



## BRIEFING PAPER

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# The Public Sector Equality Duty and Equality Impact Assessments

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## Equality Act 2010

### CHAPTER 15

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## Summary

This briefing outlines the Public Sector Equality Duty contained in section 149 of the *Equality Act 2010*, which requires public authorities to have due regard to several 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.

This briefing also provides an overview of Equality Impact Assessments. These are assessments that public authorities often carry out prior to implementing policies, with a view to predicting their impact on equality. The *Equality Act 2010* does not specifically require them to be carried out, although they are a way of facilitating and evidencing compliance with the Public Sector Equality Duty.

# 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, while 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.<sup>1</sup> 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:

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<sup>1</sup> *Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995.*

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... 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 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.<sup>2</sup>

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.<sup>3</sup>

Section 71 of the 1976 Act was amended several years later following the heavily criticised police investigation of the murder of Stephen Lawrence,<sup>4</sup> which led to a new awareness of institutional racism.<sup>5</sup> 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".<sup>6</sup> The [Macpherson Report](#) was published on 24 February 1999<sup>7</sup> and concluded that the investigation of the murder of Stephen Lawrence had been "bedevilled" by institutional racism in the Metropolitan Police.<sup>8</sup> 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<sup>9</sup>

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*.<sup>10</sup> 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".<sup>11</sup> 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.<sup>12</sup> The effect of the amendments was noted during debate on the *Race Relations (Amendment) Bill*.

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

<sup>3</sup> Ibid, p36

<sup>4</sup> On 22 April 1993

<sup>5</sup> [HC Deb 11 May 2009 c561](#)

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

<sup>7</sup> [The Stephen Lawrence Inquiry](#), Cm 4262-I

<sup>8</sup> [Ibid, para 6.44](#)

<sup>9</sup> [Ibid, para 6.54](#)

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

<sup>11</sup> Ibid, pp13-14

<sup>12</sup> See: O'Connell, C. 'The Race Relations (Amendment) Act 2000', *Public Law*, 2010, 220-232

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.<sup>13</sup>

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,<sup>14</sup> followed by a sex equality duty in April 2007;<sup>15</sup> 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.<sup>16</sup> On 14 January 2003 Lord Lester of Herne Hill introduced a Private Members' Bill, the *Equality Bill*, in the House of Lords.<sup>17</sup> [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*. While the Bill did not become law, it received widespread support. In their 2005 manifestos, both the Labour and the Liberal Democrat parties committed to "introduce a Single Equality Act."<sup>18</sup>

In 2007 the Labour Government published the *Equalities Review*,<sup>19</sup> followed by the Discrimination Law Review and proposals for a single equality Bill.<sup>20</sup> 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 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

<sup>13</sup> Race Relations (Amendment) Bill Deb 02 May 2000

<sup>14</sup> See: section 49A, *Disability Discrimination Act 1995*

<sup>15</sup> See: section 76A, *Sex Discrimination Act 1975*

<sup>16</sup> 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

<sup>17</sup> [Equality Bill 2003](#)

<sup>18</sup> [The Labour Party Manifesto 2005](#), p112; [Liberal Democrat Party Manifesto 2005](#), p9

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

<sup>20</sup> 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

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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.<sup>21</sup>

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 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 ...<sup>22</sup>

The following sections explain the operation of the PSED.

### 1.3 The Duty

The PSED comprises 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 scope. 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,

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<sup>21</sup> [Equality Bill Deb 30 June 2009 c545](#)

<sup>22</sup> Government Equalities Office, [Equality Bill: Making it work: Policy proposals for specific duties - Policy Statement](#), January 2010, p3

[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.<sup>23</sup>

### 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 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.<sup>24</sup>

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 the late Professor Sir Bob Hepple, this change in terminology sought to facilitate “a more proactive approach that focuses on making progress in outcomes.”<sup>25</sup> 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

<sup>23</sup> 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](#)

<sup>24</sup> [Joint Committee on Human Rights, Twenty-sixth Report, 12 November 2009, HC 736/ HL Paper 169, 2008-2009, Ev 86](#)

<sup>25</sup> Hepple, B. *Equality – The New Legal Framework*, 2011, p135

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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.<sup>26</sup>

[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.

