

Submissions to the Sheku Bayoh Inquiry: The Equality and Human Rights Commission

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Introduction

The Equality Act 2010 and the Equality and Human Rights Commission

The Equality and Human Rights Commission (the Commission) is a non-departmental public body established under the Equality Act 2006. The Commission is Britain's independent equality and human rights regulator. We are a United Nations accredited 'A status' National Human Rights Institution (NHRI). The Commission works to eliminate discrimination and promote equality across the nine 'protected characteristics' set out in the Equality Act 2010 (the Act). This consolidated and replaced the previous discrimination legislation for England, Scotland and Wales. The Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The Act also introduced a new Public Sector Equality Duty (PSED), which came into force on 5th April 2011. The PSED replaced the race, disability and gender equality duties. The first of these duties, the Race Equality Duty was introduced in 2001 and was part of the response to the racist murder of the black teenager, Stephen Lawrence. Following failures in the investigation by the Metropolitan Police it was clear that the approach public sector organisations were taking towards addressing discrimination and racism needed to change. For the first time the Race Equality Duty placed an obligation

on public authorities to proactively think about how they could avoid discrimination, and advance equality.

Scope of our submissions

These submissions cover the Public Sector Equality Duty as set out in Part 11 of the Act. They also cover The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 as amended (the specific duties regulations) which impose specific duties on certain public authorities listed in the specific duties regulations.

These submissions are intended to provide a broad overview of the duties in the Equality Act 2010 with specific reference to the Public Sector Equality Duty and Equality Impact Assessment obligations. We will comment on these in relation to:

- Police Scotland
- The Police and Investigation Review Commissioner (PIRC)
- The Crown Office and Procurator Fiscal Service (COPFS)

In addition at Annex A a summary is provided of the Commission's report 'Human Rights framework for restraint' published March 2019 and at Annex B a summary of the Commission's report 'Unconscious bias training: An assessment of the evidence for effectiveness' published in March 2018 is also provided.

Human rights

Public authorities, and other organisations when they are carrying out ‘functions of a public nature’, have a duty under the Human Rights Act 1998 (HRA) not to act incompatibly with rights under the European Convention for the Protection of Fundamental Rights and Freedoms (the Convention). The Public Sector Equality Duty uses the same definition of functions of a public nature as the HRA.

Because of the close relationship between human rights and equality, it is good practice for those exercising public functions to consider equality and human rights together when drawing up equality or human rights policies. In Scotland the Commission shares its mandate with the Scottish Human Rights Commission, and accordingly these submissions only address equality obligations.

The Public Sector Equality Duty

The purpose of the Public Sector Equality Duty

The purpose of the Public Sector Equality Duty is to ensure that public authorities and those carrying out a public function consider how they can positively contribute to a more equal society through advancing equality and good relations in carrying out their day-to-day business and duties, to:

- take effective action on equality
 - make the right decisions, first time around
 - develop better policies and practices, based on evidence
 - be more transparent, accessible and accountable
 - deliver improved outcomes for all

The Public Sector Equality Duty requires equality to be considered in all the functions of public authorities, including in decision-making, in the design of internal and external policies and in the delivery of services, and for these issues to be kept under review.

The Public Sector Equality Duty is set out in sections 149–157 and schedules 18 and 19 of the Equality Act 2010.

The General Equality Duty

We refer to the Public Sector Equality Duty as set out in the Equality Act 2010 as the 'general equality duty'. The general equality duty requires public authorities, in the exercise of their functions, to have due regard to the need to:

- **Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct**
- **Advance equality of opportunity between people who share a relevant protected characteristic and those who do not share it**
- **Foster good relations between people who share a protected characteristic and those who do not.**

These submissions refer to these three elements as the three 'needs' mentioned in the general equality duty and so when we discuss the general equality duty we mean all three needs. To comply with the general equality duty, a public authority must have due regard to all three of its needs. The Equality Act explains that the second need (advancing equality of opportunity) involves, in particular, having due regard to the need to:

- **Remove or minimise disadvantage suffered by people due to their protected characteristics**
- **Take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people**

- **Encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.**

The Act also sets out that:

- **meeting different needs includes (among other things) taking steps to take account of disabled people's disabilities**
- **fostering good relations means tackling prejudice and promoting understanding between people from different groups**
- **meeting the general equality duty may involve treating some people more favourably than others.**

What is the purpose of the Public Sector Equality Duty?

