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*A review of available information on the use of impact assessment in public  
policy formulation and in contributing to the fulfilment of statutory duties*

*For*

**The Equality Commission for Northern Ireland**



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**Note:** The views expressed in this report are those of the authors and do not necessarily represent the views of the Commission

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## Executive summary

This report provides a review of a range of information on the use of impact assessment in public policy formation and particularly in relation to statutory duties placed on public authorities.

- The first section charts the **antecedents** of equality impact assessment (EIA) from gender mainstreaming initiatives following the Beijing platform in 1995 in **Europe, Canada and Australia**. The main finding is that, although gender mainstreaming and EIA have occupied a central role in public policy formation, the initiatives have largely followed a voluntary '**expert-bureaucratic**' model, which has been susceptible to political change.
- The second section of the report examines the use of EIA as part of statutory duties on public authorities in **Great Britain** and recently in the **Republic of Ireland**. This section provides an analysis of the theoretical constructs of **reflexive** and **responsive** legislation that underpin positive duties. The analysis highlights the importance of reflexive legislation for behavioural change in public authorities in relation to equality. The analysis identifies the complementary effect of responsive legislation in providing a statutory basis to include the views and experiences of civil society organisations and individuals with protected characteristics in the decision-making of public authorities. It is argued that responsive legislation encompasses a '**participative-democratic**' model to public policy formation that is essential to **encouraging community involvement**. The section then examines changes under s.149 of the Equality Act 2010 that have reduced the responsive elements of the legislation in England and the distancing of the government from the use of EIA, placing greater focus on an 'expert-bureaucratic' model.
- Section 3 of the report examines the role of EIA in the **enforcement** of s.149 by **judicial review**. The findings indicate that EIA remains an **important tool** by which public authorities demonstrate their duties under s.149. The analysis indicates that civil society groups have made **extensive use in England of judicial review** to challenge the decisions of public authorities based on their failure to have due regard. The main focus has been on the poor quality and ineffective use of EIA in decision-making. A leading judicial review case, *Brown v Secretary of State for Work and Pensions and Ors*, resulted in a set of principles, the **Brown Principles**, that provide some clarity in relation to the use of EIA in demonstrating due regard. **Further research** is required to establish whether the use of judicial review of decisions made by English authorities is related to the diminished opportunities for engagement that results from the loss of a responsive element in the legislation.
- Section 4 of the report examines sources of support and guidance for both public authorities and civil society groups in relation to the development and use of EIAs. This section examines the available guidance from the government and the EHRC in relation to EIA and how this varies in relation to different position between England, Wales and Scotland. The section provides a summary of the combination of equality and human rights impact assessment (**EQHRIA**) and examines examples of two voluntary sector organisations, the Coalition for Racial Equality Rights in Scotland and Warwick Centre for

Human Rights in Practice in England, that specialise in providing guidance to civil society groups on assessing the EIAs of public authorities or conducting their own EIAs.

- The report conclusions are contained in section 6 and argue that some of the main advances made by the public sector equality duty (PSED), particularly its proactive potential, are lost if there are limited opportunities for engagement by civil society groups other than enforcement by judicial review. The divergence in this respect between England, Scotland and Wales will result in **variable equality outcomes** for protected groups in these regions. It is recommended that the clear statutory guidance for the use of job evaluation in relation to equal pay might offer an example of how public authorities could be guided more effectively on their use of EIA.

## 1. The antecedents of equality impact assessment

The antecedents of equality impact assessment can be traced to the UN Convention to Eliminate All Forms of Discrimination Against Women (CEDAW). The convention was adopted by the UN in 1979 and requires nation states who sign the convention to take measures to eliminate gender discrimination in political, economic and social life. Article 2(d) of the convention states that signatories to the convention must undertake:

To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation<sup>1</sup>

The UK signed the convention on 22 July 1981 but did not ratify the convention, with a number of reservations, until 7 April 1986.

The methods by which these aims could be achieved were clarified in 1995 at the 4<sup>th</sup> UN World Conference in Beijing. The conference established a platform for action.<sup>2</sup> Article 202 states:

In addressing the issue of mechanisms for promoting the advancement of women, Governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that, before decisions are taken, an analysis is made of the effects on women and men, respectively.

Strategic objective H2 (1a) requires all member states to "seek to ensure that before policy decisions are taken, an analysis of their impact on women and men, respectively, is carried out."

Two main methods developed from the platform for action – gender based analysis and gender mainstreaming. Gender mainstreaming (GM) has been the dominant approach in Europe (Verloo, 2005), although in the UK gender mainstreaming has had a patchy history and uptake (Veitch, 2005). Gender based analysis (GBA) has been the preferred method of operationalising GM in Canada and was considered to be leading the way, but has come under criticism recently (Paterson, 2010; Hankivsky, 2012). In Australia an approach called gender budgeting was introduced in 1984 following CEDAW and Sharp and Broomhill (2002:26) claim that "Australian governments have undertaken the first and the longest running exercises in integrating a gender perspective in budgetary decisions on policies and programs". However, these early gains have been eroded. The following section will examine the role of equality impact assessment in Europe, Canada, Australia and the UK.

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<sup>1</sup> <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article2>

<sup>2</sup> <http://www.un.org/womenwatch/daw/beijing/platform/index.html>

## 1.1 Gender mainstreaming and equality impact assessment in Europe

Following Beijing, the European Commission issued a communication on gender mainstreaming defining it as: “mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women (the gender perspective)” (COM (96) 67). Gender mainstreaming as an EU policy was formalised in the Treaty of Amsterdam in 1997. It was recognised that to be properly implemented, gender mainstreaming required a set of policy techniques and tools (Verloo and Roggeband, 1996; Rubery and Fagan, 2000). The Council of Europe (2004:20-21)<sup>3</sup> provides a useful synopsis of equality impact assessment as one of the tools necessary to operationalise gender mainstreaming:

Gender impact assessment has its roots in the environmental sector and is a typical example of an existing policy tool that has been adapted for the use of gender mainstreaming. Gender impact assessment allows for the screening of a given policy proposal, in order to detect and assess its differential impact or effects on women and men, so that these imbalances can be re-dressed before the proposal is endorsed. An analysis from a gender perspective helps to see whether the needs of women and men are equally taken into account and served by this proposal. It enables policy-makers to develop policies with an understanding of the socio-economic reality of women and men and allows for policies to take (gender) differences into account. Gender impact assessment can be applied to legislation, policy plans, policy programmes, budgets, concrete actions, bills and reports or calls for research. Gender impact assessment methods do not only have to be applied to policy in the making, they can also be applied to existing policies. They can be used in the administration as well as by external actors, in both cases they require a considerable amount of knowledge of gender issues. The advantage of these tools lies in the fact that they draw a very accurate picture of the effects of a given policy.

