enable them to assess the impact of a proposed policy on equality. This may include consultation with people likely to be affected by a policy or practice.
- Consider equality in proportion to the likely equality impact of a policy. For example, a decision to make staff redundant would require greater consideration of equality than a decision to order stationery.
- Consider how to eliminate or mitigate against any identified negative impact.
- Have enough resources to comply with the duty.

The duty:

- Applies before a decision is taken. It is not enough to consider equality after a decision has been made.
- Is ongoing. It does not just apply when policy is made, but also when it is implemented.
- Must be exercised in substance, with rigour and with an open mind, in such a way that it influences the final decision. It is not enough to 'tick boxes'.
- Cannot be delegated. A public body is responsible for making sure that any organisation that carries out work on its behalf has due regard to equality in carrying out that work. This means that if services are outsourced both the contractor delivering the service and the public body commissioning it are responsible for meeting the duty.

The EHRC has produced technical guidance on the Public Sector Equality Duty which gives more information about what 'due regard' means. There is separate guidance for England, Scotland and Wales. See <https://www.equalityhumanrights.com/en/advice-and-guidance/equality-act-technical-guidance#h1>

Specific duties

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

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

The Scottish Government has introduced specific duties for Scotland. Public bodies should:

- Report on mainstreaming the equality duty.
- Publish equality outcomes and report progress. These outcomes must be prepared with the involvement of people who are likely to be affected and groups representing them, and be based on relevant evidence.
- Assess and review policies and practices. Authorities must consider relevant evidence when making their assessment and take account of their assessment in developing a policy or practice. They must also review and where necessary revise existing policies or practices.
- Gather and use employee information. These must be published in an authority's mainstreaming report along with details of how the authority has gathered and used the information to better meet the obligations of the duty.
- Publish gender pay gap information.
- Publish statements on equal pay every four years.
- Consider equality in public procurement.
- Publish equality information and assessments listed above in an accessible manner.
- Ministers must publish proposals to improve performance and report on progress every four years.

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

Set equality objectives

- Prepare and publish equality objectives. If an authority does not have an objective for each protected characteristic they must say why not.
- Set out how and by when it intends to meet its objectives and monitor progress.
- Publish an equality objective in relation to the gender pay gap or publish reasons why not.
- Publish an action plan on gender pay.
- Review objectives at least every four years.

Achieve objectives

- Involve people who are representatives of protected groups when drawing up objectives, strategic equality plans and Equality Impact Assessments.
- Carry out and publish Equality Impact Assessments.
- Collect and publish equality information.
- Collect and publish employment information including information about pay, grade, working pattern, internal and external recruitment, training, disciplinary and grievance procedures and those who have left the authority.
- Ensure staff are trained to be able to meet their obligations under the duty.
- Draw up and publish a strategic equality plan.
- Have due regard to equality in procurement.

Report on their impact

- Publish an annual report on the duty and action to meet specific duties.
- Welsh ministers have a duty to publish a report on how devolved authorities are meeting the general duty.
- Keep arrangements under review.

How does the PSED work in practice?

The PSED can have – and is having – a positive impact on equality. When it works well, the PSED has led to action to promote equality, and helped uncover the potential negative impact of proposed policies in time to make changes to themⁱ.

Implementation of the PSED varies within and between local authorities and other public bodies. In many cases practice is good, with authorities making progress on clear equality objectives and changing policy as a result of impact assessments. However in other cases, practice is poor. Impact assessments are not carried out at all, or are superficial. Sometimes impact assessments appear to have been written in order to justify a decision, rather than analyse its impactⁱⁱⁱ. Impact assessments tend to be limited to changes to policy and practice. Assessments of existing practices are less common.

Under the previous gender equality duty, public authorities had an obligation to consider how they could close the gender pay gap. This is no longer required under the PSED, although some public bodies have included closing the gender pay gap as one of their equality objectives. However, many public bodies do not have any equality objectives that relate to gender equality at all. Just under a quarter of English local authorities have an equality objective that relates to gender equality for example^{iv}.

Organisations representing equality groups in England complain of a lack of consultation about the equality impact of policies. This is in contrast to Wales, where there is a specific duty to consult and engage with affected groups.

Severe central government spending cuts have made equality work within local government much harder. Equality teams have shrunk and in several cases now consist of a single person who is often too junior to challenge colleagues. Budgets for equality work are extremely low.

