

## LAW AND PRACTICE NOTE: RACE AND THE EQUALITY ACT 2010

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## 1. Introduction

The Inquiry's terms of reference set out "*to establish the extent (if any) to which the events leading up to and following Mr Bayoh's death, in particular the actions of the officers involved, were affected by his actual or perceived race and to make recommendations to address any findings in that regard*". In order to carry out this exercise, the Inquiry will require to assess the extent of compliance, of the relevant public bodies, with their obligations under the Equality Act 2010 including the Public Sector Equality Duty as set out in section 149. The following paragraphs contain an overview of the Equality Act 2010 as it applies to the above noted terms of reference.

## 2. Legislative background

The enactment of discrimination law in the United Kingdom can be traced back to the Race Relations Acts of 1965<sup>1</sup>. The 40 years that followed saw the development of discrimination law as a distinct area, with over 116 separate items of legislation enacted in this period<sup>2</sup>. This legislation expanded protection from discrimination on the grounds of race and ethnicity, to a number of other characteristics such as sex and disability<sup>3</sup>. In relation to race, the Race Relations Act 1965 was followed by the Race Relations Act 1968, extending the protection beyond public places to other contexts such as employment and housing, and the Race Relations Act 1976, which prohibited indirect race discrimination and established the Commission for Racial Equality<sup>4</sup>. The impetus for the rapid development of discrimination law in the UK came from both domestic policy initiatives and European Union Directives<sup>5</sup>. In 2010, the legislation was consolidated into a single act: the Equality Act 2010.

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<sup>1</sup> Equality Act 2010 (c15) Explanatory Notes *Revised Edition August 2010* p2-4, <https://www.legislation.gov.uk/ukpga/2010/15/notes/division/2> [accessed: 25/05/24]

<sup>2</sup> 'A History of Human Rights in Britain' EHRC website, <https://www.equalityhumanrights.com/human-rights/what-are-human-rights/history-human-rights-britain> [accessed: 25/05/24]

<sup>3</sup> Equality Act 2010 (c15) Explanatory Notes *Revised Edition August 2010* p2-4, <https://www.legislation.gov.uk/ukpga/2010/15/notes/division/2> [accessed: 25/05/24]

<sup>4</sup> 'An early history of British race relations legislation', House of Commons Library website, <https://researchbriefings.files.parliament.uk/documents/CBP-8360/CBP-8360.pdf> [accessed: 25/05/24]

<sup>5</sup> Ibid

The 2010 Act not only re-stated the protections afforded by earlier legislation but also expanded on these protections in a number of respects, including the creation of the Public Sector Equality Duty (“PSED”)<sup>6</sup>. The PSED streamlined and collated similar duties placed on public authorities in earlier discrimination legislation, including the Race Equality Duty (established in 2002), as well as extending it to cover other protected characteristics.<sup>7</sup>

### 3. What is meant by “race”?

Section 9 of the Equality Act 2010 provides that:

*(1) Race includes—*

*(a) colour;*

*(b) nationality;*

*(c) ethnic or national origins.*

*(2) In relation to the protected characteristic of race—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;*

*(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.*

*(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.*

*(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.*

The listed concepts of colour, nationality, ethnic or national origins at s.9(1) are non-exhaustive and are interpreted broadly and flexibly.

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<sup>6</sup> Ibid; also ‘The Essential Guide to the Public Sector Equality Duty: A guide for public authorities in Scotland’ EHRC website, <https://www.equalityhumanrights.com/sites/default/files/2021/PSED-scotland-essential-guide-public-sector-equality-duty.docx> [accessed: 25/05/24]

<sup>7</sup> Ibid

In *Mandla v Dowell Lee*<sup>8</sup>, the House of Lords held that Sikhs constituted a racial group by reference to their ethnic origins for the purposes of the Race Relations Act 1976. Lord Fraser commented that “*within the human race, there are very few, if any, distinctions which are scientifically recognised as racial*”<sup>9</sup>, and instead emphasised that an ethnic group might be recognised by its self-externally-perceived cultural and historic ties: “*an historically determined social identity in their own eyes and in the eyes of those outside the group*”<sup>10</sup>. This can be seen as an early acknowledgement of the concept now commonly referred to as *racialisation*<sup>11</sup>. In *Abbey National Plc v Chagger*<sup>12</sup>, Underhill J sitting the Employment Appeal Tribunal noted at that “*in the real world*”, discrimination on grounds of colour, race, nationality or ethnic or national origins will overlap to a very considerable, and often indistinguishable, extent.<sup>13</sup> One individual may experience discrimination as a member of multiple different racial groups depending on the circumstances<sup>14</sup>.

In addition to Sikhs (in *Mandla*), Jewish people have been recognised as an ethnic group, in the context of a case where Jewish matrilineal descent was a prerequisite for school admission<sup>15</sup>. By contrast in *Dawkins v Crown Suppliers (PSA)*<sup>16</sup>, the Court of Appeal held that Rastafarians were not a racial group because they did not hold an identity based on ethnic origin. The same reasoning has been applied, albeit only at first instance, to Muslims<sup>17</sup>. Religion is now a characteristic accorded separate protection under the Equality Act 2010 and so the distinction is less likely to give rise to discussion.

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<sup>8</sup> [1983] 2 AC 548

<sup>9</sup> Ibid at p.561

<sup>10</sup> Ibid at p.564

<sup>11</sup> A definition for racialisation is provided in SBPI-00597 p.xii

<sup>12</sup> [2010] ICR 624

<sup>13</sup> Ibid at §32. Decision reversed in part on appeal to the Court of Appeal ([2010] ICR 397), on grounds not touching this part of Underhill J's reasoning.

<sup>14</sup> For example, in *Orphanos v Queen Mary College* [1985] AC 761 the House of Lords held that the claimant was entitled to pursue a claim for treatment done variously on the grounds that he was Greek Cypriot, a non-UK national and a non-EC national.

<sup>15</sup> *R (E) v Jewish Free School Governing Body* [2010] 2 AC 728. Albeit not where the reason for the treatment complained of is the engagement (or lack of engagement) in Orthodox Jewish religious observance, rather than descent: *R(Z) v Hackney LBC* [2020] 1 WLR 4327.

<sup>16</sup> [1993] ICR 517

<sup>17</sup> *Commission for Racial Equality v Precision Manufacturing Services Ltd* ET Case No.4106/91 and *Mahomed v Guy Leisure Ltd* ET Case No.1901952/02; both cited in *IDS Employment Law Handbooks* Volume 5 §10.29.