The broad aim of the general equality duty is to integrate consideration of the advancement of equality into the day-to-day business of all bodies subject to the duty.

The general equality duty is intended to accelerate progress towards equality for all, by placing a responsibility on bodies subject to the duty to consider how they can work to tackle systemic discrimination and disadvantage affecting people with particular protected characteristics.

The Act recognises that not everyone's needs or experiences are the same and that equality does not mean always treating everybody in exactly the same way. For everyone to have an equal opportunity to

achieve their full potential, they need to be free from any artificial barriers, such as prejudice or a failure to respond to the specific needs of people with different protected characteristics.

The second need of the duty in particular reflects this by requiring relevant bodies to have due regard to the need to minimise or remove disadvantages; to take steps to meet the different needs of people with different protected characteristics; and by encouraging participation in activities by those whose participation is disproportionately low.

The Act makes it clear that in some circumstances compliance with the general equality duty may involve treating some persons more favourably than others, but not where this would be prohibited by the other provisions of the Act.

Compliance with the duty should result in:

- better-informed decision making and policy development
- a clearer understanding of the needs of service users, resulting in better quality services which meet varied needs
- more effective targeting of policy, resources and the use of regulatory powers
- better results and greater confidence in, and satisfaction with, public services
- a more effective use of talent in the workforce, and
- a reduction in instances of discrimination and resulting claims.

Legal responsibility

Within each body subject to the duty the legal responsibility for a failure to comply with the general equality duty (and where appropriate the specific duties) will rest with the person or body who has overall responsibility for the body's acts or failures to act. This includes, for example, a government minister, a chief inspector, a group of commissioners, or a board, authority, commission or council.

Who is subject to the General Equality Duty?

The general equality duty covers all public authorities named or described (listed) in Schedule 19 – Part 3 of the Equality Act 2010 as amended by subsequent regulations. Examples of these include local authorities, education authorities, health boards, police, fire and rescue authorities, further and higher education authorities and Scottish Ministers.

It covers public authorities when carrying out their public functions as service providers, as policy makers and as employers and also covers services and functions which are contracted out. The duty also covers all bodies carrying out a public function in relation to that function, where the 'public function' is one defined as such by the Human Rights Act 1998. This includes private and voluntary sector organisations. An example of this would be a private company running a prison on behalf of the Scottish Government. The company would, however, only be covered by the general equality duty with regard to its public functions, but not for other work, such as providing security services for a car

park. In these submissions, when we refer to public authorities subject to the general equality duty, this includes listed authorities as well as public authorities who are covered when they carry out public functions.

Police Scotland, the Police Investigations and Review Commissioner (PIRC) and the Crown Office and Procurator Fiscal Service (COPFS) are all subject to the general equality duty.

Implementing the general duty

In order to meet the general duty, a public authority must keep in mind that:

- Those who exercise its functions must be aware of the general equality duty's requirements. Compliance with the general equality duty involves a conscious approach and state of mind. General regard to the issue of equality is not enough to comply.
- The duty places equality considerations, where they arise, at the centre of policy formulation, side by side with all other pressing circumstances (such as financial constraints), however important these might be.
- The duty is on the decision maker personally in terms of what he or she knew and considered. A decision maker cannot be assumed to know what was in the minds of his or her officials giving advice on the decision.