The Equality and Human Rights Commission (EHRC), is responsible for enforcing the Public Sector Equality Duty. It has had its budget cut dramatically from £70 million when it was launched to £17.1 million in 2016/17. There have been large-scale job losses. This has seriously reduced the ability of the EHRC to carry out its enforcement role.

These cuts make it even more vital that UNISON activists and staff work with equalities officers and regional equality committees to challenge employers where they see unfair policies or practices using the PSED.

The role of UNISON and other trade unions

Trade unions have had a positive impact on equality in the workplace. Unionised workplaces are more likely to have equal opportunities policies than non-unionised workplaces – as well as a smaller pay gap. Research by Cass Business School found that where employers actively involve trade unions in equality issues, equal opportunities policies are less likely to be ‘empty shells’^v.

Pressure from unions and equality organisations has been a key factor in how public bodies implement the PSED. There have been a number of important cases where the PSED has been used to challenge decisions that would have had a negative impact on equality.

UNISON, along with other unions and voluntary organisations, has won judicial review cases against public bodies including government departments that have failed to meet their obligations under the duty. Many more cases have not reached court, because public bodies have changed policies when faced with unions and equality campaigners who pointed out that they would have an unfair impact on a particular group or groups of people.

How UNISON has used the PSED

“Three years ago the council planned as part of their 3-year efficiency saving plan to remove the “death in service” benefit, by using the PSED we forced them into phasing them out over three years which would allow employees to make alternative arrangements...”

We have used the PSED to argue on behalf of low paid woman employees who would be adversely affected by efficiency cuts, family friendly policies, decisions which would affect employees with disability.”

UNISON representative at North Lanarkshire Council

“The PSED has led to better recruitment monitoring. We have identified, for example, that certain protected characteristic groups get through to interview but then don’t get appointed. With the need to monitor we discovered this and more training was provided for managers...”

UNISON representative at Waverley Council

Setting and delivering equality objectives

Under the English specific duties, all public bodies must set ‘one or more’ equality objectives by 2012 and at least every four years thereafter. There is no obligation for public bodies to monitor and report their progress in achieving these objectives, which means that in some cases they have little impact on the priorities of the organisation.

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

Given the high proportion of women in the local government workforce and the small proportion in senior positions – and the gender pay gap – this needs addressing. Women are also the most likely recipients of council services. As the largest trade union in local government, UNISON should take the lead in rectifying gender – and other – inequalities.

The EHRC has produced guidance for public bodies drawing up equality objectives which recommends that unions and other groups are consulted:

<https://www.equalityhumanrights.com/en/publication-download/objectives-and-equality-duty-guide-public-authorities>

The EHRC also recommends that public bodies analyse equality data when setting equality objectives. For example if a local authority discovers that disabled people are less likely to access certain services than non-disabled people it might set an equality objective to close that gap.

What you can do

- Talk to members and other workers: what do they think your employer’s equality objectives should be? This can be through a survey or workplace meetings. Try to gather real life examples that can help to illustrate why you think your employer needs to concentrate on this issue.
- Review the equality objectives set by your employer. Do these objectives match the equality issues raised by members? For example if Black workers are significantly under-represented in management positions is there an objective to address this? Women still do not have equal pay – is there an objective to close the pay gap? If not, why?

- Ask when the equality objectives are due to be reviewed. Highlight EHRC guidance that unions should be consulted when objectives are set and show how you can provide information about pressing equality problems in the workplace and in the wider community. Ask how the employer intends to consult when the equality objectives are reviewed.
- When equality objectives are reviewed ensure that you are involved in and consulted as part of the process. Link up with equality organisations and organisations representing service users in the community to see if you can develop a co-ordinated approach. Ensure there is a plan to achieve these objectives and that progress is being monitored. For example if there is an objective to increase participation of disabled people in the workforce what specific actions are planned to meet this objective? Is the employer collecting the data needed to monitor progress and is there some system for reporting back?

Collecting and using equality data

Under the specific duties, public authorities are obliged to collect and publish data to demonstrate compliance with the General Equality Duty. This should include information on both staff and service users.