Protection extends to *perceived* race. The explanatory notes to the Act provide the following example of direct race discrimination:

*“If an employer rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer’s mistaken perception.”*<sup>18</sup>

It also extends to *association* with the protected characteristic of race. In *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent*<sup>19</sup>, a company had a policy of not hiring cars to people who were not white. Mrs Sargent, a white employee in the company, objected and lost her job. She was able to successfully bring a race discrimination claim<sup>20</sup>.

It follows that should an individual’s colour and / or perceived ethnic or national origin cause an assumption to be made about that person’s religion, which in turn results in less favourable treatment, this could amount to discrimination on grounds of race as well as religion.

There is no reference in the Equality Act 2010 to the concepts of *structural racism* or *institutional racism*<sup>21</sup>. There has been judicial caution about the use of these terms when drawing inferences about individual motivation<sup>22</sup>, although the Court of Appeal has noted that:

*“Authoritative material showing that discriminatory conduct or attitudes are widespread in the institution may, depending on the case, make it more likely that the alleged conduct occurred, or that the alleged motivations were operative.”*<sup>23</sup>.

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<sup>18</sup> Equality Act 2010, Explanatory Notes, Commentary on Section 13

<sup>19</sup> [1999] ICR 425

<sup>20</sup> This is an example of direct discrimination. The harassment provisions at s.26 Equality Act 2010 also cover perceived and associated race. Associative indirect discrimination is prohibited by s.19A Equality Act 2010. The victimisation provisions at s.27 Equality Act 2010 protect anyone who complains of race discrimination, whether on their own behalf or on behalf of someone else.

<sup>21</sup> Definitions for structural racism and institutional racism are provided in SBPI-00597 at p.xii

<sup>22</sup> *Stockton on Tees BC v Aylott* [2010] ICR 1278 at §49

<sup>23</sup> *Chief Constable of Greater Manchester v Bailey* [2017] EWCA Civ 425 at §99

It has also been argued that structural forms of racism can be missed by courts and tribunals because of an entrenched view that discrimination is perpetrated by individuals, whereas a better understanding would encompass: “...*the long process of racialisation starting from the point when the State frames its power using proxies such as criminality and immigration, which are in turn based on a racialised view of the world. These proxies seem to evade scrutiny because they do not seem to be sufficiently linked to ‘race’ as defined in the Equality Act. But these proxies can, in principle, be read into race discrimination by, first, taking a sufficiently broad and interconnected view of the current indices used to track ‘race’ under section 9(1) of the Equality Act, i.e. colour, nationality, and ethnic or national origins*”<sup>24</sup>.

A detailed discussion of these concepts is outwith the scope of this Note but is contained in SBPI-00597 Sheku Bayoh Public Inquiry Expert Report for Hearing on Race by Prof. Nasar Meer.

#### **4. What is meant by “equality”?**

Equality is often cited as the goal of discrimination law, however, there is no definition of the term “equality” set out in the Equality Act 2010 and there are differing definitions of what equality might mean and how it should be measured or assessed. The concept is highly contested<sup>25</sup>. A specialist on the theory of discrimination law, Prof. Tarunabh Khaitan, states that is that anti-discrimination frameworks seek to:

*“...reduce (and ultimately remove) any significant advantage gap between a protected group and its cognate groups...There may be considerable opacity between precise rules of antidiscrimination and this overall purpose. But the practice of discrimination law, on the whole, is geared towards achieving this goal”*<sup>26</sup>.

Further discussion of concepts of equality will be explored in expert evidence to the Inquiry.

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<sup>24</sup> Atrey, Shreya, “Structural Racism and Race Discrimination”, *Current Legal Problems*, Vol. 74 (2021), p18, <https://academic.oup.com/clp/article/74/1/1/6386395>

<sup>25</sup> Stanford Encyclopaedia of Philosophy: <https://plato.stanford.edu/entries/equality/#FormEqua> [accessed 25/05/24]

<sup>26</sup> Khaitan, Tarunabh, *A Theory of Discrimination Law*, (Oxford: 2016), p 121

## **5. In what contexts is discrimination prohibited?**

The Equality Act 2010 prohibits discrimination on the basis of nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, and sexual orientation<sup>27</sup>. Relevantly to this Inquiry, section 29 prohibits discrimination in the provision of services and the exercise of public functions. Service providers are those who provide a service to the public or a section of the public (for payment or not)<sup>28</sup>, including by providing goods or facilities<sup>29</sup> and including in the exercise of a public function<sup>30</sup>. A public function is defined as a function that is a function of a public nature for the purposes of the Human Rights Act 1998<sup>31</sup>.

The Equality Act 2010 also covers discrimination in relation to premises (Part 4); work (Part 5); education (Part 6) and associations (Part 7). The provisions contained within the Act are enforceable against private entities and individuals, as well as public authorities<sup>32</sup>, with the exception of the PSED<sup>33</sup>.

## **6. What types of discrimination are prohibited?**

The Equality Act 2010 prohibits different types of race discrimination: direct discrimination, indirect discrimination, harassment and victimisation. This note primarily focusses on two of these forms of discrimination: direct and indirect discrimination.

### *6.1 Direct race discrimination*

The prohibition of direct discrimination is found in Section 13 of the Equality Act 2010:

*“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”*

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<sup>27</sup> Equality Act 2010, s.4

<sup>28</sup> Equality Act 2010, s.29(1)

<sup>29</sup> Equality Act 2010, s.31(2)

<sup>30</sup> Equality Act 2010, s.31(3)

<sup>31</sup> Equality Act 2010, s.31(4)

<sup>32</sup> Equality Act 2010, s.114

<sup>33</sup> Equality Act 2010, s.156

The two aspects of the definition, *less favourable treatment* and *treatment done because of race*, are interrelated.

