



The Public Sector Equality Duty and Equality Impact Assessments

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Author: Doug Pyper

Section Business & Transport Section

This note outlines the development and operation of the Public Sector Equality Duty contained in section 149 of the *Equality Act 2010*. The Duty requires public authorities to have due regard to a number of equality considerations when exercising their functions.

Section 149 replaced pre-existing duties concerning race, disability and sex. It extended coverage to the additional “protected characteristics” of age, gender reassignment, religion or belief, pregnancy and maternity, sexual orientation and, in certain circumstances, marriage and civil partnership.

The note also provides an overview of Equality Impact Assessments. These are assessments that public authorities often carry out prior to implementing a policy, with a view to ascertaining its potential impact on equality. They are not required by law, although are a way of facilitating and evidencing compliance with the Public Sector Equality Duty.

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1 The Public Sector Equality Duty

1.1 Introduction

The Public Sector Equality Duty (PSED) is contained in Part 11, [Chapter 1](#) of the *Equality Act 2010* and came into force on 5 April 2011. The main Duty is set out in [section 149](#) of the Act, whilst sections 150-157 deal with the imposition of specific duties as well as powers to specify authorities to which the duties apply. Under section 149 all public authorities must, in the exercise of their functions, “have due regard to the need to” eliminate conduct that is prohibited by the Act. Such conduct includes discrimination, harassment and victimisation related to the protected characteristics identified in [section 4](#):

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

The PSED also requires public authorities to have due regard to the need to advance equality of opportunity and foster good relations between persons who share a “relevant protected characteristic” and persons who do not. The “relevant” protected characteristics are listed in section 149(7), which mirrors section 4 except that it excludes marriage and civil partnership (the reasons for this are outlined below, in section 1.3).

1.2 Background

Before the *Equality Act*, separate equality duties spanned different legislation and were restricted in their focus to sex, race and disability discrimination.¹ The first of these was the race equality duty, created by the *Race Relations (Amendment) Act 2000*, which amended section 71 of the *Race Relations Act 1976*. Prior to its amendment section 71 of the 1976 Act contained a limited duty, imposed on local authorities, requiring them to:

... make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need ... to eliminate unlawful racial discrimination; and ... to promote equality of opportunity.

This limited duty was thought to be ineffective. The Commission for Racial Equality set out the perceived deficiencies of the duty in a 1985 review of the 1976 Act:

... it is so vaguely phrased that in practical terms it may well prove to be legally unenforceable against a local authority which has done next to nothing It applies only to local authorities and not to other public bodies The restriction of section 71

¹ *Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995.*

of the Act to local authorities is illogical when so many functions of providing services out of public funds to members of the public are carried on outside of local authorities All public bodies should be covered by the section 71 duty.²

The Commission stated that section 71 should be amended to require public authorities to:

... work towards the elimination of discrimination and to promote equality of opportunity and good relations [sic] between persons of different racial groups generally ... [and] should be extended to all bodies carrying on a service or undertaking of a public nature.³

Section 71 of the 1976 Act was amended several years later following the heavily criticised police investigation of the murder of Stephen Lawrence,⁴ which led to a new awareness of institutional racism.⁵ On 31 July 1997 the then Home Secretary, Jack Straw, ordered Sir William Macpherson to carry out an “inquiry into the matters arising from the death of Stephen Lawrence”.⁶ The [Macpherson Report](#) was published on 24 February 1999⁷ and concluded that the investigation of the murder of Stephen Lawrence had been “bedevilled” by institutional racism in the Metropolitan Police.⁸ The Report observed that this institutional racism extended to other agencies:

It is clear that other agencies including for example those dealing with housing and education also suffer from the disease. If racism is to be eradicated there must be specific and co-ordinated action ...⁹

Ten months prior to the publication of the Macpherson Report, the Commission for Racial Equality submitted to the Home Secretary a document entitled *Reform of the Race Relations Act 1976: Proposals for Change*.¹⁰ In it the Commission reiterated the recommendations in their 1985 report, proposing that “government and all public bodies should have new racial equality duties” and that “when a public body fails to carry out its racial equality duties, it could be subject to challenge by way of judicial review”.¹¹ These recommendations, and the findings of the Macpherson Inquiry, fed into the decision to amend section 71 to provide for a public sector race equality duty that would apply to all public authorities.¹² The effect of the amendments was noted during debate on the *Race Relations (Amendment) Bill*:

... these amendments will create a strong, clear, effective and enforceable duty on public authorities to promote race equality. They take the legislative framework considerably further forward than the current duty under section 71 of the Race Relations Act and should help to place public authorities where they should be - at the forefront of the drive towards race equality, setting the pace for others to follow. The duty underlines the Government's strong commitment to race equality, and will mainstream that commitment into the day-to-day work of public authorities.¹³

² Commission for Racial Equality, *Review of the Race Relations Act 1976: Proposals for change*, July 1985, p35

³ *Ibid*, p36

⁴ On 22 April 1993

⁵ [HC Deb 11 May 2009 c561](#)

⁶ [Letter from Sir William Macpherson to the Rt Hon Jack Straw, 15 February 1999](#)

⁷ [The Stephen Lawrence Inquiry](#), Cm 4262-I

⁸ *Ibid*, para 6.44

⁹ *Ibid*, para 6.54

¹⁰ Commission for Racial Equality, *Reform of the Race Relations Act 1976: Proposals for Change*, 30 April 1998

¹¹ *Ibid*, pp13-14

¹² See: O’Cinneide, C. ‘The Race Relations (Amendment) Act 2000’, *Public Law*, 2010, 220-232

¹³ Race Relations (Amendment) Bill Deb 02 May 2000

The amendments created the first equality duty to extend to all public authorities and provided a prototype for the equality duties that followed. A disability equality duty came into force in December 2006,¹⁴ followed by a sex equality duty in April 2007,¹⁵ both applied to all public authorities.

The disability and sex equality duties were enacted in light of proposals to rationalise equality legislation into a single Act, with a single equality duty.¹⁶ On 14 January 2003 Lord Lester of Herne Hill introduced a Private Members' Bill, the *Equality Bill*, in the House of Lords.¹⁷ Section 26 of the Bill concerned "equality duties of public bodies", and was in many respects similar to section 149 of the *Equality Act 2010*. Whilst the Bill did not become law it received widespread support and, in their 2005 manifestos, both the Labour and the Liberal Democrat parties committed to "introduce a Single Equality Act."¹⁸

In 2007 the Labour Government published the *Equalities Review*,¹⁹ followed by the Discrimination Law Review and proposals for a single equality Bill.²⁰ The *Equality Bill* was introduced into the House of Commons on 24 April 2009 and received Royal Assent on 8 April 2010. The *Equality Act 2010* unified the pre-existing equality duties into the single PSED, expanding upon them and adding six new protected characteristics. During the Committee Stage debates on the *Equality Bill* the then Solicitor General, Vera Baird, described the new duty:

... clause 143 ... creates the new equality duty on public authorities that will replace the three existing public sector duties on race, disability and gender. Those three equality duties were innovative and pioneering, and shifted responsibility, as many speakers have acknowledged, from combating discrimination and disadvantage after it had happened—a passive model of waiting for discrimination to occur and then tackling it—to putting the onus firmly on public authorities to consider how to prevent and protect against that discrimination in the first place. There is broad consensus that the existing duties have been valuable tools in promoting race, disability and gender equality Some 82 per cent of respondents to the discrimination law review consultation supported the concept of introducing a single equality duty on the basis of the efficacy of what had gone before.²¹

The reasons for adding the new protected characteristics were set out in a Government Equalities Office policy statement on the Bill:

We know older people and younger people, gay men and lesbians, transsexuals, people of different religions or beliefs and those of none – all have different needs and may face different levels of discrimination or barriers to accessing services. It is only right that we use the powerful tool of the public sector to help eliminate any discrimination they may face and to encourage public authorities to advance equality of opportunity. The Equality Bill will therefore introduce a new integrated Equality Duty on

¹⁴ See: section 49A, *Disability Discrimination Act 1995*

¹⁵ See: section 76A, *Sex Discrimination Act 1975*

¹⁶ See: Hepple, B., 'The New Single Equality Act in Britain', *The Equal Rights Review*, Vol. 5, 2010, pp-11-24 (particularly pp14-15); B. Hepple, M. Coussey, T. Choudhury, *Equality: a New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, 2000

¹⁷ *Equality Bill 2003*

¹⁸ *The Labour Party Manifesto 2005*, p112; *Liberal Democrat Party Manifesto 2005*, p9

¹⁹ Department of Communities and Local Government, *Fairness and Freedom - The Final Report of the Equalities Review*, February 2007

²⁰ Department of Communities and Local Government, *Discrimination Law Review: a Framework for Fairness - Proposals for a Single Equality Bill for Great Britain*, June 2007. For an overview of the legislative history of the Bill see: Keter, V, *Equality Bill*, House of Commons Library Research Paper 09/42, 7 May 2009

²¹ *Equality Bill Deb 30 June 2009 c545*

all public bodies, and those discharging a public function, to consider how they can eliminate discrimination, advance equality of opportunity and foster good relations for people, irrespective of their race, their gender, their age, their sexual orientation, their religious beliefs or lack of, and for disabled people and transgender people ...²²

The following sections explain the operation of the PSED.