Research carried out by the EHRC in 2011/12 showed that only 50% of public bodies had published equality information on both staff and service users. 78% had published information on either staff or service users, but only a minority published information on all or most of the protected characteristics^{vii}. We know that data held by the Local Government Association and many local employers is poor and would not enable them to comply with the PSED. Recent research by UNISON has shown that many councils and schools do not collect data on the ethnic origins of their staff: <https://www.unison.org.uk/content/uploads/2016/06/BMElocalgov-14-June-2016.pdf>

The EHRC states that to meet best practice, equality information should be:

- Up to date and available online
- Easy to find, clearly linked and ideally in one place
- Cover both workforce and potential and actual service users, with information disaggregated as far as possible across full employment experience
- Clearly explained with facts and figures supported by a narrative
- Should include evidence of how impact on equalities is assessed
- Accessible, in alternative formats and ideally in alternative languages

What you can do

- Check what equality information is published by your employer. Does it cover both employees and service users/potential service users? Does it meet the best practice listed above?
- Collect your own equality data and compare it with the information published by the employer. The TUC Women and the Cuts toolkit contains links to sources of data and a guide to how to use them. You can access it at: <https://www.tuc.org.uk/equality-issues/gender-equality/tuc-women-and-cuts-toolkit>
- Are there any gaps in the information? Is there information that you think should be collected, for example breakdowns of the proportion of employees with protected characteristics at different levels within the organisation?
- Is information collected and published on the gender pay gap?
- Are the equality objectives based on this information? Does the information reveal equality issues that should be a higher priority for the organisation?

PSED in action: how information can be used

A union branch officer in a local authority was concerned about the level of complaints from Black members. He reviewed the authority's data on grievance and disciplinary procedures and found that Black staff were disproportionately likely to face disciplinary procedures or take out grievances. He raised this with management, reminding them of their duties under the PSED. This led to a review of the authority's practices.

Prospect officers in the Ministry of Defence regularly reviewed data on the characteristics of staff in the re-deployment pool and found that disabled staff were disproportionately over represented. This was not because they were more likely to be placed in the redeployment pool but because they stayed there longer as the cost of any reasonable adjustments fell on the new division. The MOD agreed that these costs should be better shared.

Equality Impact Assessments

One of the main tools to help public bodies meet their obligations under the PSED are Equality Impact Assessments (EIAs). This is a process by which public bodies can assess the impact that a policy or practice is having, or is likely to have, on equality.

There is no specific duty to carry out an EIA in England (in Scotland and Wales there are specific duties to assess equality impact of policies). In 2012 David Cameron announced that he was 'calling time' on Equality Impact Assessments. Brandon Lewis, then Minister of State for Local Government, wrote to all local authorities telling them that Equality Impact Assessments were not a legal requirement.

While there is no legal obligation to carry out a process called an Equality Impact Assessment, these comments were misleading. The steps that the courts have said public bodies need to take in order to demonstrate that they have had 'due regard' to equality include the main elements of an EIA. They have to gather and assess evidence and make sure decision makers are aware of this evidence. If they don't keep some sort of record of this, it will be hard to prove they have had due regard to equality. Whatever this process is called, it is an Equality Impact Assessment in all but name.

EIAs can be a useful tool, and have led to important changes in policy.

PSED in action: EIA leads to a change in policy

An authority proposed to reduce its waiting list for social housing by writing to everyone on the list and asking them to confirm that they still needed housing. Anyone who did not reply within a set time frame would be removed from the list. The EIA highlighted that people with learning difficulties, people with some mental health problems and people who did not have English as a first language might not be able to respond to the letter in time and the policy was amended.

Although Equality Impact Assessments have led to significant changes, there are still too many examples of impact assessments that are carried out late in the day, based on limited data and limited or poor consultation with those likely to be affected by proposals.

PSED in action: impact of a limited EIA

A local authority was proposing to cut funding to a women's organisation to provide English for Speakers of Other Languages (ESOL) classes. The EIA argued that there were other organisations providing classes that the women could attend. There was no evidence of consultation with women accessing the service. This would have revealed that some women would only attend women-only sessions for religious and cultural reasons. In addition the women's organisation also provided childcare on site, which other organisations did not offer. The impact assessment failed to recognise that this meant a significant number of women would not be able to access ESOL classes at all.

Unions can play an important role in making sure EIAs are carried out properly and challenging poor quality assessments.

What can you do?

Ensure impact assessments are carried out

If your employer is making decisions, proposing policies or has policies or ongoing practices that you believe will have a negative impact on equality or good relations or may result in unlawful discrimination, ask them if they have carried out an Equality Impact Assessment.

If they have not carried out an assessment and do not intend to do so, ask them how they intend to have due regard to the impact of the decision, policy or practice on equality.

