



## **Government Review of the Public Sector Equality Duty**

### **JUSTICE Response to Government Equalities Office “Call For Evidence” April 2013**

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**“Equality is at the heart of this Coalition Government. It is fundamental to building a strong economy and a fair society; and in these difficult times equality is even more important.”**

**Rt Hon Theresa May MP, Secretary of State for Home Affairs,  
Foreword to *The Equality Strategy – Building a Fairer Britain*, December 2010.**

## **Introduction**

1. Founded in 1957, JUSTICE is a UK-based law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the UK section of the International Commission of Jurists.
2. JUSTICE is a part of the Equality and Diversity Forum (EDF). The EDF has submitted a comprehensive submission to this review of the Public Sector Equality Duty ('PSED'), which JUSTICE supports.<sup>1</sup> This additional short submission is drafted with the assistance of members of Cloisters chambers (Catherine Casserley, Claire McCann and Declan O'Dempsey), leading practitioners experienced in the operation of the PSED and the positive duties in force before the enactment of the Equality Act 2010, and with input from James Wolffe QC and Aidan O'Neill QC members of the Council of JUSTICE Scotland. We highlight the important benefits of the legal framework constructed around the PSED, both in terms of clear guidance to public authorities on the promotion of equality and in giving individuals a route by which to enforce good practice and secure a remedy when decision makers get it wrong. We also make a number of ancillary comments on the conduct of the review, its progress and next steps.

## **The Review**

3. JUSTICE welcomes this opportunity to respond to the Government Equalities Office ("GEO") Call for Evidence in connection with the Government Review of the PSED in section 149 of the Equality Act 2010.
4. However, we regret that the Review is itself premature and necessarily limited. The exercise appears insular and provides little opportunity for engagement by service users and others, beyond the authorities subject to the duty. We are particularly concerned that the Review should be mindful of its implications for the Devolved Administrations and that further steps must be taken to consult with practitioners and service users in Northern Ireland, Scotland and Wales before any recommendations about the future of the duty can be made.

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<sup>1</sup> The EDF submission is available here: <http://www.edf.org.uk/blog/wp-content/uploads/2013/03/Equality-duty-review-EDF-submission-FINAL.doc>

### *Timing*

5. The PSED only came into force in April 2011. JUSTICE, therefore, considers it premature to be assessing its impact (in terms of its costs/benefits), how well it operates and is understood. Whilst similar duties existed in the heritage discrimination legislation in respect of disability, race and sex, for the relatively new protected characteristics (ie, age, sexual orientation, religion or belief and gender reassignment), there was no such duty until the advent of the PSED in April 2011. The specific duties which build upon the PSED – and which vary across the regions of the UK – have been in force for an even shorter period of time.

### *Consultation*

6. The narrowly focussed Call for Evidence in relation to the Review of the PSED was issued by the GEO on 11 March 2013. It allows for responses to be sent up until 19 April 2013 (initially, 12 April 2013). Given the Easter break, this amounts to just 26 full working days for interested parties to compile their responses. On any analysis, this falls far short of the time needed to engage in any meaningful consultation exercise. However, in light of the evidence on practical impacts sought by the Review team, this truncated timetable may limit the ability of many organisations or individuals affected by the duty to submit any response, let alone a fully considered one. For example, membership organisations may be limited in their ability to consult their members thereby making it more difficult to analyse important first-hand experience of the PSED.
7. The truncated timetable for responses and the limited nature of the Call for Evidence risks excluding the viewpoints of key stakeholders and interested parties from the process. This is both regrettable and entirely avoidable. It also serves to communicate, by implication, a disregard by the Government for the significance of the PSED. This does nothing to advance the Government's stated commitment to equality in its Equality Strategy which acknowledges that, "failure to tackle discrimination and provide equal opportunities, harms individuals, weakens our society and costs our economy"<sup>2</sup>.