The important points to note here are firstly, that Equality Impact Assessment (EIA) can be used in policy development, but can also be used on existing policy; secondly it can be used by both government administrations and ‘external actors’ and thirdly that it requires in-depth knowledge of gender equality issues. In 2006 the European Parliament established the European Institute of Gender Equality (EIGE)<sup>4</sup>, which provides extensive guidance on all aspects of gender mainstreaming including gender impact assessment.

There is a wide variation in how gender mainstreaming is understood and operationalised in European member states as are the use of gender EIAs (Rubery and Fagan, 2000; Verloo, 2005). Whilst it is evident that gender mainstreaming is statutory for public functions in some European countries it is voluntary in others (see Sterner and Biller, undated for a

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<sup>3</sup> This document provides two cases studies in Netherlands and Belgium (Flanders) where Gender EQA has been developed.

<sup>4</sup> REGULATION (EC) No 1922/2006 <http://eige.europa.eu/>

summary)<sup>5</sup>. Even where gender mainstreaming is statutory, gender EIA is most often an optional tool. As such, there is considerable critical analysis on how far gender mainstreaming as an EU policy actually penetrates member states or, indeed, recent EU policy making (e.g. Rossilli, 2000; Verloo, 2005; Eveline and Bacchi, 2005 and see Rubery, 2015 for a recent analysis in relation to European austerity policies).

Rubery and Fagan (2000), although now dated, provide a detailed analysis of gender impact assessment (GIA) in Europe. Citing Verloo and Roggeband (1996) they identify three questions that are central to a better conceptual analysis of GIA:

1. Where are the structures (institutions and organisations) that reproduce unequal power relations between men and women?
2. What are the processes that reproduce gender inequalities (access to resources; the social rules and norms about gender roles and responsibilities)?
3. Which evaluation criteria of 'equality' are to be used for policy assessment? (p.5).

In relation to barriers to developing GIA in member states Rubery and Fagan recommend:

- Practical and specific guidelines about the purpose and procedural steps of GIA are needed to make it manageable
- GIA must be introduced at an early stage in the policy making process otherwise it has little effect on the policy plans and focus
- Clear political commitment and institutional procedures are needed
- Public accountability is essential for GIA to be effective.
- Information, expertise and financial resources to build the capacity of policy makers to undertake GIA (p.7)

Rubery and Fagan (2000:34) point to the importance of the EU in stimulating policies on gender mainstreaming in member states, although later work, as identified above, suggests that commitment to gender mainstreaming and impact assessment has faltered during economic crises and EU austerity measures (Rubery, 2015).

However, gender equality remains on the agenda (European Commission, 2015) and the European Commission organised a conference hosted in Austria in June 2014 to exchange good practice on gender equality and specifically on gender impact assessment. A report was published which provides a summary of the debate between the 17 participating EU member states (European Commission, 2014). The concluding comments state:

Although many of the participating countries had produced strategic documents, guidelines, manuals and tools for civil servants, in many cases the commitments made by the authorities for gender impact assessment and/or responsive budgeting remain declarative and are unlikely to be enforced to any great extent in the near

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<sup>5</sup> Sterner and Biller (undated:11) list Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Slovenia, Spain, Sweden and the UK as having detailed mandatory requirements for gender mainstreaming.



future, especially in those countries having previous experience of slow-moving implementation of gender programmes. (p. 13)

The dependence on political will is a theme that is echoed throughout the following analyses of the implementation of gender equality impact assessment outside of Europe.

## 1.2 Gender based analysis in Canada

Similar to the European experience, gender based analysis (GBA) in Canada stems from the signing of the CEDAW in 1981 and the Beijing platform for action in 1995. In 1995 the Canadian government, in its *Federal Plan for Gender Equality*, opted for GBA on all future policies and programmes in fulfilment of its obligations under these UN charters<sup>6</sup>. The responsibility for GBA lies within the Status of Women, a department of Canadian government charged with overseeing the implementation of gender policies across all departments and agencies (Paterson, 2010).

In 2004 the Status for Women produced a guide: *An Integrated Approach to Gender-Based Analysis* in which it lists the following check-list questions:

- Does this policy/program/trend improve the wellbeing of women/men?
- What resources does a person need to benefit from this policy/program/ trend? Do women and men have equal access to the resources needed to benefit?
- What is the level and type/quality of women's and men's participation in the policy/program/trend? Has this changed over time?
- Who controls the decision-making processes related to this policy/program/trend?
- Who controls/owns the resources related to this policy/program/trend?
- Does this policy/program/trend have any unexpected negative impacts on women and/or men?
- Does this policy/program/trend benefit men more than women (or vice versa)? If so, why?
- Beyond the federal government, provinces and territories have also committed to the implementation of GBA, and in some instances, have government personnel dedicated to this initiative.

(Hankivsky, 2012:172)

In a critique of the Canadian approach, Eveline and Bacchi (2005) argue that the different choice of terminology represents a focus on 'difference' as opposed to gender mainstreaming where gender equality is integrated into existing policy processes. The difference approach was instituted following the Arbella Commission in 1984 (Canadian Royal Commission on Equality in Employment) (Paterson, 2010). However Eveline and Bacchi (*ibid.*) argue that, in the Canadian experience, difference has often been interpreted as neutral in terms of equality and that 'a differences approach can and often does simply entrench the status quo' (p.504) because it does not start from a position of unequal power relations between men and women.

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<sup>6</sup> <http://www.swc-cfc.gc.ca/gba-accs/history-histoire-en.html>

The use of GBA was reviewed by the Canadian government in 2009, when it was found ‘uneven implementation of GBA and little evidence of its influence on decision-making’<sup>7</sup>. Following the audit the government strengthened the federal government accountability to use GBA and, following criticism from feminist academics (e.g. Hankivsky, 2005, 2012; Paterson 2010), broadened its scope to include other areas of intersecting inequality (e.g. age, education, language, geography, culture and income) . The revised approach is now called GBA+. GBA+ is described by the Canadian government as follows:

GBA+ is used to assess the potential impacts of policies, programs or initiatives on diverse groups of women and men, girls and boys, taking into account gender and other identity factors. GBA+ helps recognize and respond to the different situations and needs of the Canadian population<sup>8</sup>

Paterson (2010) argues that the GBA approach in Canada is ‘expert-bureaucratic’ as opposed to ‘participatory-democratic’, meaning that input is not sought from community based groups or ‘stakeholders’.

Purposively rational models, such as the comprehensive rationality model on which gender-based analysis is premised, construct the analyst as “expert,” privileging expertise at the expense of experience and thus delegitimizing the voice of “non-experts”. (p.404)

Paterson further argues that the indefinite position of the Status of Women within the Canadian bureaucracy means that it has little authority and few resources to monitor and encourage the use of GBA. The lack of accountability to civil society, the limited power of the body charged with its execution coupled with a lack of compliance mechanisms explains, according to Patterson, why GBA has had limited impact on gender equality in Canada. Patterson also noted that political commitment to GBA has diminished as neo-liberalism has intensified in Canadian politics.