The TUC has produced a draft letter to public bodies that are not intending to do an EIA:

Dear

Re: **[Insert particular issue]** and compliance with the s.149 duty in the Equality Act 2010

I am writing to request further information on how **[public authority]** intends to discharge the duty in s.149 of the Equality Act 2010 with regard to **[decision, policy, proposed policy or ongoing practice]**. S.149 requires a public authority in the carrying out of all of its functions to have due regard to the need to eliminate discrimination, to advance equality of opportunity and to foster good relations across the protected characteristics of age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation.

We believe **[the decision, policy, proposed policy or ongoing practice]** **[could/will]** have a negative impact on equality and/or good relations **[and may result in discrimination that is prohibited by the Equality Act 2010]**. **[Say why]**. Therefore, the s.149 is duty clearly engaged.

We would expect that you will be carrying out an Equality Impact Assessment (EIA) and we look forward to co-operating with you in ensuring that you have access to all the relevant information. If you are not proposing to carry out an EIA could you explain the reasons why and how you intend to have due regard to the requirements listed in s.149. In particular, in the absence of an EIA, could you explain how you intend to:

- gather and consider information about the people affected, what protected characteristics they have and the extent to which they are affected differently from people who do not have those characteristics;

Draft letter continued overleaf

- ensure that the information gathered is sufficient to enable a proper, informed view to be taken about the impact on equality and good relations generally and the risks of prohibited discrimination;
- and, if there is a particular impact on people who share a protected characteristic, give proper consideration to the extent, nature and duration of that impact;
- and, if there is a negative impact, give consideration to how that could be eliminated or at least mitigated?

We look forward to hearing from you.

Yours sincerely,

See the TUC Equality Duty Toolkit available at:

https://www.tuc.org.uk/sites/default/files/extras/equality_toolkit.pdf

Feed into the EIA process

If your employer is planning an EIA, ask what evidence it is planning to use and how it is planning to consult those affected by the policy or process. EIAs are usually carried out by officers with responsibility for developing the policy and/or managing the service, with support from specialist equality officers. Contact both. Ask them when the consultation process starts and how you can get involved.

Respond to any consultation process carried out as part of the EIA. Share this information with members and encourage them to feed their views into the process, either individually, through your branch equalities co-ordinator or through your workplace rep. Make sure that service users are aware of the consultation and encouraged to respond. It may be helpful to link up with groups representing service users and local equality groups to see if you can develop a shared position and co-ordinate responses.

If there is no plan to consult, ask how decision makers can be sure that they will have due regard to the equality impact on staff and service users if they don't consult them. Keep members updated on the responses you receive.

PSED in action: using the duty to overturn decisions

A government department planned to shut down two lifts and reduce the time lifts were operating in its office building in order to cut energy costs as part of an environmental initiative. The union used the PSED to challenge this, pointing out the impact on disabled staff. As a result the department reversed its decision.

Review EIAs

UNISON branches can check if Equality Impact Assessments have been carried out and analyse the quality of published impact assessments. Things to ask and watch out for include:

- Does the impact assessment contain the data needed to assess impact properly? If it is an EIA of a proposal to cut a service, does it give a breakdown of those using the service and the staff delivering the service by race, gender, disability and so on? Does it consider the impact on other groups? For example, if there are cuts to social care this may mean unpaid carers – most of whom are women – have to take on more work.
- Does the impact assessment take account of the views of affected groups? Are the views of these groups fairly reflected in the impact assessment?

- Does it assess whether particular groups of service users are likely to be hit harder than others if the service is cut? For example will some people be able to use a different service that might not be accessible to others?
- Watch out for impact assessments that give an overly optimistic view of a policy's likely impact. If a service is being cut and the impact assessment states that service users can access other services instead, check if these other services are appropriate. If a specialist service is being lost will users continue to access a more generic service?
- Does it include the impact on specific groups of workers who could be disproportionately affected by a decision, such as closing a service?

PSED in action: reversing cuts to overtime pay

One county council proposed cutting overtime rates for certain staff. The council produced an EIA which argued that this would not have a disproportionate impact on equality. The UNISON branch reviewed the data published in the EIA and found that women workers would lose a higher percentage of their earnings than men. Over half of Black workers would be affected compared to 12% of white workers. Following UNISON's intervention the council agreed to adopt a new system.

Raise concerns with decision makers

Check whether final decision makers – like councillors or board members – are aware of the potential equality impacts of policy or practice. If there are flaws in the EIA highlight these using evidence you have already gathered if needed. Remind them that their responsibility to have 'due regard' to equality cannot be delegated. This means they need to ensure they have sufficient information to be able to consider the equality impact themselves.