### *Devolution*

8. The Review is in two parts, examining both the Equality Act (Specific Duties) Regulations 2011 and the General Duty in Section 149 Equality Act 2010. Any change to the General Duty will have national implications. If the determination is taken by the Review team that the General Duty warrants revision (or repeal), this decision cannot be taken in

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<sup>2</sup> *The Equality Strategy – Building a Fairer Britain*, HM Government, December 2010.

isolation. Unfortunately, it appears that the Review team did not discuss the impact of devolution until their fourth meeting, less than three months from the completion of the Review. At this meeting, it was considered that there would be “a high level of resistance to changing the PSED in both Wales and Scotland”. While roundtables are planned in Scotland and Wales, we regret that the impact of devolution on the planning of the review has been minimal. Similarly, JUSTICE considers that learning from across Northern Ireland, Scotland and Wales on the General Duty should not be marginalised, but should be fully integrated into the Review learning. Speculation about the likely resistance within the Devolved Administrations to changes to the duty suggests trepidation that engagement will undermine any planned recommendations by the Review team for reform. This, in our view, would be inconsistent with the evidence-based approach the Review purports to take.

### **How well understood is the Equality Duty and Guidance?**

9. Our final preliminary concern relates to the scope of the Review, illustrated in the questions posed in the Call for Evidence. There is wide-spread concern – as expressed succinctly in the EDF Submission – that this process is designed to allow bodies subject to the duty to make the case that it is overly burdensome and its costs outweigh its benefits. The birth of the Review in the Government’s “Red Tape Challenge” serves as a strong foundation for those fears.
10. We note the direction in the Call for Evidence that the Review Team are principally interested in practical evidence on the operation of the PSED (referencing documentation used etc) and that submissions which are not evidence-based will be ignored. However, we hope that this approach will not ignore the intrinsic value of the important legal principles established in the nascent PSED, grounded in the application of the predecessor positive duties.
11. Whilst there may be some debate over whether public authorities are applying these principles effectively – and also discussion about steps to disseminate good practice (see EDF Submission) - a lack of understanding of the principles on the part of public authorities (should that be the case) should not in itself support the case for repeal.
12. The proper operation of the PSED has been well-served by judicial interpretation of what the duty entails. So, in *R (on the application of Brown) v Secretary of State for Work and*

*Pensions*<sup>3</sup>, the Administrative Court considered what a relevant body must do to fulfil its obligation to have due regard to the aims set out in the PSED:

- (1) **Knowledge of the PSED:** Those in public authorities who have to take decisions that do or might affect the protected classes must be made aware of their duty.<sup>4</sup>
- (2) **Timeliness (i.e. “due regard” before and at the time a particular policy or decision is under consideration):** The “*due regard*” duty must be fulfilled in *advance* of a particular policy that will or might affect the protected classes being adopted. It is an essential preliminary to lawful public decision making<sup>5</sup> Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision will not be enough to discharge the duty.<sup>6</sup>
- (3) **Substantial consideration with an open mind:** Compliance with the duty involves a conscious approach and state of mind.<sup>7</sup> Such can only occur where the decision maker is aware of the duty.<sup>8</sup>
- (4) **Non-delegable duty:** This means that the duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil aspects of the duty. In those circumstances the duty to have “*due regard*” to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the “*due regard*” duty and is willing to do so; and (2) the public authority maintains a

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<sup>3</sup> [2008] EWHC 3158 (Admin); [2009] P.T.S.R. 1506

<sup>4</sup> For further information on the development of these principles, see *Equality Act 2010: Where are we now*, Karon Monaghan QC, June 2012, JUSTICE Equality Conference June 2012. Reflected in the earlier case law in *R (Watkins – Singh) v Governing Body of Aberdare Girls’ High School* [2008] EWHC 1865 at para 114, per Silber J.

<sup>5</sup> *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213, para 274, per Arden LJ; *R (C) v Secretary of State for the Home Department* [2008] EWCA Civ 882, para 49, per Buxton LJ and *R (BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, paras 2-3, per Sedley LJ; *R (Hurley & Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin), para 70, per Elias LJ.

