

PUBLIC SECTOR EQUALITY DUTY
REDUCING BUREAUCRACY:

*‘THROWING THE BABY OUT WITH THE
BATHWATER?’*

A CONSULTATION RESPONSE BY BRAP

APRIL 2011

1. Introduction

- 1.1 brap welcomes the opportunity to contribute to the 'Public Sector Equality Duty: reducing bureaucracy' consultation.
- 1.2 brap is a think fair tank, inspiring and leading change to make public, private and civil sector organisations fit for the needs of a more diverse society. brap offers tailored, progressive and common sense approaches to equality training, consultancy and community engagement issues. The organisation has twelve years' experience of directly supporting public authorities to improve their implementation of equality practice. brap also undertakes equality focused research and supports small community organisations to improve the work they do with the most excluded in society (www.brap.org.uk).
- 1.3 brap welcomes the opportunity to 're-think' overly process-driven approaches to public sector duties. It is important that we get the most out of efforts to promote equality and focusing on outcomes is an important part of that equation. Removing requirements to undertake processes that are only done to 'tick boxes' is also worthwhile. However, we believe that some of the proposals in this policy review go too far and risk 'throwing the baby out with the bathwater'. Some of the requirements that the Government is proposing to relax will have a significant impact upon equality practice within public authorities. We believe this will be detrimental to progress on equality (both process and outcomes) in the future if not accompanied by appropriate support or by other legal protections.

2. Will the changes improve implementation of equality related activities within an organisation?

- 2.1 We understand and agree that a mandatory requirement to undertake some processes has prevented meaningful activity on equality in the past. For example, public authorities we have worked with have shared their frustration at having to consult with people from particular minority backgrounds simply to 'tick the box', restricting their ability to explore more meaningful forms of engagement.
- 2.2 Removing requirements to publish details of engagement and equality analysis undertaken may help public authorities to achieve this by allowing more flexibility within the system (or being less prescriptive about the 'how'), allowing them to link community engagement, equality analysis and monitoring more closely to their own existing business processes (and not sit outside of the day-to-day running of the business as they sometimes do currently).
- 2.3 Yet the big question, of course, is whether removing requirements to publish details of things like engagement or equality analysis will help people to move beyond 'ticking the box' and to make meaningful use of processes like this to achieve better outcomes.
- 2.4 There is a risk that removing the requirement to publish is viewed by public authorities as approbation to not undertake consultation or equality analysis. It is our understanding that public authorities would need to do this in many circumstances in order to meet their general duties. Retaining the duty to publish could help to reaffirm this requirement. If the duty to publish is removed, this risk of misinterpretation of the law could be addressed in the following way:

- *Requiring public authorities to make details of specific processes/evidence available to the public within a specific timeframe if they are asked for it. These processes may differ across public authorities but could be described in law under general headings (e.g. consultation, equality analysis, monitoring, equality-focused schemes, etc).*
- *If public authorities are asked for information that will help the public/community organisations to inform a particular decision-making process then this information should be made available in sufficient time/in advance of those decisions being made.*

2.5 This is also a question of the ‘tone’ of the law. For example, removal of the word ‘sufficient’ from the requirement to publish information to demonstrate compliance could reduce the quality of data gathering and publishing undertaken. It could be read by public authorities as a signal that they do not need to produce high-quality information. Frankly, as an equality-focused charity that makes requests to public authorities for data on equality progress, it is often difficult to access any data, let alone sufficient data. Retaining a word like this could help service users and organisations like ours to hold public authorities to account on the quality of their information to demonstrate compliance. We would suggest:

- *“Publish sufficient information to demonstrate compliance” is kept in the regulations*
- *Provide public bodies with clear guidelines on what constitutes ‘sufficient’ evidence; this could be done by providing a framework by which public bodies can ‘test’ the rigour of their evidence base, against a series of criteria.*

2.6 In many cases, it is not the ‘mandatory’ nature of processes that prevented organisations from using them effectively to progress equality. Some public authorities that we have worked with have not had the requisite skills or knowledge necessary to conduct and use processes like equality impact assessments or consultation effectively. Removing (or indeed keeping) the requirement for organisations to publish details of these processes will not necessarily improve their ability to conduct and use them to meet the general duties. The Government’s plans to relax rules on publishing will only help this to happen if they are accompanied by actions to improve implementation of the law.