PSED in action: R (Rahman) v Birmingham City Council

The courts found that Birmingham City Council had failed to have due regard to equality when ending funding for legal advice services delivered by three voluntary sector organisations. Although an impact assessment had been carried out this was not included in the documents sent to councillors who were making the final decision.

After a legal challenge against the decision was lodged, councillors were presented with the impact assessment and repeated their decision to cut funding. However courts ruled that the impact assessment was flawed because it did not focus on the disadvantage to users if the service was cut and was not based on proper consultation. Councillors could not rely on a flawed EIA as evidence that they had due regard to equality.

PSED in action: Equality Impact Assessments

Managers in a local authority announced that they would no longer be carrying out Equality Impact assessments. Local equality organisations wrote a briefing highlighting court cases where local authorities that had not carried out impact assessments had been found to have breached the PSED. This was sent to all local councillors. The councillors reversed the decision.

Carry out your own impact assessment

In order to argue that a decision or policy will have or is having a negative impact on equality, you will need to collect evidence. This can include statistical data, for example showing that people with a protected characteristic are disproportionately likely to be affected by a decision. It can also use evidence from consultation with members or service users. Consulting non-members can also be a good opportunity to raise awareness of UNISON's work on equality and recruit new members. One way to present this is in the form of your own Equality Impact Assessment.

The TUC has produced a toolkit on carrying out a local equality and human rights impact assessment of the impact of spending cuts on women <https://www.tuc.org.uk/equality-issues/gender-equality/tuc-women-and-cuts-toolkit>

The Centre for Human Rights in Practice at the University of Warwick has produced a database of resources to support equality and human rights impact assessments <http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/resources>

PSED in action: DIY impact assessment

A women's network, including representatives from trade unions and local women's groups, was concerned about the impact of cuts to benefits and services on women locally. They carried out a local impact assessment, which looked not only at different cuts in isolation, but at the combined impact of cuts (known as a cumulative impact assessment). Other groups and networks produced similar cumulative impact assessments in other parts of the country. In one city this persuaded the council to start producing their own cumulative impact assessments.

Challenging cuts to services

Public spending cuts have had a devastating impact on local services and led to the loss of thousands of jobs. Under the PSED, public bodies have to have due regard to equality when making cuts. They have to consider whether a particular group will be hit harder than others when cutting a service. For example, cuts to adult social care will particularly affect disabled people and older people. They will also affect women more than men. Women are more likely to need social care, the majority of care workers are women, and women also make up the majority of unpaid carers who may have to provide more unpaid care if social care is cut.

There have been several high profile cases where decisions to cut services have been successfully challenged in court using the PSED and earlier public sector duties. Less high profile are the cases where unions and others have challenged cuts using the PSED and won concessions without ever going to court.

PSED in action: challenging decisions

A local authority proposed cutting a benefits advice service. This would have disproportionately affected disabled people who were more likely than other groups to need the service. Union members who worked in the service supported a service user to start legal action against the authority under the PSED, arguing that although there had been an impact assessment this had been superficial and not reflected the real impact on equality.

Before the case came to court the council carried out a more thorough impact assessment and revised its proposals. Following this case the council changed the way it carried out impact assessments.

What you can do

The advice given above on Equality Impact Assessments **is particularly important when services are under threat**. You can work with local Self Organised Groups (SOGs), branch equality officers and local equalities groups to:

- Provide evidence of likely equality impact during consultations and when the final decision is made.
- Make sure the views of service users and equality groups are fed into any consultation or process to analyse equality impact.
- Review EIAs and highlight any missing information.
- Form a network with local equality groups and service users to challenge cuts using the PSED.
- Collect your own evidence of equality impact and send this to decision makers, reminding them of their duty to have due regard to equality.

Make sure that the equalities impact of cuts and any breaches of the PSED are included in any wider campaigning against proposed cuts to the service. UNISON's Save our Local Services toolkit contains information and advice for UNISON members to campaign against local cuts <https://www.unison.org.uk/news/article/2016/08/save-our-local-services-exciting-new-toolkit/>

Commissioning and contracting out

Contracting out of services often leads to cuts to pay, conditions and working hours as well as reducing the quality of services. If public functions are contracted out to private bodies or voluntary organisations then those functions will be covered by the PSED. Both the public body contracting out the service and the contractor are responsible for meeting obligations under the PSED. A public body contracting out services cannot contract out its equality duties.