- Each need of the duty must be considered. The requirement to have due regard to the need to advance equality of opportunity is a separate obligation, in addition to the need to avoid unlawful discrimination.
- The general equality duty must be complied with before and at the time a particular policy is under consideration, as well as at the time a decision is taken. A public authority subject to the general equality duty cannot satisfy the general equality duty by justifying a decision after it has been taken.
- A public authority must consciously think about the need to do the things set out in the general equality duty as an integral part of the decision-making process. Having due regard is not a matter of box ticking. The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision. There should be evidence of a structured attempt to focus on the details of equality issues.
- A public authority must have sufficient evidence on which to base its consideration of the impact of a policy or decision. It will need to consider whether it has sufficient information about the effects of the policy, or the way a function is being carried out, on the needs set out in the general equality duty.
- A public authority must take responsibility for complying with the general equality duty in relation to all functions to which the general equality duty applies. Responsibility for the general equality duty cannot be delegated to external organisations that are carrying out functions on its behalf.
- A public authority must consciously consider the need to comply with the general equality duty, not only when a policy is developed and

decided upon, but also when it is being implemented. The general equality duty is a continuing one, so public authorities may need to review policies or decisions in light of the general equality duty, for example if the make-up of service users changes.

- Although a public authority is not legally required to keep records of its consideration of the needs of the general equality duty in making decisions, it is good practice to do so and it encourages transparency. If it is challenged it will be difficult to demonstrate that it has had due regard to the needs of the general equality duty if records are not kept. The general equality duty applies to the exercise of all public functions. The duty applies to all of the decisions made in the course of exercising public functions, not just to policy development and high-level decision-making.

To ensure compliance with the duty at all levels of decision-making (including in an individual case), there must be arrangements to integrate it properly into the day- to-day activities of those bodies to which it applies.

Who needs to be aware of the General Equality Duty and Specific Duties?

It is important for people throughout public bodies to be aware of the general equality duty, so that it is considered in their work where relevant.

The courts have also made it clear that the general equality duty applies not only when overall strategies are made, but also when individual decisions that implement those strategies are made.

This means that the general equality duty will apply to decisions made by the employees or agents of bodies subject to the duty in their day-to-day activities. Bodies subject to the duty will need to decide how they will enable those working for them to be aware of their responsibilities under the general equality duty.

Although the duty applies to individual decisions as well as policy formulation, this does not mean that what the duty requires those exercising the function to do in both these situations is the same. The courts have made it clear that the regard due when exercising a function will depend on the circumstances in which the function is being exercised.

The Specific Duties

The specific duties were created by secondary legislation in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These specific duties came into force on 27 May 2012 and were subsequently amended by:

- The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2015
- The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016

The purpose of the Specific Duties

The purpose of the specific duties in Scotland is to help those authorities listed in the Regulations in their performance of the general equality duty.

Who is subject to the Specific Duties?

Many of the authorities that are subject to the general duty are also covered by the specific duties. These listed authorities are named or described in the Schedule to the Regulations and subsequent regulations.

The Specific Duties in summary

Each listed authority is required to comply with the specific duties. These duties include the following:

- to report on mainstreaming the equality duty
 - to publish equality outcomes and report progress
- to assess and review policies and practices
- to gather and use employee information
- to publish in a manner that is accessible.

There are also specific duties relating to equal pay and gender pay gap reporting.

Additionally, there is a requirement for a listed authority to consider other matters which may be specified by the Scottish Ministers and a duty for the Scottish Ministers to publish proposals for activity to enable listed authorities to better perform the general equality duty.

What the Specific Duties require

Duty to report on mainstreaming the equality duty

A listed authority is required to publish a report on the progress it has made to make the general equality duty integral to the exercise of its functions, so as to better perform that duty. These should be published at intervals of not more than two years.

Duty to publish equality outcomes and report progress

A listed authority is required to publish a set of equality outcomes which it considers will enable it to better perform the general equality duty. In preparing a set of equality outcomes, the authority must take reasonable steps to involve people who share a relevant protected characteristic and anyone who appears to the authority to represent the interests of those people. The authority must also consider relevant evidence relating to people who share a relevant protected characteristic. If an authority's set of outcomes does not further the needs of the general equality duty in relation to every relevant protected characteristic, it must publish the reasons for this.