#### 6.1.1 Comparators in direct discrimination

The concept of *less favourable treatment* envisages a comparison with someone who is treated *more* favourably. For the purposes of the Equality Act 2010, a comparator is a person who does not share the claimant's protected characteristic but is in otherwise materially similar circumstances<sup>34</sup>. That does not mean the comparator needs to be identical to the claimant<sup>35</sup>. The question whether a comparator is appropriate is one of "*fact and degree*"<sup>36</sup>. The comparator can be a real person or a hypothetical construct, used by the court or tribunal to assess whether a person of a different race *would have been* treated more favourably if put in the same situation. Where a real person was treated differently from the claimant in circumstances which differ materially from those of the claimant, consideration of the differences may help to inform the construction of a hypothetical comparator. In *Watt v Ahsan*<sup>37</sup>, Lord Hoffmann said:

*"It is probably uncommon to find a real person who qualifies ... as a statutory comparator. Lord Rodger's example... of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have*

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<sup>34</sup> Equality Act 2010, s.23(1)

<sup>35</sup> See e.g. *SRA v Mitchell* UKEAT/0497/12 at §22

<sup>36</sup> *Hewage v Grampian Health Board* [2012] ICR 1054 at §22

<sup>37</sup> [2008] ICR 82



*treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.”*<sup>38</sup>

Note that the evidential value of a comparator will be weaker the greater the material difference in circumstances is<sup>39</sup>.

However, where the reason for the treatment is clear, the analytical process of constructing and considering a hypothetical comparator can be dispensed with. In *Shamoon v Chief Constable of the Royal Ulster Constabulary*, Lord Nicholls held that in some cases it is appropriate to consider the reason for the treatment, without first determining whether there has been less favourable treatment:

*“No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.”*<sup>40</sup>

Where it is possible to make a positive finding that an individual’s race was the reason for the treatment complained of, it would follow that a person of a different race would have been treated differently.<sup>41</sup> Conversely, where a positive finding is made that the reasons for the treatment had nothing to do with race, it would follow that a comparator in materially similar circumstances would be treated in the same way. In *Islington London Borough Council v Ladele*<sup>42</sup>, Elias P held that *“In some cases it may be appropriate for the tribunal simply to focus on the reason given by the [respondent]”*<sup>43</sup>.

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<sup>38</sup> Ibid at §36

<sup>39</sup> *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at §110

<sup>40</sup> Ibid at §8

<sup>41</sup> *JP Morgan Europe Ltd v Chweidan* [2012] ICR 268 per Elias LJ at §5

<sup>42</sup> [2009] ICR 387

<sup>43</sup> Ibid at §40. See also *Amnesty International v Ahmed* [2009] ICR 1450 per Underhill P at §33 and *Kalu v Brighton & Sussex University Hospitals NHS Trust* [2014] Eq LR 488 at 28: *“Where... the reason for the treatment is established, on balance of probability, to the satisfaction of the Tribunal it becomes unnecessary to ask for a real or a hypothetical comparator.”*

While it is not an error of law to dispense with constructing a hypothetical comparator, doing so can provide a helpful sense-check<sup>44</sup>.

### 6.1.2 The 'reason why' – conscious or subconscious

The overarching question therefore is the reason why the respondent treated the claimant in the manner complained of; was it because of race?

It is sufficient that race had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the treatment.<sup>45</sup> The Court of Appeal has clarified that 'significant influence' means "*an influence which is more than trivial*".<sup>46</sup>

The test is a subjective one and the case law recognises that the race may consciously or unconsciously affect the mental processes of the decision-maker. In *Nagarajan*, Lord Nicholls held that:

*"All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did."*<sup>47</sup>

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<sup>44</sup> *Law Society v Bahl* [2003] IRLR 640 (approved by the Court of Appeal [2004] IRLR 799) per Elias P at §114: "*whilst it is not necessary for tribunals to specify with precision the hypothetical comparator, they may find it helpful provisionally to try to do so in order to identify any potentially relevant explanations which might account for the difference in treatment. Whether they do account for it or not will depend upon the evidence which emerges during the trial.*"

<sup>45</sup> *Nagarajan v London Regional Transport* [2000] 1 AC 501 at 513

<sup>46</sup> *Igen Ltd v Wong* [2005] ICR 931 at §37

<sup>47</sup> *Nagarajan v London Regional Transport* [2000] 1 AC 501 at 511-512

As Linden J observed in *Gould v St John's Downshire Hill*<sup>48</sup>, the potential for prejudicial biases to operate subconsciously means that a witness's honest evidence as to their reasons may not provide a court or tribunal with a complete answer to the 'reason why' question:

*"Given that a prohibited characteristic may subconsciously influence a decision-maker, this does not necessarily mean that the court or tribunal is merely deciding whether the evidence of the decision-maker is truthful. As Lord Nicholls noted... the alleged discriminator may be mistaken in their denial that they acted on prohibited grounds because they have not appreciated that they were influenced by the protected characteristic or step. The honesty of a witness who denies that they acted on prohibited grounds is therefore relevant but it cannot, of itself, be decisive."*<sup>49</sup>

Lord Nicholls later went on to further discuss causation in discrimination cases in *Chief Constable of West Yorkshire Police v Khan*<sup>50</sup>:

*"Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*<sup>51</sup>

### 6.1.3 Perceived race and associative discrimination

The wording of s.13 of the Equality Act 2010 requires the less favourable treatment to be because of a protected characteristic such as race, but not specifically because of a claimant's (actual) race if it is to constitute direct discrimination. As discussed above,

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<sup>48</sup> [2021] ICR 1

<sup>49</sup> Ibid at §76. He further cited Sedley LJ: "Credibility, in other words, is not necessarily the end of the road: a witness may be credible, honest and mistaken, and never more so than when his evidence concerns things of which he himself may not be conscious."

<sup>50</sup> [2001] ICR 1065

<sup>51</sup> Ibid at §29

a claim can be brought by an individual who has been discriminated against because they are perceived to have a protected characteristic or because of their association with a person who has a protected characteristic<sup>52</sup>. It is not necessary that they actually possess the protected characteristic concerned. As Linden J explained:

*“... in many cases of direct discrimination the influence of the protected characteristic is that it causes the discriminator to make, and then act on, assumptions about people who have that protected characteristic based on conscious or subconscious beliefs about, or attitudes to, such people. However, it is important to note that in this type of case, as in any other case of direct discrimination, the mind of the decision-maker has been directly affected or influenced by the protected characteristic in deciding to act as they did. In most cases this is because the reason for the discriminator’s assumption or belief is that the person has the relevant protected characteristic; in associative discrimination cases it is because they are associated with a person who has the protected characteristic. In such cases there is less favourable treatment because the same assumption would not be made, or belief or attitude held, about a person who did not have that characteristic or associate with a person who had that characteristic.”*<sup>53</sup>

#### 6.1.4 No justification of direct discrimination

Importantly, where less favourable treatment because of race is established, the respondent to the claim has no defence available<sup>54</sup>. There are very limited statutory exceptions contained in the Equality Act 2010 relating to positive action (ss.158 and 159), genuine occupational requirements (paras 1 and 5 of Schedule 9), national security (s.192) or compliance with another statutory requirement (para 1 of Schedule 22).