Public bodies should carry out an impact assessment at each stage of the procurement process, including when considering whether to go out to tender. Equality criteria should be built into contracts and there should be ongoing monitoring of the impact of the contract on equality.

PSED in action: R (on the application of RB) v Devon County Council

In this case the courts ruled that Devon County Council had failed in its duty to consider equality when appointing Virgin Care to deliver children's health and care services. Although the court did not over-turn the decision to commission Virgin Care, it concluded that the PSED did apply when Devon County Council made the decision to appoint Virgin Care as its preferred bidder.

What can you do?

- Find out who is responsible for commissioning services, write to them reminding them of their obligations under the PSED and ask for a meeting.
- Remind both the public body and the contractor that they are responsible for meeting the PSED in delivering the services being contracted out.
- Ask them if Equality Impact Assessments will be carried out at each stage of the procurement process, including the initial decision to put services out to tender. The equality impact of all options, including the option of keeping services 'in house' should be properly considered. If there are no plans to do this ask them how they intend to have due regard to equality (the letter on EIAs above can be used as a template).

- Review these impact assessments and highlight any missing information.
- Check if contractors are required to provide detailed information about their equality policies and practices in their tender documents. If not, ask why, and how the commissioner plans to ensure that contractors are meeting the equality duty.
- Check if equality criteria are built into contract compliance indicators (the outcomes and milestones that contractors are obliged to meet) and that equality is monitored throughout the contract. If not, ask how the commissioner intends to monitor whether the contractor is having due regard to equality.
- Work with SOGs, members, local equality organisations and service users to highlight any potential equality impact in the delivery of services.

PSED in action: securing the Living Wage for contracted employees

In order to meet one of its equality objectives one local authority agreed a policy, supported by unions, that contractors should be required to pay the living wage. Directly employed staff were already paid the living wage. Once contractors were obliged to pay the living wage it proved better value in some cases to provide services ‘in house’.

UNISON has produced a series of guides on public sector procurement. These can be found at: <https://www.unison.org.uk/get-help/knowledge/contracts/procurement/>

Consultation and engagement

In England there is no specific duty to consult groups that might be affected by the policies or practices of a public body. However the courts have highlighted the importance of engagement. In one case where the Secretary of State for Education was found to have breached the PSED, the court observed ‘if only the Secretary of State had consulted with them (the claimants) they would have been able (if they wished) to highlight those special equality considerations to him’^{viii}.

If consultation is carried out then it must be meaningful. This means that it must be carried out in time to inform a decision, people must have enough time to respond, they must be given enough information to enable them to make an intelligent response and their responses must be taken into account when a decision is made^{ix}.

PSED in action: early consultation

An equality officer in one local authority realised that the way her authority consulted was not working. Draft policies would be sent out for consultation late in the policy making process. There was little time for unions and equality groups to respond. When these groups raised concerns the officers responsible for developing the policy often felt under attack, and ended up trying to justify the policy, rather than listening to the issues.

She changed her approach to invite relevant organisations to a round table meeting with officers at the very early stages of policy development. This helped ensure officers were aware of equality issues for different groups before they started drafting a policy proposal.

What can you do?

As well as responding to consultations on behalf of their members and supporting members to submit their own responses, UNISON can play a role in ensuring that

service users, organisations representing equality groups and others affected by local services are properly consulted. This can include making sure that these groups are aware that a consultation is taking place and providing support for them to respond.

PSED in action: involving members and service users

A branch rep was notified that the local authority was consulting on plans to cut the number of teaching assistants employed in a local school. She contacted parents of children at the school to encourage them to respond to the consultation. She realised that the cuts would have a particular impact on disabled children, who were more likely to receive support from teaching assistants.

She supported her members who were teaching assistants to form a campaign group with the parents of those children. She informed the parents about the Public Sector Equality Duty and the need for the local authority to have due regard to the impact of their proposals on disabled children. She felt this combined approach was more successful than if she had focused on raising concerns about members' jobs.

Encouraging good practice

As well as responding to policy proposals, UNISON members and paid officials can play a critical role in encouraging best practice on equalities in councils. The local authorities which have the best approach to equalities:

- Share a commitment at a senior level to promoting equality.

Work on equality is more likely to be prioritised if it is championed at a senior level. Local authorities with the best approach to equalities will identify someone at a senior level who will champion authority. Champions can be senior officers and council leaders, or chairs of important committees. This helps ensure that there are resources for training staff and that equality is considered as part of strategic decision making.