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.<sup>27</sup>

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.<sup>28</sup> 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

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<sup>26</sup> [Memorandum to the Joint Committee on Human Rights, Twenty-sixth Report, 12 November 2009, HC 736/ HL Paper 169, 2008-2009, Ev 52](#)

<sup>27</sup> [Equality Act 2010, Explanatory Notes, para 484](#); see also section 149(4)

<sup>28</sup> See: *Blackstone's Guide to the Equality Act 2010*, 2012, p155

disadvantage, because not all groups start off from the same position.<sup>29</sup>

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.<sup>30</sup>

## 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 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
- (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.<sup>31</sup>

## 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 (as he then was) in a 2010 lecture:

<sup>29</sup> [Memorandum submitted by Government Equalities Office](#), 5 May 2009, Deposited paper DEP2009-1293, paras 261-263

<sup>30</sup> [Equality Act 2010, Explanatory Notes, Para 484](#)

<sup>31</sup> [Equality Act 2010, Explanatory Notes, Para 484](#)

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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.<sup>32</sup>

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 [R \(Brown\) v Secretary of State for Work and Pensions \[2008\] EWHC 3158](#), which 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”;<sup>33</sup>
- 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;
- it is good practice for an authority to keep a record showing that it has considered the identified needs.<sup>34</sup>

Courts often consider the Brown Principles alongside<sup>35</sup> 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.<sup>36</sup>

[Bracking v Secretary of State for Work and Pensions \[2013\] EWCA Civ 1345](#) is one of the leading cases on the application of section 149. The principles outlined in the judgment were summarised by Mr Justice Gilbart in [Moore & Anor v Secretary of State for Communities and Local Government \[2015\] EWHC 44](#):

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<sup>32</sup> Mr Justice Sales, [The Public Sector Equality Duty](#), Lecture to the Employment Law Bar Association and Administrative Law Bar Association, 13 December 2010

<sup>33</sup> Para 91. See also [R \(on the application of Elias\) v Secretary of State for Defence \[2006\] 1 WLR 3213](#), para 274

<sup>34</sup> See paras 89-96

<sup>35</sup> See, for example: [Coleman, R \(on the application of\) v The London Borough of Barnet Council & Anor \[2012\] EWHC 3725 \(Admin\)](#), paras 95-96

<sup>36</sup> [Baker & Ors, R \(on the application of\) v Secretary of State for Communities & Local Government & Ors \[2008\] EWCA Civ 141](#), para 31

In *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, para 26 McCombe LJ summarised the principles to be derived from the authorities on s 149, as follows:

(1) "As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 at 274, [2006] IRLR 934, [2006] 1 WLR 3213, equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2006] EWCA Civ 1293, [2006] IRLR 934, [2006] 1 WLR 3213 (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at 26-27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at 23-24.

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, as follows:

- i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
- ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
- iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
- iv) The duty is non-delegable; and
- v) Is a continuing one.
- vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at 84, approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at 74-75.)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both

enquiring and reporting to them ": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at 79 per Sedley LJ."

McCombe LJ went on to identify three further principles, which may be summarised as follows:

(8) It is for the Court to decide for itself if due regard has been had, but providing this is done it is for the decision maker to decide what weight to give to the equality implications of the decision (following *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), per Elias LJ @ [77]-[78]).

(9) "[T]he duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consideration with appropriate groups is required" (*R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), per Elias LJ @ [89]).

(10) The duty to have due regard concerns the impact of the proposal on all persons with the protected characteristic and also, specifically, upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal (*Bracking*, per McCombe LJ @ [40]).