2.7 This could be improved by making the relationship between specific and general duties clearer to public authorities. Also it could be improved by focusing on improving skills and knowledge around equality. Many organisations have seen equality-focused training and awareness activities as an end in themselves, rather than focusing on the outcomes of this activity. Government could help this to happen by:

- *Publishing a code of practice written by practitioners for practitioners that demonstrates how particular processes can be used to achieve the general duties (e.g., a section on equality impact assessment that focuses on how these can be directly used to achieve general duties, and how authorities can know when this is not working well).*
- *Encouraging public authorities to focus on exploring and measuring the outcomes of equality-related training and awareness raising activities.*

- *Provide guidance on/be much clearer about the skills and knowledge required to lead on equality*

3. Will removing process requirements improve transparency and accountability?

- 3.1 Clearly the Government believes that reducing burdens and bureaucracy on public bodies and moving away from a process-driven approach is conducive to increased transparency, and that this will in turn will improve outcomes. Yet, the planned changes to regulations run the risk of reducing transparency and accountability and not enhancing them.
- 3.2 If public authorities are not required to publish details of how they have decided which equality objectives to focus on and how they intend to measure progress against those objectives, then this raises a number of challenges for members of the public/community organisations that want to hold those public authorities to account.
- 3.3 Firstly, access to information may be harder. In the absence of regularly published details, community organisations will be required to contact public authorities, find somebody who can talk with authority on the subject and then secure the relevant information. Currently this is extremely hard to do (and brap often tries to do it). This could be addressed at the very least by following the action suggested above (requiring public authorities to make particular types of evidence available if this is requested). This would be more likely to work if:
- *Authorities have a named contact who can respond to transparency-related requests on equality issues and within a specific timeframe*
 - *Information provided is clear and useable (e.g. not presenting community organisations with large sets of raw data – undertaking some initial filtering of that information to provide people with what they have asked for)*
 - *There is a process by which local authorities that consistently fail to meet transparency requirements can be ‘named’ and held to account by a higher authority*
- 3.4 Secondly, in the absence of information about processes taken to make decisions, people are more likely to think the process is unfair, un-transparent and that they are unable to hold decision-makers to account. This also has implications for cohesion in an area. Community conflict often arises from miscommunication and lack of knowledge about how decisions have been made to fund/support particular communities and organisations.
- *The Act should retain the duty to publish details of how equality objectives have been chosen and how progress will be measured*
 - *If this duty is not retained, information about how decisions have been made to choose particular equality objectives should be released in a useable format if requested by the public within a certain timeframe. This should include information about how and why particular aspects of equality were chosen as priorities. Good practice (in a code of practice) should involve public authorities creating a space to explain priorities to*

community groups and for those groups to have an opportunity to feedback on those decisions. This may require stronger mediation and facilitation skills on the part of public authorities.

3.5 Finally, the Government's broader aspirations around using transparency to hold public authorities to account on equality outcomes is only likely to work if accompanied by support for the public/civil society organisations to do this. More clarity or support is required on the following questions:

- *How can civil society organisations and the public determine whether public authorities are complying with the Act?*
- *What can the public feasibly be expected to scrutinise in relation to equality? Where and when is there likely to be a receptive audience for scrutiny activities by civil society? In the past many public authorities have been ambivalent at best to this type of scrutiny activity – what will be different in the future?*
- *What knowledge and skills are required by the public to gather, analyse, share and use evidence in order to strengthen public authority approaches to equality?*

Support to respond to these questions could include:

- *Capacity building support for interested members of the public/civil society organisations to analyse equality data and hold public authorities to account*
- *Local agreements between a public authority and relevant civil society organisations about how the public authority will be held to account/relevant roles and responsibilities*
- *Simple guidance for the public about how compliance can be demonstrated (based on case law relevant to meeting the general and specific duties)*
- *Support for public authorities about how to 'open' themselves up to scrutiny on equality issues and to use input from the public effectively*

4. Equality objectives

4.1 We are less interested in how many objectives public authorities need to set out and more interested in the suitability of those objectives, whether interventions to meet objectives are effective and whether progress can be measured and public authorities can be held to account at critical steps of this process.