PSED in action: ensuring equality in council budgets

A senior manager in a local authority insisted that the equality team was represented from the outset in discussions about the authority's budget each year. This meant that they were able to highlight the potential equality impact of different proposals from the start.

Senior level commitment is particularly important when it comes to gender equality which is often a low priority.

In local authorities where there are well-organised networks that bring together unions and local equality groups, this external pressure can help push equality up the list of priorities for senior managers and council leaders. UNISON activists and staff have a key role to play in promoting equality.

- Provide training and support for all staff on equality

Public bodies should make sure that staff who are responsible for considering equality impact have training in how to do this properly and understand what the PSED means for their work.

This often works best when it is focused around case studies and practical examples that are relevant to the work of people being trained. These bring the duty to life and help people understand how different groups might be affected by the services that they deliver.

Branch Equality Officers can encourage members to go on equality training courses run by UNISON. Along with other officers, they can encourage employers to make sure all employees have the training they need to meet the obligations of the PSED. You can also promote this training to non-members as a way to encourage them to join UNISON.

- Have effective equalities teams in local authorities

Specialist equality officers or equality teams within a local authority support colleagues in carrying out impact assessments, helping them understand both their legal obligations and the likely equality impact of a policy. These teams are most effective when they contain experienced staff with an understanding of equalities issues and a focus on outcomes rather than process. They also need the power to challenge poor quality impact assessments.

- Engage with external interest groups

Meaningful engagement between staff responsible for equality and external groups including unions and civil society groups works best when it is not limited to formal consultation on specific policies but ongoing discussion about the needs and experiences of particular groups that can inform policy making from the outset.

- Build strong relationships between those working for equality within the authority (as officers/councillors for example) and those working outside.

External groups and networks can provide first-hand evidence of impact/likely impact and knowledge of sources of data. They can also increase external pressure on the organisation, which can strengthen the position of insiders in discussions with colleagues.

PSED in action: equality officers working with external groups

An equality team in a local authority helped set up and support a series of networks representing different 'protected characteristics'. The women's network, which included women's organisations, trade unions and individual women developed strong relationships with officers and key councillors. Equality officers used the evidence from this network to support their efforts to encourage colleagues to take account of the impact of different policies on women.

- Consider a broader range of 'protected characteristics'

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

Building alliances on equality

Equalities work is often most successful when unions and equalities groups work together.

Find out what local women's networks, race equality networks, networks of disabled people or of disability groups, older people's networks, LGBT groups and networks and so on there are in your area. Networks that are made up of a number of local groups and individuals should welcome trade union members or affiliates. Some

local authorities provide support to and/or recognise local equality networks as a way of consulting on the potential equality impact of policies. UNISON's Self Organised Groups and branches should make formal or informal links with local equality networks and organisations.

Alliances that bring together trade unions, voluntary organisations and community groups can be particularly powerful. Voluntary organisations often have first-hand knowledge of the impact of service changes or cuts on different communities. Some may be delivering services, others will be providing advice and support to affected groups and individuals. Faith groups may also be involved in providing support to vulnerable groups – through food banks for example. These networks can be a powerful way to share information about planned changes or cuts to services, develop joint responses and organise campaigns to save local services.

The most effective networks include both service-providing organisations and campaigning groups. Service organisations might have a better understanding of how the authority works, but be less willing to challenge them when the authority could be a potential funder. Campaigning groups may be able to draw on organisations' detailed knowledge to publicly challenge local authorities.

PSED in action: building local equalities networks

A city contained networks of disability organisations and Black community organisations but had no network of women's organisations. Women from local domestic violence and rape crisis services, along with women from national women's groups like the WI and women from local trade unions got together to form a network. When services were threatened with cuts, this group was able to highlight both the impact on women workers, and the impact on women service users.

Equality Officers should include information about equalities groups and networks in any training sessions or materials they provide to colleagues so that anyone carrying out an Equality Impact Assessment knows that the network can provide evidence of potential impact.

Judicial Review

If a public body fails to comply with the general equality duty then it can be challenged through an application to the High Court for judicial review. There have been a number of important judicial review cases brought under the Public Sector Equality Duty. The fear of judicial review has prompted many public bodies to improve their equalities practice and in particular to carry out Equality Impact Assessments.

However judicial review in these cases is mainly a test of process rather than outcome. If a public body can show that it has had 'due regard' to equality, you cannot challenge the decision it reaches simply because you disagree with it.