<sup>6</sup> *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882, para 49, per Buxton LJ.

<sup>7</sup> See for example, *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, para 91; *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin), para 74; *R (Harris) v LB Haringey* [2010] EWCA Civ 703, para 27, per Pill LJ; *R (Bailey) v LB Brent* [2011] EWCA Civ 1586; [2012] EqLR 168, para 74-5, 83; *R (Hurley & Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin), para 72, per Elias LJ.

<sup>8</sup> Building on previous case-law in *R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin). See also: *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2008] LGR 239, para 37, per Dyson LJ; *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, paras 91-92; *R (Hurley & Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin), para 73, per Elias LJ; *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin); [2011] EqLR 705.

proper supervision over the third party to ensure it carries out its “*due regard*” duty.<sup>9</sup>

**(5) Continuing duty<sup>10</sup>**

**(6) Evidence of consideration:** it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where the Public Sector Equality Duty is engaged and to keep an adequate record showing that they had actually considered it and pondered relevant questions: “*In that way the decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced.*”<sup>11</sup> 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 imposed.<sup>12</sup>

The six ‘Brown Principles’ are grounded in earlier case law on the positive public duties on race, gender and disability and have been relied upon time and again in later cases. They now inform the operation of the duty within the context of public body decision-making<sup>13</sup>.

13. Taken in isolation, case law reveals only situations in which claimants have alleged – rightly or wrongly – a breach of the PSED. Whilst this may help in assessing how well the PSED operates in practice in the particular factual circumstances of those cases (ie, how well it is understood by the particular public authority defendant), it does not provide a systematic picture of how well PSED is understood and applied by all public authorities.<sup>14</sup> However, case law – particularly on the earlier equality duties relating to

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<sup>9</sup> *R (Brown) v Secretary of State for Work and Pensions & O’s* [2008] EWHC 3158 (Admin); [2009] PTSR 1506 para 94, per Aikens LJ; See, *R (Eisai Limited) v National Institute for Health and Clinical Excellence* [2007] EWHC 1941 (Admin), para 92 and 95, per Dobbs J.

<sup>10</sup> *R (Brown) v Secretary of State for Work and Pensions & O’s* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, para 95, per Aikens LJ; *R (Bapio Action Limited) v Secretary of State for the Home Department* [2007] EWCA Civ 1139.

<sup>11</sup> *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2008] LGR 239, para 38, per Dyson LJ.

<sup>12</sup> *R (Bapio Action Limited) v Secretary of State for the Home Department* [2007] EWHC 199 (Admin), para 69 per Stanley Burnton J; *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin), para 25, per Moses LJ; *R (Luton BC and O’s) v Secretary of State for Education* [2011] EWHC 217 (Admin); [2011] EqLR 481, para 113, per Holman J.

<sup>13</sup> They also form the basis of the Equality and Human Rights Commission’s Technical Guidance on the PSED (England) in the section on “*due regard*” (at paragraph 2.21)

<sup>14</sup> In Scotland, for example, the PSED and its precursors, have been very little litigated. So far as JUSTICE has been able to ascertain in the limited time available, there has been one case, concerning the closure of a community centre, which raised section 71 of the RRA (*Capacity Building Project Ltd v. Edinburgh Council* [2011] CSOH 58) and one case, concerning the closure of day centre for the learning disabled, involving the PSED. In neither case did the local authority carry out an equality impact assessment before the proceedings were raised. These cases would accordingly not support the proposition that the absence of litigation in Scotland indicates that the duty is well

race, sex and disability – has clearly demonstrated that the PSED is a valuable tool for improving the way in which public functions are carried out. Used appropriately, it is a tool to assist relevant bodies to deliver their services fairly and more transparently (see, for example, the good practice examples provided by the EDF).