As there is no justification defence available, whether the discriminator has benign rather than malign motivations for a race-based difference in treatment is irrelevant.

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<sup>52</sup> One exception is in the case of marriage and civil partnership where discrimination by association is not recognised.

<sup>53</sup> *Gould v St John’s Downshire Hill* [2021] ICR 1 at §65

<sup>54</sup> With the exception of age (section 13(2) of the Equality Act 2010)

For example, in *Amnesty International v Ahmed*<sup>55</sup>, Amnesty declined to post a Sudanese employee to Sudan for fear that she would be at increased risk of ill-treatment or violence there. Once it was accepted that the reason she was refused the appointment was her race, this inevitably amounted to direct discrimination, and was unlawful regardless of motivation.

## 6.2 *Indirect race discrimination*

The prohibition on indirect discrimination is found at section 19 of the Equality Act 2010:

*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

*(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

*(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*(c) it puts, or would put, B at that disadvantage, and*

*(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

Indirect discrimination involves a provision, criterion, or practice ('PCP') that appears to be neutral but results in a particular disadvantage to those who share a protected characteristic. Indirect discrimination looks behind the wording of a policy or practice to examine its impact. Lady Hale summarised the difference between direct and indirect discrimination as follows:

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<sup>55</sup> [2009] ICR 1450

*“Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead, it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.”<sup>56</sup>*

Lady Hale also held in the *JFS* case that:

*“The basic difference between direct and indirect discrimination is plain... The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins... Direct and indirect discrimination are mutually exclusive. You cannot have both at once.”<sup>57</sup>*

To establish indirect race discrimination, a court or tribunal must find: (1) a PCP that is or would be applied regardless of race, (2) that puts or would put a racial group to a particular disadvantage, and (3) that does put the claimant to that particular disadvantage.

#### 6.2.1 Provision, criterion or practice

The requirement for a PCP, *“should be construed widely to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions,*

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<sup>56</sup> Judgment of Lady Hale in *Essop v Home Office* [2017] 1 WLR 1343 at §25

<sup>57</sup> *R (E) v JFS Governing Body* [2010] 2 AC 728 at §56-57

*prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a ‘one-off’ or discretionary decision”.*<sup>58</sup> However, a PCP carries a connotation of a state of affairs indication how similar cases are generally treated or would be treated in future; a one-off act or decision will qualify if it carries such an indication.<sup>59</sup>

### 6.2.2 Group disadvantage and the pool for comparison

Ascertaining whether there is indirect discrimination involves a comparative exercise; looking across all the people to whom the PCP is applied (the ‘pool for comparison’<sup>60</sup>) and asking whether members of one racial group are adversely affected compared to another. The pool selected should suitably test the discrimination alleged<sup>61</sup>. In order to do this properly, the pool should include everyone who the PCP affects or would affect, positively or negatively, but not people unaffected by it. As Lady Hale explained, “*There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.*”<sup>62</sup>

There is no need to show why a group disadvantage occurs, nor that the disadvantage is causally related to race<sup>63</sup>. In *Essop*, the disadvantage was a statistically greater likelihood of candidates from ethnic minority backgrounds failing a test for promotion. This was a group disadvantage, regardless that some members of the group passed it<sup>64</sup>.

Group disadvantage can be established in a variety of ways. Often statistical evidence is relied upon, but an absence of relevant data need not be the end of the matter. In *Dobson v North Cumbria Integrated Care NHS Foundation Trust*<sup>65</sup>, Choudhury J

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<sup>58</sup> EHRC Employment Statutory Code of Practice §4.5 [employercode.pdf \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/equality/employment/employment-statutory-code-of-practice/employercode.pdf) [accessed 29/5/24]

<sup>59</sup> *Ishola v Transport for London* [2020] ICR 1204 per Simler LJ at §38

<sup>60</sup> *Essop v Home Office* [2017] 1 WLR 1343 at §41

<sup>61</sup> *Grundy v British Airways* [2008] IRLR 74, §27 per Sedley LJ

<sup>62</sup> *Essop v Home Office* [2017] 1 WLR 1343 at §41

<sup>63</sup> *Ibid*

<sup>64</sup> *Ibid* at §34-35

<sup>65</sup> [2021] ICR 1699

discussed the following approaches to analysing whether there is a group disadvantage:

- “(a) There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected in limine;*
- (b) Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;*
- (c) The disadvantage may be inherent in the PCP in question; and/or*
- (d) The disadvantage may be established having regard to matters, such as the child care disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken.”<sup>66</sup>*

### 6.2.3 Objective justification

Unlike in cases of direct discrimination, indirect discrimination can be justified if it is shown that the PCP is a proportionate means of achieving a legitimate aim. It is the PCP itself that must be justified, albeit the importance of the aim pursued will be weighed against its discriminatory effect on the claimant. For this defence to succeed:

- (a) The aim cannot solely be that it is cheaper to discriminate<sup>67</sup> although an economic factor relating to cost may be pursued alongside other aims<sup>68</sup>;
- (b) The measure must be appropriate, in that it must be rationally connected to the aim pursued<sup>69</sup>;

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<sup>66</sup> Ibid at §56

<sup>67</sup> A ‘costs’ approach; *Woodcock v Cumbria Primary Care Trust* [2012] ICR 1126

<sup>68</sup> The ‘costs-plus’ principle; *R (Diocese of Menevia) v Swansea City and County Council* [2015] EWHC 1436

<sup>69</sup> *Bilka-Kaufhaus GmbH v Weber von Hartz* C-170/84 [1987] ICR 110



- (c) The measure must be reasonably necessary, balancing the discriminatory effect of the measure against the reasonable needs of the employer<sup>70</sup>; and
- (d) The measure must be otherwise proportionate.<sup>71</sup>

An example of this in the context of race discrimination is found in the English Court of Appeal case of *Independent Workers Union of Great Britain v Mayor of London & Transport for London*<sup>72</sup>. This case involved a challenge of a policy decision, namely the removal of the exemption in the congestion charge for private hire drivers. The union representing the workers argued that this policy constituted indirect discrimination on the basis of race as it only applied to private hire vehicles, of which majority of drivers are from black and ethnic minority backgrounds, while allowing an exemption for Hackney cab drivers, the majority of whom are white. The Court of Appeal acknowledged the stark statistical imbalance in the ethnicity of drivers but held that the policy was a proportionate means of achieving the legitimate aim of reducing traffic and congestion in the city.