Hankivsky’s (2012) criticism takes a different tack by contending that GBA, despite claims toward intersectionality, intrinsically places gender as the principal disadvantage to which other disadvantages are added. Hankivsky calls for a different approach, which she calls intersectional based analysis (IBA): “IBA focuses on the interaction between core dimensions of diversity in ways that are complex and which compound one another and is grounded in the normative paradigm of intersectionality.” (p.177). Importantly, she argues:

Bringing together a range of differences into one framework may also lead to cooperation and coalition building between various groups representing specific inequalities as they start to recognize overt and subtle similarities and join efforts to make transformative change in public policy. (p.177)

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<sup>7</sup> Ibid.

<sup>8</sup> <http://www.swc-cfc.gc.ca/gba-acs/intro-en.html> An on-line training course is available for further information about how GBA works

### 1.3 Gender budgeting and impact assessment in Australia

Sawyer (1996:4) traces gender impact assessment in Australia back to the creation in 1973 of a women's advisor to the Prime Minister:

From her very first press conference this adviser articulated what was to be the characteristic Australian emphasis on the need to audit all Cabinet submissions for impact on women.

Sawyer notes that this approach was serviced by extensive women's 'machinery', an Office for the Status of Women (OSW), staffed by gender experts located at the heart of government, which has since been described as a femocracy, a term that has been used both pejoratively by critics and defiantly by feminists. However, the position of the OSW was contentious and was moved from outside of the Prime Minister's office in 1975 when a Conservative government came to power and back again to the Prime Minister's office in 1983 with a return of a Labour government. Sawyer (1996:6) notes:

One of its first victories was the requirement for impact on women statements to be attached to Cabinet submissions, a requirement which stayed in place until the streamlining of submission format in 1987.

Departments were obliged to provide gender disaggregated analyses of policy decisions (O'Connor *et al.*, 1999). The monitoring of impact assessments was conducted by a caucus of the Parliamentary Labour Party which met weekly during Parliament and was open to all women Labour MPs. Sawyer notes that extensive consultation with women's organisations and community groups were part of the process and lists a number of achievements made in relation to women's equality as a direct result of the OSW and impact assessment.

A development of the focus on impact assessment was the Women's Budget Program, which later became the Women's Budget Statement and required 'all departments and agencies to account for the impact of their activities on women in a Budget document.' (p.8). Sawyer claims:

The Women's Budget Program was a world first in terms of educating bureaucrats to disaggregate the impact of their "mainstream" programmes rather than simply highlighting programmes for women. (*ibid.*)

Sharp and Broomhill (2002:26) argue that 'women's budgets are a mechanism for establishing whether a government's gender equality commitments translate into budgetary commitment'. Gender budgets are a form of impact assessment that focus on resource allocation, or in more recent times act as 'an early warning system' (*ibid.* p. 41) to the withdrawal of resources. Sharp and Broomhill (2002) argue that they go further than impact assessment because they challenge the view of 'gender neutrality' in relation to government budgetary decisions and they also prevent impact assessment being ghettoised in stereotypically gendered policy. Indeed, they argue that gender budgeting takes mainstreaming to areas of government such as the Treasury that have strongly resisted it.

Sharp and Broomhill (2002) make the distinction between 'inside government' gender budgets and those produced by women's groups outside of government. They make the point, similar to the Canadian experience, that pressure from women's organisations and 'community voices' (p.31) are important to the success of gender budgeting as they increase government accountability and maintain an independent voice when political support wanes. However, Donaghy (2004) considers the Australian case to fall firmly within the expert-bureaucratic model

The gender budgeting requirement inside the Australian government was abolished with the change of government in 1996 (O'Connor *et al.*, 1999) and which coincided with a 40% cut to the funding of the OSW (Sharp and Broomhill, 2002:31). Sharp and Broomhill contend that, although formal gender budgeting ceased, the Federal government and some States continued to publish information on the gender impact of spending decisions. In 2004 the OSW was again moved from the office of the Prime Minister to the Department of Family and Community Services where it became the Office for Women with a focus on mainstreaming rather than gender budgeting. Hankivsky (2008) contends that gender mainstreaming/budgeting since 2004 more or less disappeared at the Federal level and has patchy up-take at the State level. Although a Labour government was elected in 2007, Hankivsky's prognosis for the reinstatement of previous gender mainstreaming machinery is negative.

## 2. Equality impact assessment and equality duties in the UK

The early development of the equality duties in the UK is analysed by O'Connell (2004) and later developments by Hepple (2010). O'Connell (2004) notes that early proactive equality legislation was preceded by gender mainstreaming initiatives in public authorities and government departments, which attempted to influence better practice in relation to gender equality. An example of the work on impact assessment carried out inside government departments during this time was the drafting of the Policy Appraisal for Equal Treatment guidelines by the Women's Unit formed in 1997 following the return of a Labour government. Another example is the insertion of a requirement for equality impact assessment into the 2004 Single Status implementation agreement for local government<sup>9</sup>. However, because of their voluntary nature, gender mainstreaming and impact assessment was taken up unevenly and with limited results (see Veitch, 2005 for a detailed history and analysis). Veitch (2005:605) describes the precarity of the Women's Unit and gender mainstreaming within the cabinet, which echoes very closely the fate of the OSW in Australia. Writing in 2005 Veitch argues:

A legal basis for gender mainstreaming would guarantee resources ... Legislation would arguably strengthen the focus on gender mainstreaming and institutionalise it in a way that so far has not happened. It would enable monitoring bodies such as the National Audit Office, the Audit Commission, and various service inspectorates to incorporate gender impact analysis as a central plank of their assessments.

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<sup>9</sup> Part 4.11 National Joint Council for Local Government Services National Agreement for Pay and Conditions of Service

The kind of law that could provide a statutory basis for equality mainstreaming needed to take a different form to the reactive anti-discrimination legislation that forms the bulk of the equality legislation in the UK. Nonet and Selznick (1978/2001) and Teubner (1983) highlight that transitions in legal approaches from reactive to proactive law are often triggered by seemingly intractable social crises. In the UK this occurred in relation to two unrelated and quite different crises. The first were the on-going 'troubles' in Northern Ireland. The second was the racist murder of Stephen Lawrence in 1993 and the deep-seated institutional discrimination it revealed. In both cases it was clear that neither the existing legislation nor voluntary approaches could offer a credible solution. In both cases new forms of responsive legislation relevant to a specific social and political context was developed.

Section 75 of the Northern Ireland Act 1998 is considered to be the forerunner of responsive legislation in the UK. The Act was a product of the 'Good Friday Agreement', a ground-breaking agreement in the complex political context of Northern Ireland. Section 75 (1) imposes a positive duty on scheduled public authorities to have "due regard to the need to promote equality of opportunity ... (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) between men and women generally; (c) between persons with a disability and persons without; and (d) between persons with dependants and persons without." Section 75(2) requires the same public authorities to "have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group." The strong role given to the engagement of civil society in the Act is noted by Donaghy (2004) who considers it to fall within the participatory-democratic model.