As to the importance of the second principle, McCombe LJ stated @ [60]-[61]:

"it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude" and "In the absence of evidence of a 'structured attempt to focus upon the details of equality issues' (per my Lord, Elias LJ in *Hurley & Moore*) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged".<sup>37</sup>

While this summary of the case law provides an indication of the meaning of "due regard" and the courts' approach to interpreting the PSED, 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."<sup>38</sup>

### 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 ;

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<sup>37</sup> Paras 109-111

<sup>38</sup> Fredman, S. The Public Sector Equality Duty, *Industrial Law Journal*, Vol. 40, No. 4, December 2011, p422

- 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.<sup>39</sup>

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 extra scrutiny to entrants from particular nationalities if there has been evidence of immigration abuse by people of those nationalities.<sup>40</sup>

## 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;<sup>41</sup>
- 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;<sup>42</sup>
- 3 where persons are not public authorities but exercise public functions, the duty applies in respect of the exercise of those functions.<sup>43</sup>

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.<sup>44</sup>

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<sup>39</sup> *Equality Act 2010*, Explanatory Notes, para 924

<sup>40</sup> [Equality Bill Deb 18 June 2009 c359](#)

<sup>41</sup> [Equality Act 2010, section 150\(1\)](#)

<sup>42</sup> [Equality Act 2010, section 150\(3\)-\(4\)](#)

<sup>43</sup> [Section 149\(2\)](#)

<sup>44</sup> *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](#)

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.<sup>45</sup>

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. In [YL v Birmingham City Council and Others \[2009\] 1 AC 95](#) Lord Bingham stated that it would be “appropriate to give a generously wide scope to the expression ‘public function’”<sup>46</sup> 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.<sup>47</sup>

### 1.7 Specific Duties

The [Equality Act 2010 \(Specific Duties\) Regulations 2011](#)<sup>48</sup> came into force on 10 September 2011 and apply to English and non-devolved public authorities (see below for the position in Wales and Scotland). The Specific Duties contained in the Regulations are designed to facilitate compliance with the PSED.

The Regulations require certain public authorities (identified in Schedules 1 and 2 to the Regulations) to publish information to demonstrate compliance with the PSED.<sup>49</sup> Identified public authorities must also publish one or more equality objectives which “it thinks it

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<sup>45</sup> [Equality Act 2010, Explanatory Notes, Para 486](#)

<sup>46</sup> Para 4

<sup>47</sup> See para 5-13

<sup>48</sup> SI 2011/2260

<sup>49</sup> [The Equality Act 2010 \(Specific Duties\) Regulations 2011, regulation 2](#)

should achieve” to facilitate compliance with the PSED.<sup>50</sup> The Government Equalities Office has published guidance on the Specific Duties, [here](#).<sup>51</sup>

The Government’s [Impact Assessment](#) (IA)<sup>52</sup> of the Regulations estimated that “over twenty five thousand public bodies could potentially be affected by the specific duties” most which were schools. The IA breaks this down as follows:

<b>Detailed breakdown of public bodies</b>	
<b>Type</b>	<b>Number</b>
Central Government	70
Local Bodies	388
NHS Bodies	539
<i>Education Institutions</i>	
Schools	22,381
Higher Education	131
Other authorities	1860
<i>Including...</i>	
Police Forces, Prison Services, Exec Justice Dept, Nationalised Industries, Probation Boards, Inspectorates	122
NDPBs sponsored by UK Govt Departments	730
<b>Total</b>	<b>25,369</b>

Source: IA, p10

The IA estimated the annual recurring cost of compliance with the new duties to be approximately £23 million.

In December 2012 the Equality and Human Rights Commission published an assessment of compliance with the Specific Duties: [Publishing Equality Information: Commitment, Engagement and Transparency](#). The report found that

50% of the listed public authorities in England that we assessed had published equality information on both their staff and service users.... The vast majority of public authorities ... (78%) have taken some steps to meet the requirement to publish equality information....<sup>53</sup>

Thus, the report suggests that not all bodies subject to the Duties comply with them. Aside from being somewhat dated (the report covered only 2011/2012), the report did not survey schools (due to the later - 6 April 2012 - commencement date of the 2011 Regulations in relation to schools; see [Schedule 2](#)). This is particularly problematic in view of the above government estimate showing that the majority of bodies subject to the Duties are schools.