14. The PSED requires public bodies to have “due regard” to the need to eliminate discrimination (in all its forms), to advance equality of opportunities and to foster good relations. Case law suggests that there is an increasingly clear understanding of what this three-pronged duty involves. This is because cases concerning the PSED now tend to focus on the *extent* to which “due regard” has been had, rather than *whether* “due regard” has been had at all.
15. So, the earlier cases, such as *R (on the application of Elias) v Secretary of State for Defence*<sup>15</sup>, focussed on whether the public body decision-maker had any “due regard” at all to the equality duty (in that case, the race equality duty in s.71 of the Race Relations Act 1976). By contrast, later cases, such as *R (on the application of Greenwich Community Law Centre) v Greenwich London Borough Council*<sup>16</sup> have focussed on the extent to which “due regard” had been had. In this case (about the funding of legal advice services), the Court of Appeal concluded that the local authority had, in practice, dealt with all those groups with the protected characteristics identified in s.149 which realistically might be affected by their decision on funding. It held that the local authority had actually structured its policy so as to ensure that those groups were the principal beneficiaries of such funds as remained available. The alteration effected by the re-commissioning exercise was designed to ensure greater savings for the good of the beneficiaries of the service. A change from one provider to another without more would not usually engage equality considerations but the local authority had fully recognised the accessibility implications and the equality implications were also specifically discussed at its final meeting and it was impossible to suggest that there was not “due regard” to that consideration.
16. So, the *Greenwich Community Law Centre* case illustrates that the local authority had well understood the PSED which had helped it to ensure that equality considerations were consciously considered at all stages of its decision-making process. JUSTICE

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understood by public authorities there. Research undertaken by the EHRC and published in 2012 indicated that the duty was poorly understood and applied: *Mitigating Action in Scottish Public Authorities*, April 2012.

<sup>15</sup> [2005] EWHC 1435 (Admin); [2005] I.R.L.R. 788

<sup>16</sup> [2012] EWCA Civ 496; [2012] Eq. L.R. 572

considers that this case serves to emphasise the importance of the PSED which, rather than being viewed as a luxury, or red tape, should be understood as a duty which helps public bodies deliver their services fairly, transparently and in an appropriately targeted way.

17. The expression, “due regard” invokes the concept of proportionality and this has led the Courts to consider the PSED by asking whether the public functions involved are *relevant* to equality and diversity issues. It is now well understood that the less (or more) relevant the functions involved, the less (or greater) regard needs to be had to the statutory aims which comprise the PSED.
18. The recent case of *Hunt v North Somerset Council*<sup>17</sup> also shows that local authorities are beginning to provide training on key aspects of the PSED. The fact that both officers of the Council and the main Councillor responsible for finance and HR received training on the operation of the PSED helped the Council to ensure that it had “due regard” to the three statutory aims when it made decisions about the provision of youth services following the Comprehensive Spending Review.
19. Case law has begun to emphasise the importance of “engagement”, a term intended to cover the whole range of ways in which relevant bodies interact with those affected by their policies and decisions. Case law shows that relevant bodies have started to understand that engaging with affected parties (whether service users, employees etc) is likely to promote fairer, transparent decision-making, and to facilitate compliance with the PSED. So, in *Barwick & Anor v Bridgend County Borough Council*<sup>18</sup>, the Council decided to close a care home in order to use the site for supported accommodation. In concluding that the decision was not unlawful by reason of breach of the PSED, the Court was persuaded that “due regard” had been had to the duty, shown by the efforts taken by the Council to engage affected parties. The Council had appointed a full-time social worker for a three-month period to act as liaison between residents/relatives and the Council. An advocate was appointed to represent the residents and groups representing older people were asked for their views. There was careful recording and noting of consultation with affected parties and spokespersons were permitted to address the decision-makers. JUSTICE considers that this case exemplifies the positive effects of the PSED when operated well as it ensured transparency in the decision-making process.