1.3 The Duty

The main²³ PSED is comprised of three limbs, set out in [section 149\(1\)](#) of the *Equality Act 2010* (“the Act”):

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

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The following explains each of these.

Eliminating prohibited conduct

Section 149(1)(a) requires public authorities to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act (hereafter collectively referred to as “prohibited conduct”). The limb is restricted in its focus: any conduct that is not prohibited by the Act falls outside its ambit. It requires public authorities to have due regard to the need to eliminate prohibited conduct relating to any of the protected characteristics identified in [section 4](#) (see above), except where parts of the Act do not apply to certain protected characteristics. For example, [Part 3](#) of the Act concerns discrimination in relation to services and public functions, yet [section 28\(1\)](#) provides that Part 3:

... does not apply to the protected characteristic of—

- (a) age, so far as relating to persons who have not attained the age of 18;
- (b) marriage and civil partnership.

Consequently, public authorities are not required to have due regard to the need to eliminate discrimination relating to those characteristics in respect of services and public functions.²⁴

Advancing equality of opportunity

Section 149(1)(b) requires public authorities to have due regard to the need to advance equality of opportunity between persons who share a “relevant” protected characteristic and persons who do not share it. The protected characteristics that are relevant for both this and

²² Government Equalities Office, *Equality Bill: Making it work: Policy proposals for specific duties - Policy Statement*, January 2010, p3

²³ There are additional “specific duties” which apply to certain public authorities; see below.

²⁴ Certain other parts of the Act, for example that which deals with the disposal and management of premises, also do not apply to the protected characteristics of age, marriage and civil partnership: [section 32\(1\)](#). For the reasons why some parts of the Act do not apply to those characteristics, see: [Equality Bill Deb 18 June 2009 cc330-332](#)

the third limb of the Duty are identified in [section 149\(7\)](#), which reproduces the protected characteristics found in [section 4](#) (see above), with the exception of marriage and civil partnership. In evidence to the Equality Bill Committee, the Solicitor General explained the reasons for this exclusion:

...the Bill does not require public authorities to have due regard to the need to advance equality of opportunity on the grounds of marriage/civil partnership, nor to foster good relations between married people/people in civil partnerships and others. That is because a) the Government has not seen any evidence of disadvantage suffered by married people/people in civil partnerships; b) any such disadvantage that may exist could be better dealt with through the other strands (for instance, homophobic abuse or belittlement of civil partnerships would be dealt with through fostering good relations on the sexual orientation strand); and c) it could unhelpfully distract public authorities from tackling other, long-standing, inequalities.²⁵

The duty to have due regard to the need to “advance” equality of opportunity represents a change of terminology from the preceding legislation which referred to the need to “promote” equality of opportunity. According to Professor Sir Bob Hepple, this change in terminology sought to facilitate “a more proactive approach that focuses on making progress in outcomes.”²⁶ This proactive approach was described in evidence submitted in 2009 by the Government Equalities Office to the Joint Committee on Human Rights:

The “positive duty” model requires public authorities to consider taking proactive steps to root out discrimination and harassment and advance equality of opportunity in relation to their functions—from the design and delivery of policies and services to their capacity as employers. The duties require public authorities to integrate equality considerations into all areas of a public authority’s work and to give consideration to taking positive steps to dismantle barriers. The advancing equality of opportunity limb reflects the fact that in order to ensure full equality in practice, this may necessitate a difference in treatment, rather than the same treatment.²⁷

[Section 149\(3\)](#) expands on [section 149\(1\)\(b\)](#):

Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, 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.