<sup>50</sup> Ibid, [regulation 3](#)

<sup>51</sup> GEO, *Equality Act 2010: Specific duties to support the equality duty - what do I need to know? A quick start guide for public sector organisations*, October 2011

<sup>52</sup> *Impact Assessment*, IA No: GEO 1019, 27/06/2011

<sup>53</sup> P8

In 2013 an independent steering group conducted a review of the PSED (see below), which included reviewing compliance with the Specific Duties.<sup>54</sup> [Chapter 6](#) of the resulting report discussed compliance with the Specific Duties, noting:

Compliance with the specific duties has been weak so far, with wide variation in the volume and nature of data being published.<sup>55</sup>

### Wales and Scotland

The [Equality Act 2010 \(Specific Duties\) Regulations 2011](#) (the English Regulations) were made under section 153(2) and 154(2) of the *Equality Act 2010*, which enable a Minister of the Crown to impose duties on the authorities listed in Parts 1 and 4 of Schedule 19. Part 1 of Schedule 19 lists non-devolved bodies and Part 4 lists cross-border Welsh authorities.

There are separate regulations that apply to “relevant Welsh authorities” listed in Schedule 19, Part 2 of the 2010 Act: The [Equality Act 2010 \(Statutory Duties\) \(Wales\) Regulations 2011](#)<sup>56</sup> (the Welsh Regulations). There are also separate regulations that apply to “relevant Scottish authorities” listed in Schedule 19, Part 3: the [Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012](#)<sup>57</sup> (the Scottish Regulations). Both the Welsh and Scottish Regulations are significantly more prescriptive than the English Regulations.

The Welsh regulations require public authorities to set equality objectives, which include a statement setting out how the authority proposes to meet the objective and how long it expects this to take. When setting the objectives the authority must have due regard to the need to reduce pay inequality. The Regulations also include engagement provisions, which require authorities to consult groups representative of persons with protected characteristics when setting the equality objectives; procurement provisions, which require authorities to consider whether the award criteria for procurement should include considerations relevant to the equality duty; and a requirement to make Strategic Equality Plans, which set out how the authority intends to comply with both the Specific Duties and the general PSED.

The Scottish Regulations are similarly comprehensive. Indeed, when proposed in draft during January 2011 the Scottish Parliament’s Equal Opportunities Committee declined to recommend the draft as they viewed it as being in need of strengthening.<sup>58</sup> The final Scottish Regulations were published on 27 May 2012. They include a duty for authorities to report on the progress they have made towards making the PSED integral to the exercise of their functions (known as “mainstreaming the equality duty”<sup>59</sup>). They also include duties to prepare and publish “equality outcomes”; assess and review policies and

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<sup>54</sup> GEO, [Review of the Public Sector Equality Duty: Report of the Independent Steering Group](#), 6 September 2013

<sup>55</sup> Page 32

<sup>56</sup> SI 2011/1064 (W.155)

<sup>57</sup> SI 2012/162

<sup>58</sup> See: Monaghan, K., *Monaghan on Equality Law*, Second Ed, 2013, p720, para 16.88

<sup>59</sup> See: [Regulation 3](#)

practices; gather employee information; publish gender pay gap information; and publish statements on equal pay. Additionally, as with the Welsh Regulations, the Scottish Regulations require authorities to consider including equality considerations into award criteria for public procurement.

## 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.<sup>60</sup> 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.<sup>61</sup> The authority must give this written information to the Commission within 28 days of its receipt of the compliance notice.<sup>62</sup>

## 1.9 Guidance

The Equality and Human Rights Commission has produced technical guidance on the PSED. This can be found [here](#).<sup>63</sup>

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<sup>60</sup> [Equality Act 2006, section 30\(1\)](#)

<sup>61</sup> Ibid, sections 31 and 32

<sup>62</sup> Ibid, section 32(2)

<sup>63</sup> EHRC website, Equality Act Codes of Practice and Technical Guidance (accessed 21 May 2013)

## 2. Review of the Public Sector Equality Duty

On 15 May 2012 the then 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.<sup>64</sup>

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](#).<sup>65</sup> The conclusions of the Steering Group were summarised in the review document:

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.<sup>66</sup>

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 Wales. It was introduced to ensure that public bodies take account of

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<sup>64</sup> [HC Deb 15 May 2012 cc28WS-29WS](#)

<sup>65</sup> GEO, [Review of the Public Sector Equality Duty: Report of the Independent Steering Group](#), 6 September 2013; [HC Deb 6 September 2013 cc33WS-34WS](#)

<sup>66</sup> GEO, [Review of the Public Sector Equality Duty: Report of the Independent Steering Group](#), 6 September 2013, p.11

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.<sup>67</sup>

On 17 October 2013 the then Chair of the Equality and Human Rights Commission, Professor Onora O'Neill, set out the EHRC's response to the review:

In broad terms, I would make three points about the Review's recommendations: on the evidence, on guidance and on procurement.