### 6.3 Harassment related to race

Harassment is defined under s.26(1) Equality Act 2010 as unwanted conduct related to a protected characteristic, such as race, which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

Guidance as to the construction of the wording 'related to a relevant protected characteristic' was given by the Court of Appeal in *UNITE the Union v Nailard*<sup>73</sup>. It imports a broader test than that which applies in a claim of direct discrimination. It was intended to ensure that the definition covered cases where the acts complained of were associated with the proscribed factor as well as those where they were caused by it.

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<sup>70</sup> *Allonby v Accrington and Rossendale College* [2001] ICR 1189

<sup>71</sup> *Seldon v Clarkson Wright & Jakes* [2012] ICR 716 at §51-62

<sup>72</sup> [2020] EWCA Civ 1046

<sup>73</sup> [2018] IRLR 730

The conduct may have the purpose or effect set out; i.e., if it has the prohibited effect, it is no defence to say that the effect was unintended. In deciding whether conduct has the effect referred to in subsection (1), a court or tribunal will take into account the perception of the recipient of the conduct, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect<sup>74</sup>. This involves both a subjective and an objective assessment.<sup>75</sup>

Section 212(1) Equality Act 2010 provides that the concept of 'detriment' does not include conduct that amounts to harassment. Thus, a claimant cannot succeed in a claim of both harassment and detrimental treatment amounting to direct discrimination or victimisation, in respect of the same conduct. However, alternative claims may be advanced in respect of the same conduct.

#### 6.4 *Victimisation*

Section 27 Equality Act 2010 provides:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
  - (a) B does a protected act, or*
  - (b) A believes that B has done, or may do, a protected act.*
- (2) Each of the following is a protected act—*
  - (a) bringing proceedings under this Act;*
  - (b) giving evidence or information in connection with proceedings under this Act;*
  - (c) doing any other thing for the purposes of or in connection with this Act;*
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

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<sup>74</sup> Equality Act 2010, s.26(4)

<sup>75</sup> *Pemberton v Inwood* [2018] EWCA Civ 564

This provision protects a person making a complaint of race discrimination from reprisals.

## **7. Approach to determining claims under the Equality Act 2010**

### *7.1 Standard of proof*

Statutory public inquiries in the United Kingdom cannot make findings of civil or criminal liability<sup>76</sup>. As such, Inquiries are not bound by normal evidential rules and are afforded a wide discretion in the protocols and procedures they adopt, including the standard of proof required<sup>77</sup>.

The standard of proof generally in civil cases, including discrimination claims, is that a claimant's case must be proved on the balance of probabilities i.e., the evidence must show that it is more probable than not that unlawful discrimination occurred. *In Re B (Children)*<sup>78</sup> Lord Hoffman explained that:

*"There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."*<sup>79</sup>

In the same case, Lady Hale pointed out: *"there is no logical or necessary connection between seriousness and probability"*; i.e., just because an allegation is serious does not mean it is inherently improbable. This is dependent on the factual context, as serious allegations are not *"made in a vacuum"*<sup>80</sup>.

### *7.2 Burden of proof*

#### 7.2.1 Shifting burden of proof under the Equality Act 2010

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<sup>76</sup> Inquiries Act 2005, Section 2

<sup>77</sup> Section 17(1) of the Inquiries Act 2005; Mitchell, Jones, Jones and Ireton, *The Practical Guide to Public Inquiries*, p198

<sup>78</sup> [2009] 1 AC 11

<sup>79</sup> *Ibid* at §15

<sup>80</sup> *Ibid* at §72

Generally, in civil cases, the burden of proof rests with the claimant, who is required to prove their case, on the balance of probabilities, in order to succeed. Discrimination claims under the Equality Act 2010 are subject to what is sometimes called a 'shifting' or 'reverse' burden of proof provision. Section 136 of the Equality Act 2010 provides:

*(1) This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision*

The provisions at s.136 adopted the Burden of Proof Directive, Council Directive 97/80/EC, now Article 19 of the recast Equal Treatment Directive<sup>81</sup>. The recitals to the Directives make it clear that the purpose of the reversed burden of proof provisions was to make it easier for complainants to establish discrimination. Article 19 provides, so far as relevant, as follows:

*1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*

There are two stages. At the first stage, the claimant bears the burden of showing a *prima facie* case of discrimination, on the balance of probabilities. If the claimant discharges that obligation, the burden shifts to the respondent to disprove

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<sup>81</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). In relation to race, see Article 8 of the EU Race Equality Directive (No.2000/43)

discrimination, again on the balance of probabilities. At this stage the respondent must prove that there was no conscious or sub-conscious discriminatory reason behind their conduct. Guidance on the shifting burden of proof can be found in *Igen Ltd v Wong*<sup>82</sup>. However, as with the construction of a comparator, reliance on the technicalities of the burden of proof provisions is not necessary where a court or tribunal is in a position to make positive findings about the reason for the treatment complained of<sup>83</sup>.

### 7.2.2 What does a claimant in a civil claim need to show?

Where a two-stage approach is adopted, at the first stage of a direct discrimination claim a claimant must show primary facts from which it could be inferred both that there has been less favourable treatment, and that the reason for the difference is race. A 'mere' difference in treatment alone is not enough, there must be 'something more' to demonstrate a causal link to race: *Madarassy v Nomura International plc*<sup>84</sup>. However, as Sedley LJ observed in *Deman v Commission for Equality and Human Rights*<sup>85</sup>,

*"... the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*<sup>86</sup>

Note the requirement to respond to a statutory questionnaire has been discontinued, but an inference of discrimination may be drawn from an evasive or false explanation in a document other than a questionnaire<sup>87</sup>. Statistical evidence may also be relied upon to found an inference of bias<sup>88</sup>.

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<sup>82</sup> [2005] ICR 931 at Annex, affirmed in *Mail Group Ltd v Efobi* [2021] 1 WLR 3863

<sup>83</sup> *Hewage v Grampian Health Board* [2012] ICR 1054 at §32

<sup>84</sup> [2007] ICR 867 per Mummery LJ at §56

<sup>85</sup> [2010] EWCA Civ 1279

<sup>86</sup> *Ibid* at §19.