Section 75 was considered to be a particularly successful aspect of the Northern Ireland Act (O'Conneide, 2004; McCrudden, 2007) and has been the model for responsive law, in the form of public sector equality duties that cover the rest of the UK. O'Conneide documents similar early provisions devolved to Wales, Scotland and London, but notes that, because they were lacking in enforcement mechanisms, success depended largely on active political support. The first public sector equality duty (PSED) covering the whole of England, Scotland and Wales was the race equality duty contained in the Race Relations (Amendment) Act 2000 and which came into force in 2001.

The race equality duty was the culmination of a changed political environment following the general election of 1997, the Macpherson Report in 1999, which found endemic public sector institutional race discrimination had hampered the investigation of the murder of Stephen Lawrence and the Hepple *et al.* report in 2000 arguing for reform of the equality legislation (Hepple, 2010). After a gap of six years a public sector equality duty covering disability was introduced as part of the Disability Discrimination Act 2005 and the gender equality duty followed in 2007 contained in the Equality Act 2006. The latter pieces of legislation were won following extensive lobbying and campaigning by disability and women's civil society groups (see Conley and Page, 2015). The three duties supplemented the existing restrictive legislation on race relations, sex discrimination and disability discrimination. They were subsequently incorporated into s. 149 of the Equality Act 2010 to include further equality strands covering age, religious belief, sexual orientation, gender reassignment, pregnancy and maternity to meet the requirements of article 6a of the 1997 Treaty of Amsterdam and the resulting European Directives.

Public sector equality duties cover both public service employment and service provision. They are innovative because, unlike the established anti-discrimination legislation, they do not provide individual rights to seek reparation reactively after discrimination has occurred. As such, they do not place the responsibility on individuals to take legal action. Instead they require public authorities to act proactively to consider the impact of their policies and decisions on equality outcomes for protected groups. This aspect of the legislation is reflexive rather than responsive as it requires only internal consideration. The logic here is to avert discrimination in the workplace and in the provision of public services *before it occurs*. The three earlier duties covering race, disability and gender also contained a responsive element in that they required, to a different degree, public authorities to seek input from each of the respective protected groups. In the race equality duty there was an 'expectation' that groups affected by the policies and decisions of public authorities would be consulted. There was a specific duty in the disability equality duty to involve people with disabilities. However, the focus was on direct participation rather than collective representation. In the gender equality duty, there was a specific duty that required public authorities to consult stakeholders and their collectives, including trade unions, and to take into account their views in formulating gender equality objectives.

The responsive element in the public sector equality duties made them a powerful tool for social movements, not only for getting their voices heard, but also for shaping the policy and decisions that affect public service employment and delivery by holding public authorities to account (Conley and Page, 2010). In addition to these innovations, a core principle of the equality duties was to give minority groups, whose voices are usually drowned out in representative democracy, a statutory collective right to be consulted in relation to public service employment and provision. However, Fredman (2011) makes the argument that focusing on equality only for protected minority groups risks the exclusion of those who suffer poverty and disadvantage but do not belong to legally defined categories.

The enforcement of the public sector equality duties is also innovative. Donaghy (2004) notes that the ability to enforce equality duties is their main advantage over the voluntary use of mainstreaming and impact assessment used in other jurisdictions. Although there are no individual rights for reparation as in the anti-discrimination legislation, there are powers for the Equality and Human Rights Commission (EHRC) to serve compliance orders on public authorities that do not carry out their duties. There are also powers for individuals and groups to seek judicial review of any policies or decisions that they feel have an adverse impact on protected groups and have not been adequately considered under the duty. Section 3 considers in detail how far equality impact assessment has featured in judicial reviews of the PSED. Although innovative, the enforcement mechanisms are considered to be problematic. The EHRC have made little use of their powers and there has been some concern that the use of judicial review by civil society groups to enforce the equality duties may have been used prematurely in some cases (Fredman, 2011) or too late in others (Conley, 2012). Ultimately, judicial enforcement is at odds with the concepts of reflexive and responsive legislation because it reverts to a negative (preventing unwanted behaviour) rather than positive (encouraging desired behaviour) role for the law.

The Equality Act 2010 (EqA 2010) was the final piece of legislation passed by the Labour Government in power between 1997 and 2010, the fulfilment of the pledge on the last page

of their 2005 Manifesto to 'simplify' and 'modernise' 40 years of complex equality legislation. The legislation underwent a protracted consultation and a difficult passage through Parliament, being heavily contested by the Conservative party in opposition (see Conley and Page (2015) for a detailed analysis). For a while it appeared that it would not be passed before the 2010 general election with the risk of being abandoned if the Conservatives took office. The Equality Act finally made it on to the Statute books on 8 April 2010 – a month before the general election that resulted in the election of a Conservative-Liberal Democrat coalition government.

The three public sector equality duties were replaced by a single duty (s. 149), which was expanded to cover the additional protected characteristics. As in the three separate duties the new duty contains two parts: a general duty which requires public authority to have 'due regard' to equality for those with protected characteristics in the exercise of its functions and a set of specific duties which provide procedural instructions on what authorities must do to demonstrate due regard. In the three original duties the requirement for public authorities to assess impact and consult interested parties were contained in the specific duties. The statutory codes of practice produced by the Commission for Racial Equality, Disability Rights Commission and the Equal Opportunities Commission provided detailed information on how public authorities could conduct equality impact assessments (EIAs).

The EqA 2010 includes only the provisions for the general duty. The provision for specific duties, the element of the legislation that provides the concrete procedural requirements, depends on secondary legislation giving Ministers of the Crown powers to impose specific duties on public authorities at a later date (s.153). Although the general public sector equality duty contained in s.149 applies uniformly in England, Scotland and Wales, the power to impose specific duties is devolved to these regions<sup>10</sup>. The specific duties vary considerably in England, Scotland and Wales, particularly in relation to the emphasis that is placed on the use of EIAs. After a long delay in their formulation, the specific duties for the equality duty in England are more limited than those for its predecessor duties, having no direct provisions for equal pay or requirements to consult trade unions as contained in the gender equality duty. The new specific duties covering England are far less prescriptive than those contained in the previous separate equality duties and there is no specific requirement for equality impact assessment. Crucially, the requirement to consult stakeholders is absent meaning that the responsive element of the legislation has been lost (see Hepple (2011) and Fredman (2011) for a detailed analysis). The specific duties in Scotland are more extensive than the provisions in England, particularly in relation to collecting and reporting equality data including gender pay gaps. Regulation 5 requires a listed authority to assess where, and to the extent necessary to fulfil the general equality duty, the impact of applying a proposed new or revised policy or practice. However, similarly to England, there is no provision that requires the engagement or consultation of public service users or employees. The specific duties for Wales are far more detailed than both the English and Scottish provisions including specific duties in relation to addressing pay gaps on public authorities and requiring that employees are given training to understand the duty. In the specific duties for Wales sections 7 and 8 require impact

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<sup>10</sup> Statutory Instruments: 2011 No.2260 (Specific Duties for England); 2011 No. 1064 (W.155) (Specific Duties for Wales); 2012 No. 162 (Specific Duties for Scotland)

assessments to be completed. Most importantly, from the perspective of responsive legislation, Regulation 5 contains the 'Engagement Provisions', which require public authorities to involve people with protected characteristics, their representatives and other parties with an interest in how decisions are made in the authority and in drawing up equality impact assessments.