Judicial review is complicated and expensive. UNISON will only seek judicial review in very limited circumstances and any possible case would need to be discussed with your Regional Organiser and agreed by the UNISON HQ legal team before it could proceed.

Judicial review cases have to be taken as promptly as possible, and no later than three months after a decision is made. The Public Law Project has produced a guide to judicial review: http://www.publiclawproject.org.uk/data/resources/6/PLP_Short_Guide_3_1305.pdf

The guide itself makes it clear that it is not a substitute for legal advice, but is intended to help people understand the advice they are given.

The Public Sector Equality Duty can be a powerful tool for unions in the fight for equality. However it is not a magic bullet. Public bodies have to have 'due regard' for equality, but they do not have an obligation to take action to reduce inequality, only to properly consider it. Equality is not the only thing they have to take into account when making decisions. So a public body may well make a decision you disagree with even when it has properly considered its impact on equality. Despite this many UNISON members and others have found that the PSED has helped change policy and practice.

Key questions for your branch

To use the PSED effectively and promote equality with your council, your branch needs to be aware of its potential and be well equipped to use it. Here are some issues for you to consider:

- Does your branch have equality officers, covering all the equality strands?
- Do you have equality reps in workplaces?
- Are they all well trained in equality law, the PSED and wider equality issues?
- Are branch officers also trained?
- If not, what will you do to ensure this?
- Have you discussed the need for equality reps with your council?
- Do you have active links with the equality organisations and campaigns within your council area?
- Do you know the councillors and officers with responsibility for ensuring PSEDs are carried out?
- Have you raised the need for equality objectives with your council?
- What equality objectives does your branch want to see?

Key questions for your council

As a starting point, here are some key questions for you to consider and for you to ask your local authority:

- Who is responsible at a senior level for ensuring the authority meets its obligations under the PSED?
- Who is responsible on a day to day level for equalities work?
- Do they have the resources, training and authority to carry out this role properly?
- How does the authority consult with equalities groups?
- How can equality groups and the UNISON branch feed into equality work?
- What training does the authority provide to staff on the PSED?
- What equality objectives has the authority set? Do these match the priorities of your members?
- What evidence was looked at when setting these objectives? Who was consulted and how?

- How will the authority monitor progress towards meeting these objectives? Are there milestones along the way and how have they been set?
- What equality information does the authority publish? Are there gaps?
- Does the authority publish Equality Impact Assessments of policies and practices? How comprehensive are these?
- Has policy been altered or amended as a result of an impact assessment?

Footnotes

- i TUC response to GEO call for evidence, 19 April 2013, available on line at <https://www.tuc.org.uk/sites/default/files/tucfiles/tucresponsepsedreview.pdf>
- ii Clayton Hathaway K, 2013, The Public Sector Equality Duty: Empirical Evidence Base: Oxford Brooks Centre for Diversity Policy Research and Practice, Oxford, available on line at: https://www.researchgate.net/publication/258435275_THE_PUBLIC_SECTOR_EQUALITY_DUTY_-_EMPIRICAL_EVIDENCE_BASE
- iii Harrison J and Stephenson M, 2011, Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments, Scottish Human Rights Commission, Edinburgh. Available on line at <http://scottishhumanrights.com/>
- iv EHRC 2013, Assessment of the publication of equality objectives by English public authorities, Equality and Human Rights Commission, London, available on line at: <https://www.equalityhumanrights.com/en/publication-download/assessment-publication-equality-objectives-english-public-authorities>
- v Bacon N and Hoque K, 2013, The role and impact of trade union equality representatives in Britain, Cass Business School, available on line at: <http://www.cassknowledge.com/sites/default/files/article-attachments/role-impact-trade-union-equality-britain-cass-knowledge.pdf>
- vi EHRC 2013, Assessment of the publication of equality objectives by English public authorities, Equality and Human Rights Commission, London, available on line at: <https://www.equalityhumanrights.com/en/publication-download/assessment-publication-equality-objectives-english-public-authorities>
- vii EHRC, 2013, Publishing Equality Information: Commitment, Engagement and Transparency, Equality and Human Rights Commission, London, available on line at <https://www.equalityhumanrights.com/en/advice-and-guidance/our-research-equality-duty>
- viii R. (on the application of (1) Luton Borough Council and Nottingham City Council (2) Waltham Forest London Borough Council (3) Newham London Borough Council (4) Kent County Council (5) Sandwell Metropolitan Borough Council) v. the Secretary of State for Education [2011] EWHC 217 (Admin) Holman J. at para 114.
- ix R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168