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<sup>17</sup> [2012] EWHC 1928 (Admin); [2012] Eq. L.R. 951

<sup>18</sup> [2009] EWHC 1723 (Admin)

20. Whilst the concept of “due regard” has been helpfully clarified by the courts, this clarity has not been replicated in the available guidance about the PSED. The Technical Guidance produced recently by the EHRC<sup>19</sup> is a helpful but lengthy document, whilst the GEO’s Guidance on the PSED is framed in negative terms, focussing on what relevant bodies need not do, rather than what they might do to improve decision-making and outcomes for affected parties. The existence of two cadres of guidance may give rise to confusion or, at least, additional work for relevant bodies.
21. JUSTICE regrets the Government’s decision not to require the EHRC to publish a statutory Code of Practice on the PSED. The absence of such a Code, giving authoritative and concise guidance, is likely to increase the burden for relevant bodies which, instead, are forced to seek non-authoritative guidance from multiple sources (or simply proceed in the absence of any relevant guidance). The Courts have consistently accepted the valuable contribution made to the development of the law, and constructive compliance with positive statutory duties, by clear statutory guidance.<sup>20</sup>

### **What are the benefits of the PSED?**

22. The PSED provides the means to promote equality within society and in that goal, reflects the UK commitment to equality before the law recognised in the common law and in our international obligations. The Equality Act 2010 was passed with support from all political parties as a sign of a common commitment to better promote equality within society. As well as promoting equality as a living value, compliance with the PSED is a tool for securing compliance with Article 14 of the European Convention on Human Rights.
23. JUSTICE considers that embedding, deepening and mainstreaming equality values within decision-making leads to better and more transparent decisions. It is one of the fundamental principles of good governance that government wills the means and not just the ends. The PSED ensures that relevant policy-makers and decision-makers take into account the needs of all affected parties. Therefore, whatever the end decision (or policy), one can be confident – if the PSED operates as it should – that the decision-

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<sup>19</sup> Equality Act 2010: Technical Guidance on the Public Sector Equality Duty (England), January 2013

<sup>20</sup> See for example, *R (Brown) v Secretary of State for Work and Pensions & O’s* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, para 95

making process has been well-informed, transparent and undertaken with proper consideration of equality values.

24. JUSTICE urges the Review team to recall, that the equality duty was originally introduced into the Race Relations Act 1976 in the light of the Report from the *Stephen Lawrence Inquiry* in February 1999<sup>21</sup>. That Inquiry provided a stark illustration of the result when anti-discrimination legislation is not taken seriously by public bodies. Other, more recent inquiries carried out by the EHRC continue to highlight the need for relevant bodies to have due regard to the needs of certain communities within our society (for example, the Disability Harassment Inquiry).<sup>22</sup>
25. By virtue of the PSED, relevant bodies performing public functions have been able to improve their approach to the needs of people with protected characteristics as a result of giving conscientious consideration to the PSED in accordance with their duty. This has been especially true of Government departments, as evidenced by the statutory (section 31) assessments<sup>23</sup> undertaken by the EHRC into, for example, HM Treasury<sup>24</sup> and the Department for Work and Pensions (JobCentre Plus)<sup>25</sup>.
26. JUSTICE notes that consideration by relevant bodies of the PSED has brought about a change of approach and policy to achieve better equality outcomes. By way of example, this is evidenced by the case on taxi transport (*Lunt v Liverpool City Council*<sup>26</sup>) which triggered many local authorities to check their practices in relation to disability compliance in respect of taxi licensing.
27. JUSTICE considers that, in conjunction with properly understood local data – and supported by the principles set out in the case law –, the PSED could enable relevant bodies properly to design a decision-making process which will be fairer, more transparent and less susceptible to challenge.