The precarious existence of the public sector equality duty did not end with its weakened transposition into the EqA 2010. Its continued existence was threatened when Home Secretary and Equalities Minister, Theresa May, announced on 17 May 2012, when the Specific Duties were barely a year old, that a review of the PSED would be conducted as part of the 'Red Tape Challenge', a government initiative to strip away bureaucratic burdens to business. The review of the duty so soon after it had become fully operational was justified with concerns by government Ministers, including the Prime Minister, that it had become a bureaucratic 'tick box' exercise (Stephenson, 2014). The review process was unorthodox in that it was not initially open to all stakeholders and was largely the remit of a government selected steering group, which did not contain any representatives of civil society groups who use public services.

The response of stakeholder groups to the threat that loomed over the public sector equality duty was vocal and concerted. The problematic nature of the review process came under widespread public scrutiny and criticism when Doreen Lawrence<sup>11</sup>, the mother of Stephen Lawrence, wrote an open letter to the Prime Minister, Deputy Prime Minister and other political leaders questioning the composition of the steering committee and highlighting its bias towards public service senior managers rather than public service users. The letter asked that the review should "recognise that those who are to be held to account by legislation may have radically different views when compared to those who wish to use the legislation to hold public bodies to account".

In the event, a number of civil society groups submitted evidence to the review without a direct invitation. Stephenson (2014:77) identifies that the majority of the eventual submissions to the review were 'broadly supportive' of the duty providing a wide range of instances where the public sector equality duty had succeeded in improving equality outcome in public authorities. In the face of such public support for the duty, the government backed away from any changes to the legislation, ironically echoing the initial advice from civil society groups that it was too soon to judge its effectiveness and postponed the review until 2016. Even so, the report of the steering committee was largely negative and did not accurately reflect the weight of the evidence that it had received (Stephenson, 2014). Although the Chair of the steering group could not get the support of the other members of the group, his personal recommendation was that the duty should be repealed (*ibid.*), which does not bode well for the 2016 review.

Since the review of the PSED, the government has taken steps to limit the number of judicial reviews, many of which relate to the use of the duty, by reducing the amount of time to lodge a case and giving judges more powers to decide which cases can go forward to judicial

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<sup>11</sup> Doreen Lawrence was made a life peer in 2013, and is now Baroness Lawrence of Clarendon. She received an OBE in 2003 for services to community relations.



review and what level of financial support will be allowed<sup>12</sup>. This move substantially reduces the remaining opportunities for civil society groups to use the legislation and, therefore, further limits its responsive elements.

In a speech to the CBI on 19 November 2012 the Prime Minister made it clear that equality impact assessment was not required in relation to the PSED:

...in government we have taken the letter of this law and gone way beyond it, with Equality Impact Assessments for every decision we make. Let me be very clear. I care about making sure that government policy never marginalises or discriminates. I care about making sure we treat people equally. But let's have the courage to say it: caring about these things does not have to mean churning out reams of bureaucratic nonsense. We have smart people in Whitehall who consider equalities issues while they're making the policy. We don't need all this extra tick-box stuff. So I can tell you today we are calling time on Equality Impact Assessments. You no longer have to do them if these issues have been properly considered<sup>13</sup>

This, of course, leaves open the question of how English public authorities can demonstrate compliance with s. 149, whereas the specific duties in Scotland and Wales provide greater guidance based on a reliance on impact assessment. The Prime Minister's statement appears to centralise even further the responsibility for compliance with s.149, moving it further away from a participative-democratic model and stands at odds with case law and best practice guidance. Section 3 examines the treatment of equality impact assessment in case law in relation to public sector equality duties and the development of support for improving the quality of assessments. Before this the following section examines gender mainstreaming and the development of a public sector equality duty in the Republic of Ireland (RoI) in comparison to the UK duties.

## **2.1 Gender mainstreaming and public sector equality duty in the Republic of Ireland**

Sterner and Biller (undated) note that gender mainstreaming and the use of impact assessment was taken forward enthusiastically in the RoI, which they list as one of the EU member states as having detailed and systematic policy in this regard (p.11). The report, based on a survey of member states, highlights that political will and financial resources were considered essential to the successful implementation of gender mainstreaming. Sterner and Biller state that, at the time of their survey, the RoI had declared that €6 million had been made available for positive actions and gender mainstreaming (p.15) and placed an emphasis on monitoring and control (p.20). Although, despite this, the RoI had not provided details of the actual structures put in place for the implementation of gender mainstreaming (p.18).

Barry and Conroy (2013) note how the economic recession that began in 2008 has severely affected the RoI and has had a particular impact on the progress of gender equality, which

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<sup>12</sup> Criminal Justice and Courts Act 2015 and Civil and Legal Aid (Remuneration) (Amendment) Regulations 201

<sup>13</sup> <https://www.gov.uk/government/speeches/prime-ministers-speech-to-cbi>

they argue has not been acknowledged or scrutinised via equality impact assessment. They further note the extensive dismantling of equality machinery in the ROI including the merger of the equalities and human rights agencies, to form the Irish Human Rights and Equality Commission (IHREC) which they argue will result in a reduction of power and resources including the controversial re-direction of EU funds for gender equality.

It is in this context that the Irish Human Rights and Equality Commission Act 2014 (IHRECA 2014) was passed into law. Section 42 of the Act contains a PSED, which has some similarities to s.149 of the Equality Act 2010 in Great Britain. Section 42 (1) places a duty on public authorities 'to have regard to the need to:

- a) eliminate discrimination;
- b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services; and
- c) protect the human rights of its members, staff and the persons to whom it provides services.'

The focus on the need to have regard and coverage of both employment and service delivery is similar to the duty in Great Britain. As in s.149 of the Equality Act 2010 the duty covers a range of protected characteristics, although these differ from those in the UK.<sup>14</sup> The inclusion of human rights makes it somewhat distinctive but there are no requirements for consultation with staff or service users. A further distinction is the lack of reference to secondary legislation (in the GB duty the powers of Ministers of State to introduce 'specific duties' in s.153), although there is a focus on requiring public authorities to publish strategic plans and report on progress, which has some similarities to the weak specific duties in England. The ROI duty is particularly different in its enforcement mechanisms, which fall entirely on the IHREC with no recourse for individuals or civil society groups to enforce the duty. Indeed s.42 (11) seems to directly preclude this: "Nothing in this section shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under *subsection (1)*." This means that, coupled with the lack of requirement for consultation, the duty in the ROI is entirely reflexive (rather than responsive) in its approach. Whilst there was some encouragement and guidance for public authorities to undertake EIAs prior to the legislation and the merger of the equality bodies, there is no recent policy guidance on this, although there is some discussion of social impact assessment under the UN Covenant of Economic, Social and Cultural Rights (IHREC, undated). However, it is clear that s. 42 of the IHRECA 2014 will not generate the large body of case law that has shaped the enforcement of the PSED and in particular the development of principles that have shaped and refined the use of EIA as is examined in relation to Britain in Section 3.