<sup>87</sup> See e.g. *Dattani v Chief Constable of West Mercia* [2005] IRLR 327

<sup>88</sup> See e.g. *Rihal v London Borough of Ealing* [2004] IRLR 642 and *Home Office (UK Visas and Immigration) v Kuranchie* UKEAT/0202/16/BA

In an indirect discrimination claim, under s.136 a claimant has the burden of showing the existence of a PCP causing a racial group and individual disadvantage, before the burden shifts to the employer to prove justification<sup>89</sup>.

### 7.2.3 What does a respondent in a civil claim need to show?

The *Igen* guidance suggests that there must be an “adequate” explanation, which proves on the balance of probabilities that race was not the reason for the treatment in question, and that the respondent would normally be required to produce “cogent evidence”. However, the evidence required to discharge the respondent’s burden of proof will depend on the strength of the *prima facie* case proved by the claimant<sup>90</sup>. An explanation of mistake and error may be acceptable if given honestly and in good faith to disprove discrimination<sup>91</sup>.

### 7.3 *Drawing inferences – holistic approach*

In considering what inferences can be drawn, it is necessary for the court or tribunal to adopt a holistic rather than fragmentary approach: to look not only at the detail of the various individual acts of discrimination but also to step back and look at matters in the round. Eady J has described this as a requirement “to see *both the wood and the trees*”<sup>92</sup>.

On the matter of drawing inferences, Lord Leggatt commented:

*“I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available*

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<sup>89</sup> *Dziedziak v Future Electronics Ltd* UKEAT/0270/11/ZT at §42

<sup>90</sup> *Network Rail Infrastructure Limited v Griffiths-Henry* [2006] IRLR 865 at §20.

<sup>91</sup> See e.g. *Osoba v Chief Constable of Hertfordshire Constabulary* UKEAT/0055/13/BA

<sup>92</sup> *Fraser v University of Leicester* UKEAT/0155/13 at §79

*to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.”<sup>93</sup>*

## **8. The Public Sector Equality Duty**

The Public Sector Equality Duty ( “PSED”) has its genesis in the recommendations of the MacPherson report on the murder of Stephen Lawrence<sup>94</sup>. The earliest iteration of what is now known as the PSED was introduced by the Race Relations (Amendment) Act 2000. The duty was then expanded to apply to the anti-discrimination statutes relating to sex and disability. The Equality Act 2010 extended this equality duty to cover all protected characteristics. In their written submissions to the Home Affairs Committee report “*The Macpherson Report: Twenty-two years on*”, the EHRC stated that:

*“...the purpose of the PSED is to integrate the consideration of equality across the protected characteristics in public authorities’ day-to-day decision-making...to prompt public bodies to identify the main inequalities in their area of responsibility, set objectives to improve outcomes in relation to those inequalities, and put in place targeted plans to deliver change”.*<sup>95</sup>

The PSED is found at Section 149 of the Equality Act 2010, and provides that:

*(1) A public authority must, in the exercise of its functions, have due regard to the need to—*

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<sup>93</sup> *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863 at §41

<sup>94</sup> *The public sector equality duty: Why was it introduced?*, EHRC website: <https://www.equalityhumanrights.com/media-centre/blogs/public-sector-equality-duty-why-was-it-introduced> [accessed:16.08.2023]

<sup>95</sup> Written submission from the Equality and Human Rights Commission – Evidence on the MacPherson Report: twenty years on: [MPR0025 - Evidence on The Macpherson Report: twenty years on \(parliament.uk\)](#) para 27

- (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 PSED sits apart from other provisions within the Act because it seeks to address inequality in a different way from the formal and substantive equality provisions discussed above, and because it has a different mechanism of enforcement<sup>96</sup>. Breaches of the PSED can only be enforced through judicial review proceedings but cannot form part of an Equality Act claim in Sheriff Court or at Tribunal<sup>97</sup>.

Section 31 of the Equality Act 2006 empowers the EHRC to conduct an assessment into the extent or manner in which a body has complied with the PSED, and if a body is found not to have complied, a compliance notice can be issued by the EHRC. Failure to comply with a compliance notice without a reasonable excuse can give rise to a Sheriff Court action to compel compliance<sup>98</sup>. The EHRC is also able to raise judicial review proceedings in respect of breaches of the PSED<sup>99</sup>.

As the wording of the provision makes clear, public authorities are required to have due regard to the PSED. This duty applies to high level decision-making as well decisions made by individuals within an organisation<sup>100</sup>. In the case of *R (Meany) v Harlow DC*<sup>101</sup> the defendant argued that the claimant had to either demonstrate that the public authority had paid *no* regard to the statutory criteria, or alternatively, that the decision of the public authority was irrational.

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<sup>96</sup> Manfredi, Vickers and Clayton-Hathway, The public sector equality duty: enforcing equality rights through second-generation regulation, I.L.J. 2018, 47(3), 369-370

<sup>97</sup> Equality Act 2010, Section 156

<sup>98</sup> Equality Act 2006, Section 32

<sup>99</sup> Ibid, Section 30

<sup>100</sup> Equality and Human Rights Commission, *Technical guidance on the Public Sector Equality Duty: Scotland*, paragraph 5.36

<sup>101</sup> [2009] EWHC 559 (Admin)



The test for irrationality was established in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>102</sup>. In *Wednesbury* it was established that decision is unreasonable, or irrational, if it is so unreasonable that no reasonable person acting reasonably could have made it.

In *Meany Davis J* rejected the defendant's argument, holding that:

*"...the question of due regard requires a review by the court ... how much weight is to be given to the countervailing factors is a matter for the decision maker. But that does not abrogate the obligation on the decision maker in substance first to have regard to the statutory criteria on discrimination...the Wednesbury test applies to the consideration of the countervailing factors there referred to, but not to the question of whether the necessary due regard has been had."*<sup>103</sup>

The question of what a public body is required to do in order to satisfy the requirement to have *due regard* has been explored in subsequent case law. The case of *R (Brown) v Secretary of State for Work and Pensions*<sup>104</sup> set out six general principles that a relevant body must satisfy in order to meet its duties under the PSED:

- Those in decision-making positions within the public authority must be made aware of their duty to have "due regard" to the identified goals.
- The "due regard" duty must be fulfilled before and at the time that a particular policy is being considered by the public authority.
- The duty must be exercised in "substance, with rigour and with an open mind".
- The duty imposed on public authorities cannot be delegated. If, in practice, another body carries out the function, they must be capable and willing to fulfil the duty and there must be sufficient oversight by the public authority concerned.
- The duty is a continuing duty.