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<sup>21</sup> <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

<sup>22</sup> <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/>

<sup>23</sup> These are assessments carried out by the EHCR under its statutory powers contained in s.31 of the Equality Act 2006

<sup>24</sup> <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/section-31-assessment-of-hm-treasury/>

<sup>25</sup> <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/assessment-of-compliance-into-jobcentre-plus/>

<sup>26</sup> [2009] EWHC 2356 (Admin); [2010] 1 C.M.L.R. 14

## How organisations are managing legal risk and ensuring compliance with the PSED

28. The review suggests that Government is concerned about whether the PSED is working in practice or whether it is creating additional work (and costs) for relevant bodies without evidenced benefit in terms of equality outcomes. JUSTICE considers that the PSED must operate in such a way that it has the greatest possible impact for equality and transparency. The courts have clearly stressed that the imposition of a positive equality duty must not lead to mere “box-ticking” on the part of relevant bodies in an attempt to ensure formal compliance.<sup>27</sup>
29. Case law suggests that relevant bodies are, to an increasing extent, getting it right more of the time (though it is open to doubt how far any conclusions can be drawn from the incidence of cases as to the operation of the PSED generally, particularly given the limited time the general duty has been in force). In the case of *Hunt v North Somerset Council*, the local authority had been greatly assisted in ensuring compliance with the PSED by rolling out a training programme for its senior officers and relevant councillors. This was not mere box-ticking as it led to better outcomes for the Council’s constituents. In fact, the PSED has helped relevant bodies to manage legal risk by providing a framework for evidence-based, well-informed and transparent decision-making.
30. In the current financial climate, it is more important than ever that service provision is properly targeted, to ensure that resources are not wasted and are distributed as fairly as possible. It is abundantly clear that, in an economic downturn, when hard choices must be made about the allocation of ever-decreasing resources, there is a greater risk that protected groups will be disproportionately affected by spending cuts. It is apparent – both from the EHRC statutory assessments and from case law – that the PSED is helping to inform those hard choices in order to promote decisions and policy less susceptible to legal challenge.

Nevertheless, JUSTICE has concerns about the over-simplification of the specific duties in England which are process-led, rather than outcome-focussed. In Wales and Scotland, the specific duties are more extensive than those in England. However, neither the general nor specific obligations have been in place for a sufficient time to provide for a constructive comparison of best practice. The Scottish provisions were introduced only in May 2012: The Equality Act 2010 (Specific Duties) (Scotland)

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<sup>27</sup> *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 at paras 24-25.

Regulations 2012. The present Review should provide an opportunity to build a framework for shared learning across the administrations, to better understand whether greater direction within the statutory framework could better support public authorities to implement the general duty in practice. In the absence of detailed specific duties, a statutory code, or detailed and authoritative sector specific guidance, authorities in England have no detailed guidance on how to achieve compliance with the duties. JUSTICE proposes that a combination of steps would assist authorities.

**What changes, if any, would ensure better equality outcomes (eg, legislative, administrative and/or enforcement changes)?**

31. JUSTICE has been disappointed by some comments from Ministers which suggest that equality considerations amount to no more than unnecessary 'red tape'<sup>28</sup>. The message that this conveys is that the PSED is an obstacle and this will only serve to undermine the effective operation of the duty. Instead, the Government should focus on building upon the PSED as a positive tool for effecting change to enable fairer, more transparent exercise of public functions.

32. We support the recommendations for change outlined by the EDF. In particular, we agree that any change must begin with renewed, positive and visible leadership on the advancement of equality for all.<sup>29</sup> JUSTICE considers the following changes key to improving implementation of the positive legal framework set out in the Equality Act 2010 and domestic case-law:

- (1) A statutory Code of Practice on the PSED giving authoritative and concise guidance on what the duty requires.
- (2) An increased role for inspectorates (such as the Care Quality Commission, and Her Majesty's Inspectorate of Prisons, for example) in order to promote compliance with the PSED.
- (3) A statutory requirement on relevant bodies to collect, retain and monitor diversity data in connection with goods, facilities and services (not just employment).

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<sup>28</sup> See David Cameron's speech (19 November 2012) to the CBI: <http://www.telegraph.co.uk/finance/economics/9687688/David-Cameron-CBI-speech-in-full.html>

<sup>29</sup> See EDF Submission at paras 50 – 51.