²⁵ [Joint Committee on Human Rights, Twenty-sixth Report, 12 November 2009, HC 736/ HL Paper 169, 2008-2009, Ev 86](#)

²⁶ Hepple, B. *Equality – The New Legal Framework*, 2011, p135

²⁷ [Memorandum to the Joint Committee on Human Rights, Twenty-sixth Report, 12 November 2009, HC 736/ HL Paper 169, 2008-2009, Ev 52](#)

For example:

The duty could lead a local authority to target training and mentoring schemes at disabled people to enable them to stand as local councillors, with the aim of advancing equality of opportunity for different groups of people who have the same disability, and in particular encouraging their participation in public life.²⁸

Further, [section 149\(6\)](#) (which applies to all three limbs of the Duty in section 149(1)) provides:

Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

In contemplating the need to cater differently to different needs, the Duty seeks to give effect to the principle of “substantive equality”; the idea that for there to be equality of outcomes the starting points of individuals must be taken into account.²⁹ This was explained in a Government Equalities Office memorandum of 5 May 2009:

The advancing equality of opportunity limb reflects the fact that in order to ensure full equality in practice, this may necessitate a difference in treatment, rather than the same treatment ... In both EC and domestic law, it is accepted that in order to achieve full equality in practice, disadvantaged groups may actually require different treatment and equal treatment may perpetuate any disadvantage, because not all groups start off from the same position.³⁰

The Explanatory Notes indicate how section 149(1)(b) might apply in practice:

The duty could lead a local authority to provide funding for a black women’s refuge for victims of domestic violence, with the aim of advancing equality of opportunity for women, and in particular meeting the different needs of women from different racial groups.

The duty could lead a local authority to review its use of internet-only access to council services; or focus “Introduction to Information Technology” adult learning courses on older people, with the aim of advancing equality of opportunity, in particular meeting different needs, for older people.³¹

Fostering good relations

Section 149(1)(c) requires public authorities to have due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it. As noted above, the relevant protected characteristics are the same as those in section 4, excluding marriage and civil partnership. [Section 149\(5\)](#) identifies particular factors the public authority needs to have due regard to:

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) tackle prejudice, and

²⁸ [Equality Act 2010, Explanatory Notes, para 484](#); see also section 149(4)

²⁹ See: *Blackstone’s Guide to the Equality Act 2010*, 2012, p155

³⁰ [Memorandum submitted by Government Equalities Office](#), 5 May 2009, Deposited paper DEP2009-1293, paras 261-263

³¹ [Equality Act 2010, Explanatory Notes, Para 484](#)

(b) promote understanding.

The Explanatory Notes indicate how this limb might apply in practice:

The duty could lead a large government department, in its capacity as an employer, to provide staff with education and guidance, with the aim of fostering good relations between its transsexual staff and its non-transsexual staff.

The duty could lead a school to review its anti-bullying strategy to ensure that it addresses the issue of homophobic bullying, with the aim of fostering good relations, and in particular tackling prejudice against gay and lesbian people.

The duty could lead a local authority to introduce measures to facilitate understanding and conciliation between Sunni and Shi'a Muslims living in a particular area, with the aim of fostering good relations between people of different religious beliefs.³²

1.4 Having due regard

The Act does not identify what is meant by the requirement to “have due regard”. The difficulty with this was discussed by Mr Justice Sales in a lecture:

The very abstract formulation of the duty, which is to “have due regard” to certain matters, should also be noted. What is “due regard”? The statute does not give us much information about that, other than again in very general terms in section 149(3). The practical effect of the combination of a very wide range of application for the duty across all public functions and a very abstract formulation of what has to be done means that the burden of spelling out the practical content of the duty devolves upon the courts.³³

Thus, in order to approximate a definition of “due regard” it is necessary to look at the case law. This includes case law on the previous equality duties relating to race, disability and sex, as the courts take account of this when interpreting section 149.

One of the leading cases is the “[Post Office closures case](#)”.³⁴ This established six principles, known as the “Brown Principles”:

- decision-makers must be made aware of their duty to have due regard to the identified needs;
- the Duty must be fulfilled both before and during consideration of a particular policy, and involves a “conscious approach and state of mind”,³⁵
- it is not a question of ticking boxes, the Duty must be approached in substance, with rigour and with an open mind, and a failure to refer expressly to the Duty whilst exercising a public function will not be determinative of whether due regard has been had;
- the Duty is non-delegable;
- the Duty is continuing;

³² [Equality Act 2010, Explanatory Notes, Para 484](#)

³³ Mr Justice Sales, [The Public Sector Equality Duty](#), Lecture to the Employment Law Bar Association and Administrative Law Bar Association, 13 December 2010

³⁴ [R \(Brown\) v Secretary of State for Work and Pensions and another \(Equality and Human Rights Commission intervening\)](#) [2008] EWHC 3158 (Admin)

³⁵ Para 91. See also [R \(on the application of Elias\) v Secretary of State for Defence](#) [2006] 1 WLR 3213, para 274

- it is good practice for an authority to keep a record showing that it has considered the identified needs.³⁶