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<sup>14</sup> (i) gender; (ii) civil status; (iii) family status; (iv) sexual orientation; (v) religious belief; (vi) age ;(vii) disability; (viii) race, including colour, nationality, ethnic or national origin; (ix) membership of the Traveller community.

### 3. Analysis of judicial review based on compliance with public sector equality duties

This section analyses how far equality impact assessment has featured in judicial reviews of the PSED. Drawing on the Equality and Diversity Forum (EDF)<sup>15</sup> database of judicial reviews in relation to the PSED, the following sections analyse all of the leading cases (Table 1 Appendix 1) and selected recent cases (Table 2 Appendix 2) for references to EIA in the transcripts of England and Wales Court decisions. It is clear from the analysis that EIA is a key feature as the main mechanism by which compliance with 'Due Regard' is established in almost all judicial reviews of the separate equality duties prior to 2010 and s.149 of the Equality Act 2010. Interestingly it appears that, even in recent cases, public authorities are still using EIA, or a functional equivalent, in order to comply with s.149 of the Equality Act 2010. Judicial review decisions have raised a number of issues including the content, quality, timing and role of EIA in decision-making. It is important to note that *Brown v Secretary of State for Work and Pensions and Ors*<sup>16</sup> and *Baker v Secretary of State for Communities and Local Government and Ors*<sup>17</sup> provide useful summaries of the legal position in relation to compliance with the public sector equality duties that have been drawn upon before and after the Equality Act 2010 (McColgan, 2015). Section 3.1 provides an analysis of the principles laid down in the *Brown* and *Baker* cases, whilst Section 3.2 provides an analysis of how key issues that emerge from the cases in Table 1 and Table 2 fit with, develop or conflict with these principles before and after the Equality Act 2010. Section 3.2.1 considers key issues in relation to the content and quality of EIAs whilst Section 3.2.2 considers key issues in relation to how EIAs should be used in relation to decision-taking and policy-making. Section 3.3 provides a summary. Excerpts from judicial review cases that aided the analysis are contained in Appendix 3.

#### 3.1 The Brown principles

The *Brown* case established **six principles** that public authorities need to fulfil to demonstrate 'due regard' (McColgan, 2015). These are found in paragraphs 90-96 of the ruling and are summarised as:

"First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals...Thus, an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them" (90)

"Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind... Attempts to justify a decision as being consistent with the exercise of the duty when

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<sup>15</sup> It is recognised that this does not provide a full coverage of the case law in relation to the PSED, but it provides a useful sub-set for analysis.

<sup>16</sup> [2008] EWHC 3158 (Admin)

<sup>17</sup> [2008] EWCA Civ 141

it was not, in fact, considered before the decision, are not enough to discharge the duty.” (91)

“Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes".” (92) “However, the fact that the public authority has not mentioned specifically [the legislation] in carrying out the particular function where it has to have "due regard" to the needs set out in the section is not determinative of whether the duty under the statute has been performed... But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases” (93)

“Fourthly, the duty imposed on public authorities that are subject to the... duty is a non – delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the... duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty”. (94)

“Fifthly, (and obviously), the duty is a continuing one.” (95)

“Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record - keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty...” (96)

It is worth noting, since it is not directly included in the six principles, that in *Brown* the judge found in favour of the defendant largely because he ruled that the duty is not a duty to achieve a result, but to have due regard to the need to achieve the result, in that case to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. This principle was established in *Baker*. The following section analyses how the *Brown Principles* have influenced subsequent cases, both prior to and following the Equality Act 2010.

### **3.2. Analysis of key issues**

An analysis of the judgement concerning the importance of EIA in relation to the fulfilment of the PSED provides a number of key issues which can be considered a) in relation to the content and quality of the impact assessment and b) the use made of EIA in having due regard in relation to decision-taking and policy-making.

### 3.2.1 Content and quality of EIAs

**Impact assessment does not have to take a particular format and does not need to make specific reference to the legislation as long as in substance due regard has contained such an assessment**

This principle was established early in relation to the separate duties in *Baker and Brown* (third principle) and relied upon in *O'Brien* where the appellant argued that the respondent had not conducted a race impact assessment on the decision to apply for an injunction in relation to breaches of planning controls at a Traveller site. The judge found that although not explicitly called an equality/race impact assessment the respondent “did take into account all material considerations and because it approached the issue in a balanced and proportionate way... [which] did in substance amount to such an assessment, even if not produced in such a form”. It has remained a principle in rulings in later cases following the Equality Act 2010, for example *Green and Rowe and Hird* in 2011 where the judge commented:

“It is common ground that the question is whether the duties have been carried out in substance by the persons responsible for the decisions in question rather than whether a document referred to as an EIA has been produced. Carrying out an EIA is not an invariable necessity for conformity with the public sector equality duty but nor (conversely) is evidence that an EIA has been produced, evidence that "due regard" has been given to the statutory equality needs. The substance of the analysis is the key in this area.” (para 118).

However in *R (on the application of JM and NT) v Isle of Wight Council* the judge ruled that, where an impact assessment has been submitted as evidence of due regard, it should be scrutinized by the court for quality and accuracy, giving greater focus on the content and quality of EIAs as the main mechanism for demonstrating due regard.

**The quality of impact assessment is important and the analysis of impact must accurately match the information gathered.**

Although earlier cases, following *Brown*, had focused on the importance of performing the duty generally “with vigour and with an open mind” (*R (Domb) v London Borough of Hammersmith and Fulham & Ors* para 52), later cases following the Equality Act 2010 have focused on the quality of impact assessment. In *R (on the application of JM and NT) v Isle of Wight Council*, drawing on an earlier case *R (W and others) v Birmingham City Council*, the judge described the content of the EIA used as evidence of having due regard as “too vague and generalised” (para 124). In *Zaccaeus* the judge notes that it must be clear what impact is actually being measured in an EIA. Other aspects raised in later cases in relation to the content of EIAs include:

**Impact must be assessed in relation to protected groups and should not consist only of general impact** *R (Winder and Others) v Sandwell Metropolitan Borough Council and the Equality and Human Rights Commission (intervening)*.

This case raises a useful conceptual distinction between equality impact assessment and general impact assessment. Whilst general impact or risk assessments are frequently carried out on decisions made by public authorities, the aim is usually to protect the organisation from risk rather than as a tool to ensure consideration of the needs of those with protected characteristics. The ruling in this case makes it clear that a general risk or impact assessment cannot substitute for an EIA.