(4) Revision of Best Value Guidance (introduced in September 2011<sup>30</sup>) to ensure that local authorities gather the necessary data in order to have “due regard” to the statutory aims contained in the PSED.

33. **Code:** It is important that there should be authoritative material which the courts, lawyers and decisions makers can rely upon to guide them through the processes which aid a public body in having due regard. Those processes need to be transparent and the same as between public bodies. Without a Code it is likely that practices will become opaque and divergent as between public bodies. Such lack of transparency in decision making is likely to lead to more rather than fewer claims being brought and at the same time to poorer decision making by authorities.

34. **Inspectorates:** Specific regulators may be best placed to promote compliance with the PSED as they are already familiar to those they regulate, and are the most knowledgeable about their sectors. For example, a regulator is much more likely to understand how the PSED can be made to work alongside the practices of the particular sector it regulates. A regulator familiar with a sector is less likely therefore to impose requirements which are unrealistic relative to that sector and is more likely to appreciate the equality objectives set by authorities under their remit.

35. **Data:** The requirement on relevant bodies to collect retain and monitor diversity data is crucial. An authority without such data cannot hope to set realistic equality objectives or have a sense of where there may be a problem with its compliance with the PSED. In addition, unless there is a requirement to collect such data, it will be difficult for officers in authorities to persuade the authority that it is a proper expenditure. The present requirement in the specific duties – to collect only information relating to employment, and such information to be “relating to” people who share a particular protected characteristic – is insufficient to inform public authorities. JUSTICE suggests that without more robust requirements the project of ensuring the achievement of the equality objectives is radically undermined. In short, authorities will not have the basic information by which to evaluate their compliance.

The need to collect such data is particularly acute in the context of the age demographics. Increasingly authorities’ public functions, their service provision as well as their employment requirements, will be delivered to an increasing spread of ages.

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<sup>30</sup><https://www.gov.uk/government/news/a-fair-deal-for-the-voluntary-and-community-sector-from-whitehall-to-town-halls>

Identifying how public funds are divided between age groups will take on an increasingly important role. Data is also key to delivering services which are better tailored to the make up of the local population in relation to all the characteristics under the Equality Act 2010.

36. **Best Value Guidance:** On 5 September 2011, the Department for Communities and Local Government published new statutory guidance on Best Value (“BVG”).<sup>31</sup> This Guidance makes no mention of the PSED. The Guidance states that “in the interests of economy and efficiency, it is not necessary for authorities to undertake lifestyle or diversity questionnaires of suppliers or residents.” In effect, the BVG encourages local authorities to believe that they do not have a duty to obtain relevant diversity information from service users in situations in which such a step is necessary for them to establish that they have had due regard to the PSED. The production of the Guidance itself appears not to have had due regard to the PSED. The Impact Assessment on the Guidance (which concluded in April that a full impact assessment was not necessary) stated:

“The new draft Best Value statutory guidance sets out clear expectations on councils considering cutting funding to local organisations in the voluntary and community sector, particularly around avoiding passing on disproportionate cuts. This guidance will help to balance out any possible future impacts on equalities groups arising from authorities having less funding overall.”

“What existing sources of evidence will you use to help you identify the likely impacts on different groups of people?”

The BVG appears to discourage local authorities from collecting the data which would enable them to fulfil their duty under the PSED. The BVG can be revised without a legislative change and could have a significant impact on good practice.

Angela Patrick

**Director of Human Rights Policy, JUSTICE**

Catherine Casserley, Claire McCann & Declan O’Dempsey

**Cloisters<sup>32</sup>**

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<sup>31</sup> <https://www.gov.uk/government/news/a-fair-deal-for-the-voluntary-and-community-sector-from-whitehall-to-town-halls>

<sup>32</sup> Cloisters, Chambers of Robin Allen QC, 1 Pump Court, Temple, London EC4Y 7AA