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<sup>102</sup> (1948) 1 KB 223

<sup>103</sup> David J in *Meany* as quoted in McColgan, Aileen *Litigating the Public Sector Equality Duty: The Story So Far* Oxford J Legal Studies (2015) 35 (3): p460-461, 1 July 2015

<sup>104</sup> [2008] EWHC 3158

- it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered equality duties and pondered relevant questions<sup>105</sup>.

Subsequent Court decisions have added to these general principles. In *Bracking v Secretary of State for Work and Pensions*<sup>106</sup>, the Court of Appeal set out additional principles to be taken into consideration by public authorities in the discharge of their duty to have ‘due regard’ to the PSED: PSED is integral to the mechanisms for fulfilling the aims of anti-discrimination legislation; the duty to fulfil the PSED lies with the decision maker personally and what he or she considered or knew and that a public body must assess the risk and possible methods of mitigating such risk before proposing a particular course of action<sup>107</sup>.

In *Bracking* the Court also held that, in order to discharge their duty, a public body must demonstrate that their deliberations have been based on sufficient evidence<sup>108</sup>. The EHRC’s technical guidance on the PSED emphasises that this case law should not be read as statute but is instead a “framework for considering the application of, and compliance with, the equality duty”<sup>109</sup>.

In practice, in order to evidence their compliance with the duty, many public bodies carry out Equality Impact Assessments.

### 8.1 *The Scotland-specific duties*

Sections 153, 155 and 207 of the Equality Act 2010 empower the Scottish Ministers to impose specific duties on public authorities in respect of the PSED. In exercise of this power, the Scottish Ministers produced the (Specific Duties) (Scotland) Regulations 2012 (“the 2012 Regulations”).

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<sup>105</sup> *R (Brown) v Secretary of State for Work and Pensions* at §90-96 as quoted in Equality and Human Rights Commission, *Technical guidance on the Public Sector Equality Duty: Scotland*, paragraph 2.21

<sup>106</sup> [2013] EWCA Civ 1345

<sup>107</sup> Equality and Human Rights Commission, *Technical guidance on the Public Sector Equality Duty: Scotland*, paragraph 2.22

<sup>108</sup> *Ibid*

<sup>109</sup> Equality and Human Rights Commission, *Technical guidance on the Public Sector Equality Duty: England* at paragraph 2.47

The Schedule to the 2012 Regulations lists the public authorities in Scotland to which the regulations apply. The 2012 Regulations imposes additional duties on the prescribed public authorities in relation to the PSED. The purpose of the specific duties is to provide:

*“... a supporting framework to enable listed public authorities to better perform their PSED and to mainstream equality and good relations in their everyday work, through enhanced data collection and evaluation, and greater transparency and accountability. In doing so this should reduce inequality and lead to better outcomes for all, including those who experience disadvantage (e.g. by designing and delivering services that meet the diverse needs of users).”<sup>110</sup>*

The Regulations require a listed authority to report on progress made on mainstreaming the equality duty; to publish equality outcomes and report on progress and, to assess and review policies and practices.

Listed authorities are also required to gather and use employee information, publish gender pay gap information and statements on equal pay; to publish in an accessible manner, and in relation to public procurement. The Regulations also allow Scottish Ministers to specify further duties and publish on how listed authorities can better perform their duties every four years.

Regulation 3 provides that listed authorities must *“publish a report on the progress it has made to make the equality duty integral to the exercise of its functions so as to better perform that duty”* every two years. Regulation 4 requires that a listed authority must *“publish a set of equality outcomes which it considers will enable it to better perform the equality duty”* every four years. Regulation 5 specifies that an authority must, *“to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice”*.

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<sup>110</sup> Final Report for the Scottish Government on PSED Consultation (30 November 2022) <https://www.gov.scot/publications/review-operation-public-sector-equality-duty-scotland-consultation-analysis-report/> [accessed 25/05/24]

The specific duties require listed authorities to consider relevant evidence and take reasonable steps to involve those who have a protected characteristic, or those who represent such groups, when preparing and publishing equality outcomes<sup>111</sup> and in assessing the impact of applying a new policy or revising a policy<sup>112</sup>. This differs from the general PSED in that there is no express requirement that public bodies consider relevant evidence or seek to involve relevant stakeholders in their decision-making process<sup>113</sup>.

The EHRC's guidance on involvement provides that 'reasonable steps' are those which:

*"...should be practicable and proportionate for the authority to take, bearing in mind the significance of the issues, the extent of what is already known about the issues, the resources required to take the steps and the extent of the resources available to the authority. The efforts put in need to be in proportion to both the resources of the organisation and the potential impact on people's lives."*<sup>114</sup>

However, the EHRC's technical guidance on the PSED in Scotland also provides that:

*"Where there appears to be insufficient evidence to establish whether or not action might be needed to further one or more of the needs mentioned in the general equality duty or to tackle inequalities in relation to a particular protected characteristic, a listed authority should consider taking steps to gather additional relevant evidence to provide it with an informed basis for setting its equality outcomes... Where gaps exist, a listed authority should take reasonable steps to address them over time".*<sup>115</sup>

There is little case law concerning the PSED in Scotland, however, in the Court of Session (Inner House) case of *S v Scottish Ministers*<sup>116</sup> a prisoner sought to judicially

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<sup>111</sup> Regulation 4(2)

<sup>112</sup> Regulation 5(2)

<sup>113</sup> [evidence-public-sector-equality-duty-scotland.pdf \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/evidence-public-sector-equality-duty-scotland.pdf) p8

<sup>114</sup> Equality and Human Rights Commission, *Involvement and the Public Sector Equality Duty: A guide for public authorities in Scotland* p10

<sup>115</sup> Equality and Human Rights Commission, *Technical guidance on the Public Sector Equality Duty: Scotland* §6.1-6.2

<sup>116</sup> 2020 SLT 1254

review a decision to refuse escorted leave to visit a disabled relative. The prisoner argued that the respondents had failed to comply with the PSED, in particular their duties under Regulation 5 of the 2012 Regulations, when formulating their policy on escorted day absence. The Inner House granted the petitioner's petition to proceed to judicial review. Lord Docherty commented that:

*"It was notable that the respondents had not produced an equality impact assessment ("EIA"). The document lodged was a mere summary. It did not meet the requirements for an EIA under reg.5 of the 2012 Regulations"*<sup>117</sup>.

