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The Public Sector Equality Duty Q&A

There are many reasons why councils need to make their parks, playing fields, recreation grounds etc more welcoming to teenage girls: it's about fairness; it's about girls growing up feeling safe in public space; it's about giving girls the space they need to maintain and improve their mental and physical health. But it's also about the law, and about councils complying with a fundamental legal obligation: the Public Sector Equality Duty. When we have talked to councils, planners, designers, play professionals and academics, there is often a low level of awareness of this duty or confusion about what it means in practice.

We are therefore delighted to have teamed up with award winning, nationwide law firm Weightmans LLP to answer some of the questions we've come across during our work and cast some light on this area. Please note that this is a general guide to this area of law: it is not legal advice and councils should seek their own advice on particular issues that they face.

If you are a council or other party who would like to get legal advice on the Public Sector Equality Duty and how it impacts the work that you do, please contact Simon Goacher Simon.Goacher@Weightmans.com, Suzan Yildiz Suzan.yildiz@weightmans.com or Michelle Spark michelle.spark@weightmans.com at Weightmans LLP.

What do people mean by the Public Sector Equality Duty?

The Public Sector Equality Duty is a series of legal obligations that public bodies (including local authorities) must comply with when they make decisions. The Public Sector Equality Duty is made up of a general duty (set out in section 149 Equality Act 2010 and applying equally in England, Wales and Scotland) and a number of specific duties (set out in regulations and which differ for England, Wales and Scotland).

In this note we focus mainly on the general GB-wide public sector equality duty, which we refer to as the PSED.

However, it is worth noting that public bodies that are also subject to the specific duties (which includes most local authorities) are required to set equality objectives/outcomes (depending on whether they are in England, Scotland or Wales). Given longstanding evidence and current concerns about the safety and participation of women and girls in public spaces, local authorities should consider whether they should be setting an objective/outcome in this area.

What does the PSED require local authorities/councils to do?

The PSED requires local authorities/councils, when exercising their public functions, to consider proactively the need to:

- eliminate unlawful discrimination, harassment, victimisation and other unlawful discrimination;
- advance equality of opportunity between people who share a protected characteristic and those who do not; this involves removing/reducing disadvantage, meeting differing needs, and encouraging people to participate in activities where their participation is low; and
- foster good relations between people who share a protected characteristic and those who do not.

What are “protected characteristics”?

The PSED protects people by recognising that there are certain personal characteristics which can lead to discrimination or disadvantage within society.

These are referred to as the “protected characteristics” and for the PSED they are: sex; sexual orientation; age; disability; gender reassignment; pregnancy and maternity; race; and religion or belief¹.

Why is the PSED relevant to the work of Make Space for Girls?

Sex² (referring to male/female) is one of the protected characteristics. Where a local authority's/council's current facilities for teenagers (skate parks, fenced pitches, BMX tracks) are dominated by boys and/or there is low participation in the park by girls, girls are disadvantaged.

The PSED requires local authorities/councils to consider proactively the need to reduce this disadvantage and encourage greater participation.

There is also an argument that the current provision in many parks puts girls at a particular disadvantage, and this cannot be objectively justified. This could amount to indirect discrimination which is unlawful under separate provisions in the Equality Act 2010.

¹ Marriage and civil partnership are also relevant protected characteristics for the first limb of the PSED

² The Equality Act constructs this protected characteristic by reference to legal sex, not by reference to gender.

Who is responsible for making sure the PSED is complied with?

The duty applies to the local authority/council which is exercising the function and it cannot delegate that duty, even if it has outsourced the function.

All individuals working in the local authority/council must understand the duty and ensure that it is complied with. Councillors need to be sure that the duty is complied with and cannot simply assume that the officers/staff have taken the PSED into account.

We are very clear at our council: we would never discriminate against anyone and we have a clear anti-harassment/discrimination policy that everyone adheres to. So, the PSED doesn't really concern us.

Sometimes discrimination is overt and/or intentional; anti-harassment/discrimination polices perform a key role in tackling this.

But often discrimination or disadvantage is more opaque in origin, being the result of structural inequalities, unconscious bias or stereotypical thinking; and as such may be missed by anti-harassment/discrimination polices. Complying with the PSED is a legal obligation which gives local authorities/ councils a framework to help them tackle these harder to see problems.

We treat everyone the same, so surely as a practical matter we are complying with the PSED, even if we don't talk about it?

Because people with different protected characteristics face different barriers and have different needs, treating everyone the same could be discriminatory and will often perpetuate inequality and disadvantage. The PSED requires local authorities/councils to consider proactively how their decisions could impact different groups in different ways and this proactive consideration will help to reveal these barriers and uncover these needs.