**1) On the evidence gathered in the course of the Review:**

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<sup>67</sup> [HC Deb 6 September 2013 cc33WS-34WS](#)

We feel there have been more definite conclusions drawn than the fairly light evidence presented justifies. For example, the report Foreword says that no public body has made efforts to reduce the costs of compliance with the PSED. We do not see evidence for this in the Review, and it is not our experience in working with many public bodies that use the PSED constructively and effectively.

### **2) On the guidance produced by the Commission:**

We were disappointed that the extensive guidance we have already produced on the PSED was not considered fully during the Review. That guidance has been widely used: there were nearly 7,000 downloads of our suite of non-technical guidance between April and August this year. The guidance is clear on what is required by the PSED, on the need for action to be proportionate and on what is required for compliance, as opposed to what might be adopted as best practice.

We will continue to review our guidance and to work with the public bodies implementing the PSED to help ensure what is needed is provided. However, as we advocated during the Review, the best way to reduce bureaucracy and over-engineering of compliance with the PSED would be to publish a statutory Code. This would allow public bodies to be clear about what is legally required and to depend on the Code in defending challenges, because the courts place far greater weight on a Code than on guidance. Guidance cannot substitute for the certainty which a Code provides for bodies that may otherwise adopt what they intend to be a risk averse approach, which may lead to heavier bureaucratic requirements. This would be a key step in tackling the 'gold plating' that the report says has been identified.

### **3) On procurement, and the Review's recommendations:**

We have already produced guidance on procurement, which underlines the importance of a proportionate approach, the need to remove barriers for SMEs and the value of a diverse supplier base. We are not clear whether the Steering Group had the benefit of studying our existing guidance.

This guidance recognises the importance of removing PQQ barriers for SMEs. However, we are concerned that the current proposals are not clear. Proportional compliance for small contracts does not mean non-compliance. Implementation of these proposals will need very careful clarification and explanation.

We will take up work on the three recommendations addressed to the Commission; in particular, we will liaise with the Information Commissioner to see whether there is a need to clarify requirements for data collection and retention in this area.<sup>68</sup>

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<sup>68</sup> [Commission responds to Public Sector Equality Duty Review report](#), EHRC website, 17 October 2013 (accessed 18 October 2013)

### 3. House of Lords Select Committee

On 24 March 2016 an ad hoc post-legislative committee – the Select Committee on the Equality Act 2010 and Disability – [published](#) its report considering the 2010 Act’s impact on persons with disabilities.<sup>69</sup> Chapter 8 of the report considered the PSED.

The Committee concluded that the PSED is fundamentally flawed, in that authorities must merely “have due regard” to evidence, but can then ignore it:

When the Government and public authorities are formulating their policies, they have a duty to “have due regard” to the need to eliminate discrimination and advance equality of opportunity. This wording allows them to consider all the evidence, but still to pursue plainly discriminatory policies. We recommend that the wording should be strengthened, so that the discriminatory consequences of their decisions can no longer be ignored.<sup>70</sup>

Their Lordships recommended amending section 149:

Our evidence has demonstrated that there is a fundamental flaw in the current Public Sector Equality Duty, namely that a public authority can make no progress towards the aims of the general duty and yet be judged compliant with it by the courts. We have heard convincing evidence that an amendment is needed to remedy this.