**An equality impact assessment can be considered as evidence of compliance with the Duty but is not necessarily so**

This point is raised in the third *Brown Principle*, that substance and not form is the important consideration in relation to the quality and content of EIA and has been reiterated in a number of cases since (*O'Brien, Domb, Green and Rowe and Hird*). The point here being that the presence of an inadequate EIA will not demonstrate compliance with the Duty.

**A large impact requires a higher level of due regard**

In addition to the content and quality of impact assessment recent cases have established that the extent of impact is also important. This consideration was raised in two cases following the Equality Act 2010, *R (on the application of Hajrula and Hamza) v London Councils* and *R (on the application of Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions*. In *Hajrula* the level of impact considered by the judge was the large number of people with protected characteristics the decision would affect. In *Zacchaeus* the level of impact was considered to be the amount of disruption, in this case in relation to rent increases, which would be caused. However, this principle needs to be considered in relation to the judgments in *Baker* and *Hurley and Moore* in which the weight given to impact on people with protected characteristics must be assessed in relation to its proportional importance to the decision and “it is for the decision maker to decide how much weight should be given to the various factors informing the decision.” (*Hurley and Moore* para 76).

**3.2.2 Use of EIA in decision-taking and policy making**

Having considered the application of the principles developed in *Baker* and *Brown* in recent cases and the growing importance of the content and quality of EIAs in judgements, the purpose of this section is to consider when and how EIAs should contribute to decision-making that falls under the PSED.

**Timing of assessment is important**

The issue of timing of EIA has been present from the early cases and is the basis of the second *Brown Principle*. However there have been some contradictory rulings, particularly recently, in relation to when EIA can or must contribute to decision-making that is subject to the PSED. Prior to the Equality Act 2010, in *Kaur* and *Brown*, the position is that EIA must be completed prior to the decision-making. This was also the position in *Winder, Hurley and Moore* and *Green/Rowe and Hird, R (on the application of Luton Borough Council and*

others) following the Equality Act 2010. However, there are some cases, both before and after the Equality Act 2010, where the importance of timing the EIA before the decision-making is brought into question. For example, in both *R (Fawcett Society) v HM Treasury & HMRC* prior to the Equality Act 2010 and *R (on the application of UNISON) v the Lord Chancellor* following the Equality Act 2010, the judgment included the view that impact could only be known with any certainty once the decision had been in place for some time. The timing of EIA is related to other issues that have emerged in judicial review that are further considered below.

**Legal duty must be clear to the decision-takers and they must be fully aware of the impacts of their decisions**

This issue has been raised in a number of cases prior to (*Brown, Domb, Boyejo*) and following (*Bracking, RB v Devon CC, JM and NT v Isle of Wight Council*) the Equality Act 2010 and is the basis of the first *Brown Principle*. In *W and others v Birmingham City Council* and *JM and NT v Isle of Wight Council* the judgments stipulated that EIA should contain sufficient information for decisions to be taken. In *Green and Rowe and Hird* the judge held that “The formative stage at which the duty is to be performed is not at the early stage when officers are contemplating policy options but as part of the decision making process.” (para 121). The need for due regard, therefore, does not prevent a number of policy options being contemplated. However, for decision-takers to be fully aware of the impact of their decisions and for it to form part of the decision-making process, clearly EIA must be completed on the available options prior to the decision on which option is selected. The issue of whether decision-takers have access to and read EIAs is covered in *Hunt* and subsequent appeals.

**Impact can be cumulative and can include fear of losing a service.**

In *Boyejo* the ruling highlighted that the cumulative impact, which could include the fear of losing a service should have been brought to the attention of the decision-takers. This should be compared to the decision in *R (Fawcett Society) v HM Treasury & HMRC* where the judge ruled there was no need to assess cumulative impact.

**Consideration should be given to mitigation of adverse impacts and all reasonable available alternatives should be considered**

The importance of EIA in relation to decision-making is further highlighted in rulings where the issue of mitigation of impact is considered important. This has arisen in cases before the Equality Act 2010 (*Kaur, Boyejo*) and following (*JM and NT v Isle of Wight Council, W and others v Birmingham City Council*).

However, judgments have also sought to limit the burden on public authorities and are considered below.

**Impact assessment should not make effective decision-taking unreasonably onerous and does not need to be ‘forensic’**

This point was first made in *R (Bailey and others) v Brent Council and others* following the Equality Act 2010. It was reiterated in *Hunt*.

**There is no duty to consult on the content of EIAs – if the decision makers are appraised on all relevant equality issues**

Similarly this point was made in *Bailey* and reiterated in *Hunt*. However, on appeal in *Hunt* the judge clarified that it cannot be assumed that decision-makers had read documents that had not been directly supplied to them.

**The Duty is ongoing and impact should be kept under review**

This is the fifth *Brown Principle* and provides an important point that, since the Duty is continuing, a consideration of impact should not only be made prior to a decision, but should be revisited if there is reason to believe it may have altered. The continuing nature of the PSED has been raised as an important consideration in *R (on the application of UNISON) v the Lord Chancellor* and may prove to be important in relation to cases where the ruling is that impact can only be assessed after a decision has been in place for some time. This principle raises the question of how much time may be allowed to elapse before impact must be retrospectively assessed and, crucially, how mitigation could be achieved if a negative equality impact is then detected. A point could be made that the longer the time that elapses between the decision being made and the retrospective finding of a negative impact, the greater the impact will be and therefore, in-line with the rulings in *Hajrula* and *Zaccaeus*, the higher the requirement of due regard.

### 3.3 Summary

It is clear from this analysis that civil society groups and individuals have made extensive use of the judicial review enforcement mechanism in relation to the PSED with a surprising amount of success (McColgan, 2015). In theoretical terms this could be evidence of the responsive nature of the legislation although, as Fredman (2011) notes, the interjection of the courts negates the reflexive impact of the legislation. The large body of case law that has built up in a relatively short amount of time has nonetheless enhanced understanding of what due regard is in relation to the PSED and what the role of EIA is in determining it. The *Brown Principles* are pre-eminent in this understanding and, although established prior to the Equality Act 2010, are still influential in judicial decisions in cases where s. 149 is in play. EIA remains a key mechanism for establishing due regard, even though information gathering on impact may not be referred to directly as such. Therefore, greater scrutiny on the quality of EIA and the *Brown Principle* of substance over function is still widely cited.

EIA is an important function of decision-making and is integral to legal principles in relation to requiring decision-takers to be fully aware of their legal duty of due regard and the impact of their decisions on people with protected characteristics. As McColgan states, EIA is clearly changing the behaviour of public authority decision-takers. However, the legal position on the timing of EIA in relation to decision-making is contradictory and problematic and may undermine the distinctive proactive nature of the PSED.



McColgan (2015) argues that the specific duties have played little part in relation to the enforcement of the PSED. However it is not clear from analyses so far from which region the litigation emanated, although one can often make an informed guess by the identity of the defendant/respondent.<sup>18</sup> Since the specific duties are substantially different in Wales, Scotland and England, the relationship between the specific duties and litigation is an important aspect that requires further investigation, even though the specific duties cannot be challenged by judicial review. Drawing on the theoretical analysis above it could be hypothesised that the greater detail contained in the specific duties in Wales and Scotland mean that the PSED in those regions encourages public authorities to have greater reflexivity and is more responsive to civil society expectations, therefore resulting in fewer challenges to the general duty by judicial review.