Duty to assess and review policies and practices

A listed authority is required to assess the impact of applying a proposed new or revised policy or practice with reference to the requirements of the general equality duty, in so far as is needed to meet the general equality duty.

In making the assessment, an authority must consider relevant evidence relating to people who share a protected characteristic (including any evidence received from those people). In developing a policy or practice, an authority must take account of the results of their assessment of that policy or practice. If an authority decides to apply the policy or practice in question, it must publish the results of the assessment, within a reasonable time. An authority must also make arrangements to review and, where necessary, revise any existing policies or practices. An authority's consideration of whether or not an

assessment of impact is needed cannot be treated as an assessment itself.

Duty to gather and use employee information

A listed authority is required to take steps to gather information on the composition of its employees (if any); as well as annual information on the recruitment, development and retention of employees with respect to the number and relevant protected characteristics of employees. Importantly, the authority must use this information to better perform the general equality duty.

Duty to use information on the protected characteristics of members

Scottish Ministers are required, from time to time, to gather information on the protected characteristics of the members (or board of management) of listed authorities and will provide the information they gather to that listed authority. Each listed authority must then use the information to better meet their general equality duty.

Duty to publish gender pay gap information

A listed authority is required to publish information every two years on the percentage difference, among its employees, between men's average hourly pay (excluding overtime) and women's average hourly pay (excluding overtime).

Duty to publish statements on equal pay, etc.

A listed authority is required to publish a statement on equal pay every four years.

Duty to publish in a manner that is accessible, etc.

If it has existing public performance reporting systems a listed authority is required to use these, as far as practicable, to publish its:

- report on mainstreaming the equality duty
- set of equality outcomes and report on progress made to achieve these outcomes
- gender pay gap information
- statement on equal pay and occupational segregation.

The reports must also be accessible to the public.

Duty of the Scottish Ministers to publish proposals to enable better performance

Scottish Ministers must publish proposals for activity to enable a listed authority to better perform the general equality duty.

Police Scotland and the PSED

Police Scotland was established on 1st April 2013 and is responsible for policing across the whole of Scotland.

Police Scotland are and were, as at May 2015, subject to the Public Sector Equality Duty and to the Specific Duties.

Compliance with the PSED should be seen as an essential part of internal and external policy development processes by all public authorities, including Police Scotland, the Scottish Police Authority (SPA), and the Police Investigations and Review Commissioner (PIRC).

The PSED should be seen by all relevant public authorities as a critical framework for addressing equality.

The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 place additional obligations on listed public authorities – including Police Scotland – to support their compliance with the general duty. This includes a requirement to **“assess the impact of applying a proposed new or revised policy or practice against the needs”** of the general duty. Such an assessment is known as an Equality Impact Assessment (EIA). Assessing impact will be addressed below.

In general, in order to comply with the PSED we would expect Police Scotland to analyse a proposed policy from an equality perspective and identify potential for inequality and disadvantage at an early stage through ongoing public engagement that is meaningful and accessible. We would then expect changes or amendments to that

policy based on the assessment and continuing review as the policy or practice is implemented.

Police Investigations and Review Commissioner (PIRC) and the PSED

The role of the PIRC is to carry out independent investigations into certain incidents involving the police. The PIRC also reviews how policing bodies in Scotland have handled complaints made about them by the public. The PIRC ensures that Police Scotland and the Scottish Police Authority (SPA) have suitable systems in place for handling complaints.

As Scotland has a single police service, to maintain public confidence in policing it is essential that there is an independent body to investigate certain serious incidents involving the police and to examine the way in which the police deal with complaints made to them by the public.

In carrying out these functions the PIRC is subject to the PSED but is not subject to the Specific duties.

For example, the three needs of the PSED should be at the forefront when investigating claims of discrimination within the police complaints system, when reviewing the handling of police complaints or undertaking investigations into the actions or omissions of the police, including criminal allegations and that the PIRC retains the confidence of all communities and groups by doing so.

COPFS and the PSED

The Crown Office and Procurator Fiscal Service (COPFS) is Scotland's prosecution service and death investigation authority. COPFS receives reports about crimes from the police and other reporting agencies and then decides what action to take.