We recommend that a new subsection should be added to section 149: “To comply with the duties in this section, a public authority in the exercise of its functions, or a person within subsection (2) in the exercise of its public functions, shall take all proportionate steps towards the achievement of the matters mentioned in subsection (1).”<sup>71</sup>

The Government’s [response](#) to the Committee’s report, published in July 2016, said that the Government would take into account the Committee’s recommendations in any future review of the PSED.<sup>72</sup>

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<sup>69</sup> House of Lords Select Committee on the Equality Act 2010 and Disability, [The Equality Act 2010: the impact on disabled people](#), Report of Session 2015–16, HL Paper 117

<sup>70</sup> *Ibid.*, p5

<sup>71</sup> *Ibid.*, p99

<sup>72</sup> *Government Response to the House of Lords Select Committee Report on The Equality Act 2010: The impact on disabled people*, Cm 9283, July 2016, p24

## 4. 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 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.<sup>73</sup>

The practice of carrying out EIAs is widespread. While 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”<sup>74</sup> they have also been described as overly bureaucratic.<sup>75</sup>

On 19 November 2012 the former Prime Minister, David Cameron, [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.

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<sup>73</sup> [Using the equality duty to make fair financial decisions](#), Equality and Human Rights Commission website (accessed on 21 March 2013)

<sup>74</sup> Conley, H., Page, M. ‘The gender equality duty in local government: the prospects for integration’, *Industrial Law Journal*, 39(3), 2010, 321-325

<sup>75</sup> See: [Equality Impact Assessments explained](#), *The Telegraph* [online], 19 November 2012 (accessed 21 March 2013)

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.<sup>76</sup>

## 4.1 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] EWCA Civ 882 a case concerning the race equality duty, the Court of Appeal noted:

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.<sup>77</sup>

*R (C (A Minor))* was considered in the *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158. 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.<sup>78</sup>

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]<sup>79</sup>

The current legal position is that 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 to public authorities

<sup>76</sup> [Prime Minister's Speech to CBI](#), Number 10 website (accessed 21 March 2013)

<sup>77</sup> Para 39

<sup>78</sup> Para 89

<sup>79</sup> [Relevant Case Law](#), Equality and Human Rights Commission website (accessed on 21 March 2013)

when defending their decisions in court. *Brown* 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 ...<sup>80</sup>

*R (D) v Worcestershire County Council* [2013] EWHC 2490 (see above), in which the High Court found that the PSED had been complied with, provided further illustration of the relevance of EIAs when defending decisions during judicial review proceedings:

Whether an authority has complied with its PSED is fact-specific. This is not a case where the PSED was simply ignored. As I have indicated ... not only was an EIA commissioned, the Council set up an EIA Working Group to oversee and contribute to the EIA, in the context of the consultation responses, and it met a number of times. At each meeting, it considered the requirements of the PSED, and in particular the need to advance equality of opportunity for disabled people.<sup>81</sup>

The fact that the Council in that case had demonstrably considered the requirements of the PSED during its work on the EIA was instrumental in proving compliance with the PSED. A 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

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<sup>80</sup> Para 96

<sup>81</sup> Para 95

of documentary evidence of compliance with the PSED when determining judicial review cases.<sup>82</sup>

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<sup>82</sup> 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

## 5. Equality Impact Assessments – coronavirus

There has been recent interest in the equality impact of coronavirus, not least due to [disparities in risk and outcomes](#) among Black, Asian and minority ethnic (BAME) communities.<sup>83</sup>

Several Members of Parliament have asked to see EIAs or other equality analysis. The following answers to Parliamentary Questions indicate the Government's approach:

### [Coronavirus: Equality: Written question - 43977](#)

**Q**

Asked by [Rachael Maskell](#)  
(York Central)  
Asked on: 06 May 2020

**Cabinet Office**

**Coronavirus: Equality**

43977

To ask the Minister for the Cabinet Office, what equalities impact assessment the Government has made of the effect of (a) each financial package and (b) its approach to managing the public health risk in its response to the covid-19 outbreak.

**A**

Answered by: [Penny Mordaunt](#)  
Answered on: 22 May 2020

It is vital that our response to COVID-19 takes account of the different needs of people depending on their circumstances. The government has fulfilled its requirements stemming from the Public Sector Equality Duty (PSED) for all elements of its response to COVID-19.

The Government pays due regard to the equality impacts of its policy decisions, in line with legal requirements. There are internal procedural requirements and support in place for ensuring that such considerations inform decisions taken by Ministers.

The Government also fulfilled its requirements in relation to the Coronavirus Restrictions Regulations which were brought into force 23 March 2020, as well as for subsequent changes to the policy.