For example, in theory everyone is equally entitled to turn up to a fenced pitch/MUGA and have an informal kick around. But in practice the design of these areas and their dominance by boys mean that girls don't have access (unless as part of an organised sports club).

But if as a council we focus on getting a better understanding of the needs of teenage girls, isn't that unlawful discrimination against teenage boys?

No. The Equality Act recognises that in order to comply with the PSED, authorities/ councils need to focus on the position of disadvantaged groups and may need to change the way services are provided to ensure that they can access them fairly.

The duty talks about eliminating disadvantage, but I don't know who is disadvantaged. So how can I make sure my council complies with the duty?

The courts have looked at this and explained that complying with the PSED require a proper analysis of all the relevant material and for decision makers to be properly informed.

The courts have also confirmed that if the decision makers don't have the relevant material, there is a duty to acquire it. This frequently means engagement and consultation with groups who will be impacted by the decision will be needed.

For example, if a local authority/council is planning a refresh of the park, or looking at investing in or making changes to a skate park, the local authority/council should get information about how boys and girls use the current and proposed facilities so that the decision makers can discharge their PSED obligations.

Does the PSED only apply to decisions above a certain financial threshold or at certain strategic/policy level?

No: the duty applies whenever a local authority/council is exercising its public functions, whether that is taking decisions, setting policies or providing services. The PSED does not just apply to policy development or high-level decision-making.

To ensure compliance with the duty at all levels of decision-making, there must be arrangements to integrate the PSED properly into the day-to-day activities of local authorities/councils. Everyone should understand the PSED and how their responsibilities under it affect the way they should do their work.

Our planning policies have been assessed under the PSED. If the Planning Committee makes decisions that are within those policies, does the committee still need to apply its mind to the PSED in relation to individual planning applications?

Yes: it is important that key policies are developed in line with the PSED. But each individual planning decision also requires compliance with the PSED. The members of the Planning Committee can't just assume that the duty will be complied with just because they have followed policy.

Presumably the PSED only applies if we are spending council money? If someone else is funding a service or facility, then we don't need to worry about the PSED.

The PSED applies whenever a local authority/council exercises its public functions. The fact that the funding for a particular project may come from a different source does not absolve the authority/council from the need to comply with the PSED.

We are a small Parish/Town council; surely the PSED doesn't apply to us in the same way that it applies to larger councils (county, district or unitary councils)?

The PSED applies in the same way to all local authorities, including Parish and Town Councils. There is no exemption or "watering down" of the PSED for smaller councils.

What are Equality Impact Assessments (EIAs)? Are they a legal requirement?

The PSED does not specify how a local authority/council should comply with the PSED. It is important that local authorities/councils find a way of assessing what they do, to ensure compliance with the PSED. They should find a process that works for them and can be integrated into their day to day activity.

Some local authorities/councils find an assessment template is useful to ensure consistency and proportionality. These templates are often referred to as "Equality Impact Assessments". There is no legal requirement to use a template like this; but documenting how equality issues have been considered and influenced decision-making is an

important way of evidencing that the PSED has been complied with. This is particularly important in the event of a decision being challenged.

Complying with the PSED is all about box ticking; once we've decided what we are doing, we get one of the council staff to use our standard EIA to review it.

The PSED is not about box ticking and if the decision maker gets someone else to look at it after the decisions have been made, the chances are the decision maker won't have complied with the PSED.

The courts have given guidance on this and are clear: the duty must be exercised in substance, with rigour and with an open mind. The assessment of the risk of discrimination must be done before the decision and not as a rear-guard action.

Our council doesn't have any records of its consideration of the PSED in relation to recent decisions in relation to the park. Is this a problem?

Yes: whatever process a local authority/council adopts to comply with the PSED and whether it uses Equality Impact Assessments or not, the courts have made it quite clear that the decision maker should record the steps they have taken to comply with the PSED. Local authorities/councils need to keep adequate records to be able to demonstrate compliance.

If there are no records, this leaves the decision makers open to accusations that they have not complied with their legal duties and makes defending a challenge difficult.

I am a councillor and I have never received any training on the PSED. Should I have done?

There is no absolute legal obligation that requires councillors/ council staff to receive training on the PSED but it is difficult to see how the duty can be complied with if individuals do not understand their legal responsibilities.

It is also important to note that the purpose of the PSED is to bring about a culture change so that promoting equality becomes part of a local authority's/council's core business. Clearly it is good practice for well-run organisations to ensure that their key decision makers and employees receive proper training in areas of core business.