Courts will generally consider the Brown Principles alongside³⁷ the statements of Lord Justice Dyson in the *Baker & Ors*:

What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged ... group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.³⁸

This has been described as “the most important articulation of the due regard obligation”.³⁹

Whilst these two cases, taken together, provide a good approximation of the meaning of “due regard”, Professor Fredman has noted that “although judges consistently refer to a settled group of principles, their application to the facts yields far from consistent outcomes.”⁴⁰

1.5 Exceptions to the Public Sector Equality Duty

Section 149(9) of the Act provides: “Schedule 18 (exceptions) has effect”. Schedule 18 identifies exceptions to the PSED. These include exceptions relating to:

- children;
- immigration ;
- judicial functions;
- Parliament, security services and the Church of England.

In general, the exceptions concern areas in which application of the PSED may interfere with the exercise of an authority’s functions. For example, the immigration exception means that:

The UK Border Agency, when taking immigration-related decisions, will not be required to have due regard to the need to advance equality of opportunity for people of different races, religious beliefs or age when taking those decisions.⁴¹

The Solicitor General outlined the reasons for this during the Committee Stage of the *Equality Bill*:

Many immigration laws and policies require differential treatment on grounds of nationality. It goes to the heart of the UK immigration system. Different visa requirements need to apply to people from different countries, depending on a variety of historical, political and diplomatic reasons. Immigration officers may want to give

³⁶ See paras 89-96

³⁷ See, for example: *Coleman, R (on the application of) v The London Borough of Barnet Council & Anor* [2012] EWHC 3725 (Admin), paras 95-96

³⁸ *Baker & Ors, R (on the application of) v Secretary of State for Communities & Local Government & Ors* [2008] EWCA Civ 141, para 31

³⁹ Hickman, T. Too hot, too cold or just right? The development of the public sector equality duties in administrative law, *Public Law*, April 2013, pp325-344, p329

⁴⁰ Fredman, S. The Public Sector Equality Duty, *Industrial Law Journal*, Vol. 40, No. 4, December 2011, p422

⁴¹ *Equality Act 2010*, Explanatory Notes, para 924

extra scrutiny to entrants from particular nationalities if there has been evidence of immigration abuse by people of those nationalities.⁴²

1.6 Application of the Duty

The Duty applies in three ways:

1. it applies to “public authorities” specified in [Schedule 19](#) in respect of all of their functions, unless the authority is specified in respect of only certain functions;⁴³
2. where a public authority is specified in Schedule 19 in respect of only certain functions, the Duty applies to the authority in respect of only those functions;⁴⁴
3. where persons are not public authorities but exercise public functions, the Duty applies in respect of the exercise of those functions.⁴⁵

The authorities specified in Schedule 19 include Ministers of the Crown and government departments, armed forces, the National Health Service, local government, educational bodies and emergency services.

Public authorities may be specified in Schedule 19 in respect of only certain functions. This may be appropriate where it is considered that some of an authority’s functions should be subject to the Duty, whilst others should not. For example, the British Broadcasting Corporation is subject to the Duty except “in respect of functions relating to the provision of a content service”, as it was felt that statutory intervention in the BBC’s content services was undesirable.⁴⁶

A person/organisation that is not a public authority but exercises public functions will be subject to the PSED in respect of those functions. This invites the difficult question of what constitutes a “public function”. The Explanatory Notes state:

“Public function” is given the same meaning as it has in the Human Rights Act 1998. This term is used in subsection (2) of section 149, which extends the Public Sector Equality Duty to persons not listed in Schedule 19 but who exercise public functions.⁴⁷

Section 6(3) of the Human Rights Act states:

In this section “public authority” includes—

- (a) a court or tribunal, and
- (b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

The meaning of “public function” has been subject to much judicial consideration. The leading case is [YL v Birmingham City Council and Others \[2009\] 1 AC 95](#). In YL Lord

⁴² [Equality Bill Deb 18 June 2009 c359](#)

⁴³ [Equality Act 2010, section 150\(1\)](#)

⁴⁴ [Equality Act 2010, section 150\(3\)-\(4\)](#)

⁴⁵ [Section 149\(2\)](#)

⁴⁶ [Equality Act 2010, Schedule 19, Part 1, as amended by the Equality Act 2010 \(Public Authorities and Consequential and Supplementary Amendments\) Order 2011 SI No.1060](#)

⁴⁷ [Equality Act 2010, Explanatory Notes, Para 486](#)

Bingham stated that it would be “appropriate to give a generously wide scope to the expression ‘public function’”⁴⁸ and that the following would be relevant:

- the role and responsibility of the State in relation to the function;
- the nature and extent of any statutory power or duty in relation to the function;
- the extent to which the State, directly or indirectly, regulates, supervises and inspects the performance of the function, and imposes criminal penalties on those who fall below publicly promulgated standards in performing it;
- whether it is a function for which the State by one means or another is willing to pay.