### [Coronavirus: Disease Control: Written question - 43001](#)

**Q**

Asked by [Stella Creasy](#)  
(Walthamstow)

[\[N\]](#)

Asked on: 04 May 2020

**Cabinet Office**

**Coronavirus: Disease Control**

43001

To ask the Minister for the Cabinet Office, if he will publish an Equality Impact Assessment of the Government's plans for easing the covid-19 lockdown.

<sup>83</sup> *Covid-19 and Black, Asian and minority ethnic communities*, Commons Debate Pack CDP-2020-0074, 17 June 2020

**A**

Answered by: [Penny Mordaunt](#)  
 Answered on: 28 May 2020

The government has assessed the equalities impacts of the social distancing policy on different groups of people, including those with protected characteristics and has engaged individuals, expert groups, charities and other organisations in the policy development process. This is a key part of the decision making process and the government has discharged its obligations under the Equality Act at each stage of its COVID-19 response.

We are aware of the disproportionate impacts of the policy on some groups. For example, we acknowledge that the order to stay at home can cause anxiety for those who are experiencing or feel at risk of domestic abuse and we've seen a rise in calls to the national abuse helpline. That is why the Home Secretary introduced a package of measures to support such victims, including an additional £2m of funding for domestic abuse helplines and online services as well as the '#YouAreNotAlone' communications campaign to reassure victims that support services remain available.

The Government has also recognised that some individuals with learning disabilities or autism have specific exercise requirements that are important to their health and has clarified that such groups are allowed to continue to exercise outdoors more than once a day. It is recognised that the policy will continue to have a disproportionate impact on many disabled individuals.

There is evidence of a disproportionate impact on many other sectors of society. The Government is keeping this under review and will introduce mitigation measures wherever possible and appropriate. However, the overall assessment concluded that the measures the Government has taken have been proportionate to the risks of the coronavirus outbreak.

In line with the practice of successive administrations, the Government does not routinely publish equality impact assessments.

### **[Females: Coronavirus: Written question - 63534](#)**

**Q**

Asked by [Claire Hanna](#)  
 (Belfast South)  
 Asked on: 23 June 2020

#### **Women and Equalities**

#### **Females: Coronavirus**

63534

To ask the Minister for Women and Equalities, if she will publish the equalities impact assessments undertaken by her Department to determine the impact of covid-19 related legislation on women.

**A**

Answered by: [Kemi Badenoch](#)  
 Answered on: 30 June 2020

Departments do not routinely publish these assessments, as it is important that officials can draft them with openness and candour. Individual departments and their ministers are responsible for equality of policies, and the government takes this responsibility very seriously. The government has assessed the equalities impacts of non-pharmaceutical interventions on different groups of people, including those with protected characteristics and has engaged with individuals, expert groups, charities and other organisations in the policy development process. This is a key part of the decision making process and the government has discharged its obligations under the Equality Act at each stage of its COVID-19 response

## 6. Equality Impact Assessments – public finance

Since the enactment of the *Equality Act 2010* there have been calls for successive governments to publish EIAs alongside budgets and finance bills. In response to a [PQ in 2017](#) the then Government set out its approach:

**Q**

Asked by [John McDonnell](#)

(Hayes and Harlington)

Asked on: 20 July 2017

**HM Treasury**

**Public Finance**

6549

To ask Mr Chancellor of the Exchequer, what equality impact assessment his Department has carried out on the provisions of the forthcoming Finance Bill; and if he will place in the Library a copy of the relevant documents when that Bill receives its First Reading.

**A**

Answered by: [Mel Stride](#)

Answered on: 06 September 2017

HM Treasury publishes distributional analysis of the cumulative impact of the Government's tax, welfare, and public service spending decisions at each fiscal event, the latest of which can be found here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/597473/impact\\_on\\_households\\_SB2017\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/597473/impact_on_households_SB2017_web.pdf)

The Government publishes Tax Information and Impact notes (TIINs) for all tax policy changes. TIINs provide an explanation of the policy objective together with details of the tax impact on the Exchequer, the economy, individuals, businesses, civil society organisations, as well as any equality or other specific area of impact. All TIINs, including those for the Budget 2016 changes to Capital Gains Tax, can be found here:

<https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins>

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