In 2022, the Outer House in *B v Scottish Borders Council*<sup>118</sup> reduced a decision to close a day care facility as the Council had failed to perform its statutory duty under section 149 of the Equality Act 2010. In this case it was noted in particular that although the council had carried out an Equality Impact Assessment, this assessment had not complied with the 2012 Regulations.

The Scottish Government is currently undertaking a review of the PSED in Scotland<sup>119</sup>. The government consulted on proposed changes to the specific duties between December 2021 and April 2022. One of the proposed changes to the 2012 Regulations is a strengthening of Regulation 5. The Scottish Government propose to:

*"...to adjust the duty to assess and review policies and practices to emphasise that assessments must be undertaken as early as possible in the policy development process and should aim to test ideas prior to decisions being taken to ultimately make better policy for people"*

*The Scottish Government also proposes to strengthen the duty to assess and review policies and practices to require the involvement of people with lived experience, or*

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<sup>117</sup> Ibid at §13

<sup>118</sup> 2022 SLT 1311

<sup>119</sup> Scottish Government website – Public Sector Equality Duty in Scotland – Consultation, <https://www.gov.scot/publications/public-sector-equality-duty-scotland-consultation/pages/5/> [accessed on 25/05/24]

*organisations who represent them, in certain circumstances, like where the policy being assessed is a strategic level decision”<sup>120</sup>*

There has been support for this proposal amongst those responding to the consultation, with some groups highlighting that the current implementation of this duty has been weak to date<sup>121</sup>. Although Regulation 5 already requires these steps to be taken, the wording of the regulation is not prescriptive as to the steps that should be taken and has led to a variety of different approaches to EIAs across different authorities<sup>122</sup>. The proposed changes to Regulation 5 aim to clarify when assessments should be carried out, how evidence and data should be used and also to provide further clarity on which policies and practices require to be assessed and reviewed as the EHRC guidance currently states that Regulation 5 “...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”<sup>123</sup>. The proposals seek to provide further clarity to enable organisations to embed equality considerations in their decision-making processes.

Other proposals include the setting of national equality outcomes rather than the current requirement for authorities to set their own, changes to reporting cycles, the consolidation of the regulations, the embedding of inclusive communication and widening of duties in relation to pay gap information to cover ethnicity and disability, and the introduction of additional evidence gathering duties in respect of intersectional data<sup>124</sup>.

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<sup>120</sup> Scottish Government website - Public Sector Equality Duty - operation review: consultation analysis: <https://www.gov.scot/publications/review-operation-public-sector-equality-duty-scotland-consultation-analysis-report/pages/7/> [accessed on 22/09/23]

<sup>121</sup> Ibid

<sup>122</sup> Ibid

<sup>123</sup> Equality and Human Rights Commission, *Assessing impact and the Public Sector Equality Duty A guide for public authorities in Scotland* (July 2016), chapter 6

<sup>124</sup> Scottish Government website - Public Sector Equality Duty - operation review: consultation analysis: <https://www.gov.scot/publications/review-operation-public-sector-equality-duty-scotland-consultation-analysis-report/pages/7/> [accessed on 22/09/23]

## 9. Guidance

The Equality and Human Rights Commission (“EHRC”) was established by the Equality Act 2006 (“the 2006 Act”)<sup>125</sup>. The EHRC replaced the existing commissions for sex, race, and disability, and was given a wider remit to include the new additional protected characteristics<sup>126</sup>. The purpose of the Commission is to provide institutional support for equality and human rights<sup>127</sup>. Section 14 of the 2006 Act empowers the EHRC to draft statutory codes of practice in relation to equality and human rights matters, which are then laid before Parliament for approval. Section 13 of the 2006 Act also permits the EHRC to publish non-statutory guidance. Non-statutory guidance is not subject to parliamentary scrutiny.

There are three pieces of statutory guidance applicable to the Equality Act 2010: The Equality Act 2010 Code of Practice on Services, Public Functions and Associations (“the Services Code”), the Equality Act 2010 Code of Practice on Employment (“the Employment Code”) and the Equality Act 2010 Code of Practice on Equal Pay (“the Equal Pay Code”). A number of non-statutory codes of practice have also been published by the EHRC. The EHRC published these codes as ‘technical guidance’ explaining that:

*“Technical guidance is a non-statutory version of a code; however, it will still provide a formal, authoritative, and comprehensive legal interpretation of the PSED and education sections of the Act. It will also clarify the requirements of the legislation.”*<sup>128</sup>

In *R v London Borough of Islington LBC Ex p. Rixon*<sup>129</sup> the English High Court held that a failure to comply with statutory policy guidance, “*is unlawful and can be corrected by means of judicial review*”. It was held that a public body is required:

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<sup>125</sup> Equality Act 2006, Part 1, Section 1

<sup>126</sup> Equality Act 2006 Explanatory Notes

<sup>127</sup> Ibid

<sup>128</sup> Equality and Human Rights Commission website: [Equality Act technical guidance | Equality and Human Rights Commission \(archive.org\)](#) [accessed 22/09/2023]

<sup>129</sup> [1997] ELR 66

*“...to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.”*<sup>130</sup>

This position was upheld in the House of Lords case of *R (Munjaz) v Mersey Care NHS Trust*<sup>131</sup>. Compliance with statutory guidance is required, unless cogent reasons can be advanced for departing from it.

In *R (Kaur and Shah) v London Borough of Ealing*<sup>132</sup>, on the question of whether a public authority was required to follow non-statutory guidance on race equality impact assessments issued by the EHRC, Moses LJ commented that:

*“An authority is only entitled to depart from the statutory code for reasons which are clear and cogent...I suggest that that is sufficient authority also for the proposition that any authority would have to justify its departure from the non-statutory guide.”*<sup>133</sup>

The EHRC technical guidance on the PSED in Scotland states that:

*“...showing that the guidance in this document has been followed – or being able to explain why it was not – will be relevant in demonstrating compliance with the Public Sector Equality Duty. The courts have said that a body subject to the duty will need to justify its departure from non-statutory guidance such as this.”*<sup>134</sup>

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<sup>130</sup> Ibid

<sup>131</sup> [2006] 2 AC 148

<sup>132</sup> [2008] EWHC 2062 (Admin)

<sup>133</sup> Ibid at paragraph 22

<sup>134</sup> Equality and Human Rights Commission: Technical guidance on the Public Sector Equality Duty: Scotland [last updated April 2023] accessed at [Technical guidance on the Public Sector Equality Duty: Scotland | Equality and Human Rights Commission \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/en/technical-guidance-on-the-public-sector-equality-duty/scotland) [on 04/09/2023]