4.2 Although we understand that the process for identifying and pursuing equality objectives will need to be defined locally by public authorities themselves, it is still useful to consider the approach that could be taken and whether these proposals to changes in the law will help that process to be achieved.

A typical process could include:

- Reviewing available data on patterns of inequality experienced by service users/local communities
- Consulting with a range of excluded groups about issues of inequality they face
- Reviewing all of this information to consider which objectives would be most likely to address the most pressing issues of inequality and considering which objectives would be most realistic and efficient given restrictions of time and resources and given other priorities of the organisation
- Communicating that objective to relevant members of the public and providing an opportunity for feedback. Mediating and facilitating discussions and supporting communities to understand why particular objectives have been chosen. Reviewing objectives if deemed necessary
- Agreeing how the public can hold public authorities to account in meeting those objectives (how progress will be measured) and in delivering on other aspects of the Equality Act
- Reviewing progress against those objectives at regular intervals and reviewing the relevance and suitability of objectives at particular intervals

4.3 In our view, removing the requirement to publish details of engagement undertaken when determining equality objectives will make the above process much harder.

- *The duty to publish details of engagement undertaken when determining equality objectives should be retained, as should a requirement to share how progress against equality objectives will be measured*
- *If it is not retained, then public authorities should be duty bound to produce such information if requested. Pursuing a freedom of information act will be time-consuming and waste money. Public authorities should be prepared to share this information and a named officer should be responsible for providing such information if requested.*

5. Equality of process is as important, sometimes, as equality of outcomes

5.1 The Government's decision to focus more heavily on equality improvements (rather than whether certain processes are being followed) is to be welcomed in many ways. Yet there is a significant danger that this could be read as focusing exclusively on equal *outcomes*. Issues of equal *process* could be ignored as a result. This distinction is well established and forms the basis of the equality measurement framework that has been developed over many years by the EHRC and others and can be described in the following way:

- **Inequality of outcome** refers to inequality in the things that people actually achieve (e.g. getting a job, getting five GCSES, being in good health)
- **Inequality of process** refers to inequalities in treatment through discrimination by other individuals and groups, or by institutions and systems, including not being treated with

dignity and respect (e.g. being treated badly through a recruitment process, being discriminated against by a nurse in hospital)

5.2 The latter type of equality is sometimes as important as equality of outcome. For example, two people may receive the same outcomes (both may be given appropriate medicine by a doctor), yet one of those people may be treated with no dignity or respect and as a result their overall experience of the healthcare system may be much worse. These issues of experience and fair treatment are often improved by ensuring that *fair processes* are in place to avoid discrimination and harassment. Often it is *process-based* interventions that ensure fair treatment. Encouraging public authorities to focus solely on equal outcomes (and to avoid focusing on process) runs the risk of saying that public authorities do not need to think proactively about changes to their processes.

- *Obviously changes to processes also improve equal outcomes. Yet we need to ensure that public authorities can also take proactive steps to ensure fair treatment (equality of process) by reviewing the fairness of their processes. There is a risk that the Government's explanation of changes to the Equality Act (less focus on process) will be interpreted by public bodies as a free rein to avoid proactively reviewing processes to ensure this type of fair treatment. We understand that it will be still be unlawful for public bodies to discriminate against people – but sometimes proactive steps need to be taken to improve processes to prevent discrimination happening in the first place.*

6. Further information

For more information on any aspect of this response, please contact:

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