The House of Lords in *YL* were careful to state that the above list is not exhaustive. The weight given to different factors will vary from case to case.⁴⁹

1.7 Specific duties

[The Equality Act 2010 \(Specific Duties\) Regulations 2011](#) came into force on 10 September 2011. The Regulations require certain public authorities (identified in Schedules 1 and 2 to the Regulations) to publish information to demonstrate compliance with the PSED.⁵⁰ Identified public authorities must also publish one or more equality objectives which “it thinks it should achieve” to facilitate compliance with the PSED.⁵¹

1.8 Enforcement

[Section 156](#) of the Act states:

A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law.

This means that an aggrieved party who feels a public authority has not complied with the PSED can only bring their claim by way of judicial review (public law). Judicial review is a process whereby the High Court (and more senior courts) determines whether the actions of a public body are lawful. Only the Equality and Human Rights Commission (“EHRC”) or individuals/organisations affected by a failure of a public authority to comply with the PSED may issue a claim for judicial review.

The EHRC has a statutory power to institute judicial review proceedings where a public authority may have failed to comply with the PSED.⁵² Further, if the EHRC suspects that an authority is not complying with the PSED it has a power to conduct an assessment and, if necessary, serve a compliance notice on the authority requiring it to set out in writing steps it proposes to take to address the non-compliance.⁵³ The authority must give this written information to the Commission within 28 days of its receipt of the compliance notice.⁵⁴

⁴⁸ Para 4

⁴⁹ See para 5-13

⁵⁰ [The Equality Act 2010 \(Specific Duties\) Regulations 2011, section 2](#)

⁵¹ *Ibid*, [section 3](#)

⁵² [Equality Act 2006, section 30\(1\)](#)

⁵³ *Ibid*, sections 31 and 32

⁵⁴ *Ibid*, [section 32\(2\)](#)

1.9 Guidance

The Equality and Human Rights Commission has produced technical guidance on the PSED. This can be found [here](#).⁵⁵

2 Review of the Public Sector Equality Duty

On 15 May 2012 the Home Secretary, Theresa May, announced a review of the PSED:

I am today announcing the outcome of the red tape challenge spotlight on equalities, alongside the Government response to the consultation on the reform of the Equality and Human Rights Commission.... We have also looked again at the Public Sector Equality Duty (PSED). This Government have a strong commitment to equality of opportunity. But we also have a strong desire to reduce unnecessary bureaucracy where it exists and consider alternatives to legislation. We committed last year to assess the effectiveness of the PSED specific duties. We have decided to bring forward that review and extend it to include both the general and specific duties to establish whether the duty is operating as intended.⁵⁶

On 17 April 2013 Sandra Osborne tabled an Early Day Motion noting the review and calling on Ministers to reaffirm their commitment to the PSED.⁵⁷

The *Review of the Public Sector Equality Duty: Report of the Independent Steering Group* was published on 6 September 2013 along with the Government's [response](#).⁵⁸ The conclusions of the Steering Group were summarised in the review document as follows:

The Steering Group believes it is too early to make a final judgement about the impact of the PSED, as it was only introduced in April 2011 and evidence, particularly in relation to associated costs and benefits, is inconclusive. While the Steering Group has found broad support for the principles behind the Duty, the review has found the main challenges lie in its implementation, which varies considerably across the public sector.

The nature of a 'due regard' Duty is that it is open to interpretation by public bodies. What amounts to 'due regard' depends on particular circumstances and only a court can confirm that a public body has had due regard in a particular case. This uncertainty has on many occasions led to public bodies adopting an overly risk averse approach to managing legal risk in order to rule out every conceivable possibility. This has been a recurring theme throughout the review.⁵⁹

The Government's response was as follows:

The Secretary of State for Culture, Media and Sport (Maria Miller): I am today publishing the outcome of the review of the Public Sector Equality Duty (PSED). This review was announced by the Home Secretary on 15 May 2012 following the red tape challenge spotlight on equalities.