It also looks at deaths that need further explanation and also investigates allegations of criminal conduct against police officers.

Its decisions are made independently and in the public interest.

In carrying out these roles the COPFS is subject to both the PSED and the Specific Duties.

Assessing impact

The requirement to assess impact means that a public body such as Police Scotland, PIRC or COPFS must consider how a policy will impact on the needs of the general equality duty.

The PIRC is covered only by the general equality duty and is not required to assess the equality impact of policies or practices. That was also the case in 2015. However, the principles of assessing impact may help a body to meet the requirement to have due regard to the needs of the general equality duty and to demonstrate compliance.

Police Scotland and COPFS are subject to the specific duty to assess proposed new or revised policies and are required to:

- assess the impact of applying a proposed new or revised policy or practice against the needs of the general equality duty to the extent necessary to fulfil the general equality duty,
- consider relevant evidence when making the assessment relating to people who share a protected characteristic (including any evidence received from these groups).
- take account of the results of any assessment in respect of that policy or practice when it is being developed.
- publish, within a reasonable period, the results of the assessment if it decides to apply the policy or practice.

In making the assessment the body must consider relevant evidence, including evidence received from equality groups (that is groups who

share a particular protected characteristic). Having considered all of these elements, it must take account of the results of such assessments.

This requires it to consider taking action to address any issues identified, such as removing or mitigating any negative impacts, where possible, and exploiting any potential for positive impact. If any adverse impact amounts to unlawful discrimination, the policy must be amended to avert this.

Why assess impact?

The specific duty to assess impact is intended to be carried out within a listed authority's existing systems and frameworks and to improve outcomes for those who experience discrimination and disadvantage. Assessing impact is an effective way of improving policy development and service delivery, making sure that a body such as Police Scotland considers the needs of its employees and the communities it serves, identifies potential steps to advance equality and foster good relations, and does not discriminate unlawfully.

Assessing impact enables a body to:

- **Take effective action on equality**

Preventing unlawful treatment, advancing equality and fostering good relations requires more than just avoiding certain actions and behaviour. Proactive steps should be taken to identify potential discrimination and to prevent it, and to consider how a policy or practice can be adapted to better advance equality. Policies should meet the needs of staff and the population they serve. They should

also make sure there is equal access and opportunity for all, while recognising that providing the same service in the same way to everyone can sometimes create a disadvantage for those with different needs.

- **Develop better policies and practices, based on evidence**

A policy or practice which proactively considers equality, particularly through the use of evidence, is likely to be a better quality policy or practice because it should be more responsive to the needs of all those affected. Assessing impact provides a mechanism to build equality considerations into policy and decision making, providing a clear and structured way to consider evidence about the needs of equality groups.

- **Be more transparent and accountable**

Assessing the impact of policies allows a body to demonstrate to stakeholders that it has considered equality in carrying out its functions. It will be better equipped to respond to any queries or challenges from stakeholders.

Which policies should be impact assessed?

The duty to assess impact applies to new or revised policies as well as to existing policies. However, this does not mean that everything an authority does requires a detailed assessment of impact.

The extent to which policies should be subject to assessment will depend on questions of relevance and proportionality. It will also need to assess the impact of the way a policy is implemented by the

organisation, even when it has originally been developed outside of that organisation – for example if a national strategy has been introduced.

This will help to ensure that the implications of the policy for the organisation, services and community are known. Having due regard to equality across all of a body's functions may also involve assessing impact against the three needs of the general equality duty.

When should impact be assessed?

Assessing impact is not an end in itself but should form an integral part of policy development and decision-making. The regulations say that it is the impact of applying a proposed new or revised policy that must be assessed. This means the assessment process must happen before a policy is decided. The assessment cannot be retrospective, or undertaken near the end of the process, but should instead be integral to the earliest stage of the development of proposed policies or practices, and also in the revision of existing policies or practices.

Assessing impact does not end with the introduction of the new or revised policy; it is important to monitor the actual impact of the policy as it is implemented and revisit the assessment as part of any review.