The PSED, which was introduced through the Equality Act 2010, came into force across Great Britain on 5 April 2011 and comprises a general duty (s149 of the Act) and specific duties set out in regulations which vary across England, Scotland and

⁵⁵ EHRC website, Equality Act Codes of Practice and Technical Guidance (accessed 21 May 2013)

⁵⁶ [HC Deb 15 May 2012 cc28WS-29WS](#)

⁵⁷ [EDM 1279](#) of 2012-13 "Public Sector Equality Duty", 17 April 2013

⁵⁸ GEO, *Review of the Public Sector Equality Duty: Report of the Independent Steering Group*, 6 September 2013; [HC Deb 6 September 2013 cc33WS-34WS](#)

⁵⁹ GEO, *Review of the Public Sector Equality Duty: Report of the Independent Steering Group*, 6 September 2013, p.11

Wales. It was introduced to ensure that public bodies take account of equality when carrying out their day-to-day work—in shaping policy, in delivering services and in relation to their own employees—and to address the bureaucracy associated with the previous duties on race, disability and gender. The review was established to examine whether the PSED is operating as intended.

The Government appointed an independent chair, Rob Hayward OBE, and steering group to oversee the review. Over the course of 2013, supported by officials in my Department, they have led an extensive programme of engagement and evidence-gathering, including a series of roundtables with experts, site visits to public bodies, an open call for evidence, and independent qualitative research.

The Government are grateful to the chair and steering group for their thorough work and welcome their report. The review has not considered repeal of the PSED. We agree with its conclusion that a full evaluation should be undertaken in 2016 when the duty will have been in force for five years. The review has however identified a number of issues associated with the implementation of the PSED and makes recommendations for the Equality and Human Rights Commission (EHRC), for contractors, for public bodies and for Government. We would like to see these recommendations implemented fully by all relevant parties, in particular to reduce procurement gold-plating by the public sector.

In relation to the specific duties which apply in England (and non-devolved bodies in Scotland and Wales), we note there was not consensus from the steering group but nonetheless accept the chair's recommendation to consider the operation and effectiveness of these duties. Public authorities must be transparent about their objectives and performance on equality, and it is vital that the specific duties support this aim. We will therefore keep these duties under review and work closely with the EHRC as it conducts its more detailed assessment of the specific duties.

We accept the recommendation to consider what complementary or alternative means, other than judicial reviews, there may be to enforce the PSED. Recognising that many of the concerns identified in the report are not unique to the PSED, we will take account of this recommendation in the wider work, led by the Justice Secretary, to ensure that disputes are resolved in the most proportionate way possible and in the most appropriate setting.

Finally, I will work closely with all my ministerial colleagues to reduce the impact of red tape on the public sector, and to ensure that their Departments, and the sectors for which they are responsible, respond urgently and positively to the review's findings and recommendations.⁶⁰

3 Equality Impact Assessments

An Equality Impact Assessment ("EIA") is an analysis of a proposed organisational policy, or a change to an existing one, which assesses whether the policy has a disparate impact on persons with protected characteristics. They are carried out primarily by public authorities to assist compliance with equality duties. The EHRC has provided the following guidance:

Assessing the impact on equality of proposed changes to policies, procedures and practices is not just something the law requires, it is a positive opportunity for public authorities to ensure they make better decisions based on robust evidence. The assessment does not necessarily have to take the form of a document called an

⁶⁰ [HC Deb 6 September 2013 cc33WS-34WS](#)

Equality Impact Assessment (EIA) but you can choose to do so if it is helpful. It will help you to demonstrate compliance if you:

- Ensure you have a written record of the equality considerations you have taken into account
- Ensure that your decision-making includes a consideration of the actions that would help to avoid or mitigate any negative impacts on particular protected groups.
- Make your decisions based on evidence
- Make your decision-making process more transparent.⁶¹

The practice of carrying out EIAs is widespread. Whilst they have been described as a valuable “tool to encourage service managers to consider the equality issues within their service and to act upon the findings of the assessments”⁶² they have also been described as overly bureaucratic.⁶³

On 19 November 2012 [the Prime Minister spoke](#) at the Confederation of British Industry’s annual conference. He announced that government departments would no longer be required to carry out EIAs:

...in government we have taken the letter of this law and gone way beyond it, with Equality Impact Assessments for every decision we make.

Let me be very clear. I care about making sure that government policy never marginalises or discriminates.

I care about making sure we treat people equally. But let’s have the courage to say it: caring about these things does not have to mean churning out reams of bureaucratic nonsense.

We have smart people in Whitehall who consider equalities issues while they’re making the policy.

We don’t need all this extra tick-box stuff.

So I can tell you today we are calling time on Equality Impact Assessments.