Therefore, assessment of impact should be considered to be an ongoing, end-to-end process, from early discussions right through to the final decision about whether to go ahead with a policy or service change and beyond, to monitoring the actual impact of the implementation.

Annex A: Summary – Human Rights Framework for restraint

EHRC report ‘Human Rights framework for restraint’ (<https://www.equalityhumanrights.com/sites/default/files/human-rights-framework-restraint.pdf>), published March 2019:

The framework sets out the key human rights principles relating to the use of restraint contained in the European Convention on Human Rights (ECHR), including Article 3 (prohibition on torture, inhuman and degrading treatment, Article 8 (respect for autonomy, physical and psychological integrity) and Article 14 (non-discrimination). The framework is intended to be a starting point for organisations or bodies to develop more comprehensive sector-specific guidance.

An act of restraint must comply with these basic legal principles when it is carried out by a person performing a public function or providing a public service.

The framework defines restraint as an act carried out with the purpose of restricting an individual’s movement, liberty and/or freedom to act independently. This includes chemical, mechanical and physical forms of control, coercion and enforced isolation.

It is never lawful to restrain someone in such a way that amounts to torture, inhuman or degrading treatment. Restraint may be lawful when it complies with the following requirements:

- There must be a legal framework which includes a power authorising the use of restraint in the individual's circumstances and for the intended purpose of the restraint. The circumstances must be clearly defined with procedural safeguards and the purpose must fall within one of the grounds set out in Article 8(2) of the ECHR.
- Where restraint is used within the legal framework, the aim of the restraint must meet the purpose of the legal power and there must be a rational connection between the restraint method and the aim.
- The means of restraint and duration must be no more than necessary to accomplish the aim.
- There must be procedural safeguards including adequate training and regular review of any anticipated restraint, including reasonable adjustments that could be taken to avoid the use of restraint. Use of restraint should be recorded and data analysed to identify whether discrimination is occurring in its use.

The rights outlined must be effective.

Annex B: Summary – Unconscious bias training: An Assessment of the evidence for effectiveness

EHRC report ‘Unconscious bias training: An assessment of the evidence for effectiveness’

(<https://www.equalityhumanrights.com/our-work/our-research/unconscious-bias-training-assessment-evidence-effectiveness>, published March 2018).

The report aims to answer the question “What is the evidence for the effectiveness of unconscious bias training?” by identifying and evaluating available relevant evidence. We note that the report was referred to by CRER in their interim closing submissions of June 2023 at paragraph 276.

The report explains that unconscious biases, unlike conscious biases, are views and opinions that we are unaware of; they are automatically activated and frequently operate outside conscious awareness and affect our everyday behaviour and decision making.

Unconscious bias training (UBT) aims to increase awareness of unconscious bias and its effect on those with protected characteristics under the Equality Act 2010, to reduce both unconscious and explicit bias and to change behaviour.

The report explains what the format of unconscious bias training usually entails, i.e. an unconscious bias test and education on the impact of unconscious bias and how to reduce this.

The report found that there was a mixed picture regarding the effectiveness of UBT and a need for more research in this area. The key findings included:

UBT is effective for awareness raising by using an Implicit Association Test (IAT) (a reaction-time measure of how quickly a participant can link positive and negative responses to labels such as 'male' or 'female') followed by a debrief or more advanced training designs such as interactive workshops.

UBT can be effective for reducing unconscious bias, but it is unlikely to eliminate it.

UBT interventions are not generally designed to reduce conscious bias (such as overt racism or sexism) and those that do aim to do so have shown mixed results.

Using the IAT and educating participants on unconscious bias theory is likely to increase awareness of and reduce unconscious bias.

The evidence for UBT's ability effectively to change behaviour is limited.

There is potential for back-firing effects when UBT participants are exposed to information that suggests stereotypes and biases are unchangeable.

Evidence from the perspective of the subjects of bias, such as those with protected characteristics, is limited. This evidence could provide additional information on potential back-firing effects.