You no longer have to do them if these issues have been properly considered.⁶⁴

3.1 Equality Impact Assessments and the law

The *Equality Act 2010* does not require public authorities to carry out EIAs.

Under previous case law there was some uncertainty about whether EIAs were legally required. In *R (C (A Minor)) v Secretary of State for Justice [2008]*,⁶⁵ a case concerning the race equality duty, the Court of Appeal noted:

⁶¹ [Using the equality duty to make fair financial decisions](#), Equality and Human Rights Commission website (accessed on 21 March 2013)

⁶² Conley, H., Page, M. ‘The gender equality duty in local government: the prospects for integration’, *Industrial Law Journal*, 39(3), 2010, 321-325

⁶³ See: [Equality Impact Assessments explained](#), *The Telegraph* [online], 19 November 2012 (accessed 21 March 2013)

⁶⁴ [Prime Minister’s Speech to CBI](#), Number 10 website (accessed 21 March 2013)

... it was accepted that the effect of section 71(1) of the Race Relations Act 1976 was to require a race equality impact assessment ... where it was proposed to change policy in a matter that might raise issues about racial equality.⁶⁶

R (C (A Minor)) was considered in the Post Office closures case.⁶⁷ In that case the High Court stated that section 49A(1) of the *Disability Discrimination Act 1995* (the disability equality duty) did not impose any duty to carry out an impact assessment:

...we do not accept that either section 49A(1) in general, or section 49A(1)(d) in particular, imposes a statutory duty on public authorities requiring them to carry out a formal disability equality impact assessment when carrying out their functions. At the most it imposes a duty on a public authority to consider undertaking an assessment, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability. To paraphrase the words of WB Yeats in *An Irish Airman Foresees his Death*, the public authority must balance all, and bring all to mind before it makes its decision on what it is going to do in carrying out the particular function or policy in question.⁶⁸

An Equality and Human Right Commission note on the judgment described the view of the Court:

The Court stated that rather than carrying out a formal equality impact assessment, the Authority had to demonstrate that it had paid 'due regard' to its equality obligations. In other words, the Court held that **public authorities did have to assess the impact their proposed policies had on equality but that there was no prescriptive way to do so**. Consideration could be shown in a number of other ways, for example in the form of various reports, including research/data gathered from fieldwork and consultations. [my emphasis]⁶⁹

The current legal position reflects that stated in the Post Office closures case: EIAs are one way - but not the only way - for a public authority to demonstrate compliance with the PSED.

However, the case law indicates that some form of documentary evidence of compliance with the PSED is valuable when defending judicial review proceedings. The Post Office closures case underlined the importance of such evidence:

... it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their ... equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty ...⁷⁰

⁶⁵ EWCA Civ 882

⁶⁶ Para 39

⁶⁷ *R (Brown) v Secretary of State for Work and Pensions and another (Equality and Human Rights Commission intervening)* [2008] EWHC 3158 (Admin); see above, section 1.4

⁶⁸ Para 89

⁶⁹ [Relevant Case Law](#), Equality and Human Rights Commission website (accessed on 21 March 2013)

⁷⁰ Para 96

A recent review of the case law in the journal *Public Law* illustrates the approach taken by the courts in other cases:

... the courts have often required and given extremely close scrutiny to primary documentation, including internal memos, minutes of meetings and fragmentary document trails in order to establish whether or not the duty has been complied with, and have been prepared to make findings of fact about how the decision was reached even if this involves rejecting the view of the defendant authority. In *R. (on the application of JL) v Islington LBC*, for example, although the defendant authority contended that disability equality issues had been considered, Black J found that there was “no audit trail confirming that the local authority has complied with its DDA duty or even had reference to it at all.” She found that the “documentation” did not “demonstrate a proper approach”. Likewise, in the *FNP* case the court rejected a witness statement that expressly asserted that due regard had been had to race equality considerations because there was a “dearth of direct evidence” to support it Another example is the *Building Schools for the Future* case, in which Holman J.... reject[ed] the evidence that the Secretary of State had been conscious of the disadvantages to disabled children of the cancellation of the policy in question. He said that the absence of reference in primary documentation, whilst not determinative, was “glaring and very telling”

Thus, although the law does not require public authorities to carry out EIAs, the courts place significant weight on the existence of some form of documentary evidence of compliance with the PSED when determining judicial review cases.⁷¹

⁷¹ Hickman, T. ‘Too hot, too cold or just right? The development of the public sector equality duties in administrative law’, *Public Law*, April 2013, pp325-344, p340