## 4. Support for EIA

The preceding analysis highlights the importance of EIA to changing the behaviour of public authorities in relation to equality. It also indicates that the failure to use or a failure in the quality of EIA, or a mechanism by another name that fulfils this function, is the most likely cause of civil society actors to seek judicial review. The policy support for EIA can then be thought of as having two directions: a) to help public authorities to understand their legal responsibilities and the role that EIA can have in demonstrating due regard and b) to help interested parties to know when EIA is inadequate or inaccurate. The following review, therefore, examines a range of policy initiatives under these two headings.

### 4.1 Policy support for public authorities

The main sources of support for public authorities in the UK come from the Equality Commissions. In relation to EIA in Great Britain the Equality and Human Rights Commission (EHRC) provides guidance for public authorities in England and non-devolved authorities and guidance for devolved authorities in Scotland and Wales. The EHRC also provides a set of technical guidance documents for each of the regions aimed at “lawyers, advocates, human resources personnel, courts and tribunals, and everyone who needs to understand the law in depth, or apply it in practice”.<sup>19</sup> However, the government has decided that these guides shall not be put before Parliament and, therefore, unlike the codes of practice for the separate duties prior to the Equality Act 2010, they have no statutory weight.

In addition to the guides the EHRC has, in the wake of its section 31 assessment of HM Treasury 2010 Spending Review and possibly prompted by the ruling in *Fawcett*, published a guide on cumulative impact assessment. It is important to note that, using cumulative impact modelling techniques, the researchers did find significant equality impacts of 2010 spending review decisions by HM Treasury. The House of Commons Library has also issued briefing notes on the use of EIAs. The latest (No. 06591) was published in January 2015 and provides an in-depth analysis of the legal position.

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<sup>18</sup> All of the cases in the EDF database where the region is identifiable are English. All but one case where the region is identifiable in the table of cases provided by McColgan (2015) are English.

<sup>19</sup> <http://www.equalityhumanrights.com/legal-and-policy/legislation/equality-act-2010/equality-act-guidance-codes-practice-and-technical-guidance#tech>

The EHRC guidance for England and non-devolved authorities is entitled *Meeting the Equality Duty in Policy and Decision Making*.<sup>20</sup> The guide states:<sup>21</sup> “Understanding (or assessing) the impact of your policies and practices on people with different protected characteristics is an important part of complying with the general equality duty... The general equality duty does not set out a particular process that public authorities are expected to follow. It is up to each authority to choose the most effective approach. This will vary depending on the size of the organisation, the functions they carry out, and the nature of the particular decision.” (p. 6). In relation to timing of assessment the document states:

Your assessment should start early in the policy development process or at the early stages of a review. **Assessing impact on equality should not be a one-off exercise.** This is because the general equality duty is a continuing duty and policy contexts and other circumstances will change over time. Equality considerations are to be taken into account both when decisions are made and **after** policies are in place. There is no point in considering the impact of your policies on equality if your findings are not given active consideration in your policy development and decision-making processes. Considering and reflecting on equality matters should benefit both your policy design and the delivery of your services. (p. 9 emphasis in original)

There is also a guide for “Equality Information and the Equality Duty” that discusses in more detail the requirements for EIA. Both sets of guidance draw heavily on case law and legal principles including the point that EIA is not mandatory. Both are dated 2014.

In relation to Wales, the EHRC produces a guide specifically in relation to EIA “Assessing Impact and the Equality Duty”<sup>22</sup>. This is a more detailed document, which has greater focus on the specific duties. It is unequivocal in its requirement for EIA. In relation to timing the guide states:

Assessing the impact of policies and practices on a listed authority’s ability to comply with the general equality duty should be integral to the development and review of policies from the outset. It is important to monitor the actual impact of a policy as it is implemented, and the assessment should be revisited as part of any review. (p.10)

There is also a separate document *Equality Information: A Guide for Listed Public Authorities in Wales*<sup>23</sup>. The focus of this document is largely about the information that is required to fulfil the specific duties.

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<sup>20</sup>[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Meeting%20the%20duty%20in%20policy%20and%20decision-making.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Meeting%20the%20duty%20in%20policy%20and%20decision-making.pdf)

<sup>21</sup>[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Equality%20information%20and%20the%20equality%20duty.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Equality%20information%20and%20the%20equality%20duty.pdf)

<sup>22</sup>[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Assessing%20Impact%20and%20the%20Equality%20Duty%20Wales\\_0.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Assessing%20Impact%20and%20the%20Equality%20Duty%20Wales_0.pdf)

<sup>23</sup>[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Equality%20information%20and%20the%20Equality%20Duty%20Wales%20%282%29.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Equality%20information%20and%20the%20Equality%20Duty%20Wales%20%282%29.pdf)

Documents relating to the PSED in Scotland are produced by the EHRC but held at a different website<sup>24</sup> There is a guide specifically in relation to impact assessment.<sup>25</sup> This document is again largely focused on the specific duties and the more bounded requirement for authorities to “assess the impact of applying a proposed new or revised policy or practice **against the needs of the general equality duty**” (p.8 emphasis in original). However, it is interesting to note that there is some emphasis on being proactive. For example: “Proactive steps should be taken to identify potential discrimination and to remove it, and to consider how you can adapt a policy or practice to better advance equality.” (p.10). In relation to timing, the guide states:

Assessing impact is not an end in itself but should be 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 in the revision of existing policies or practices. (p. 13 italics in original)

In Scotland there is also a joint initiative between the Scottish Human Rights Commission and the EHRC Scotland to combine equality and human rights impact assessment (EQHRIA).<sup>26</sup> The website states that the initiative is to support public authorities in Scotland who are aiming to combine equalities and human rights issues in their policies and procedures. The added benefit of including human rights to EIA is to extend good practice to all people in Scotland, rather than groups with legally protected characteristics and to balance competing rights. The initiative provides 10 good practice ‘building blocks’ for successful EQHRIA:

1. senior level commitment and engagement
2. Timing and capacity to influence decisions
3. Staff, training and resources
4. Understanding the legal basis of EQHRIA
5. Deciding what to assess and the scope of the assessment process
6. Evidence to support assessments
7. Involvement of communities
8. Assessing combined impacts
9. Conclusions and recommendations
10. Transparency and review

There have also been two pilot studies in local authorities, Renfrewshire and Fife.

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<sup>24</sup> : <http://www.equalityhumanrights.com/about-us/devolved-authorities/commission-scotland/public-sector-equality-duty-scotland/non-statutory-guidance-scottish-public-authorities>

<sup>25</sup>[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Assessing%20impact%20and%20the%20public%20sector%20equality%20duty%20Scotland.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Assessing%20impact%20and%20the%20public%20sector%20equality%20duty%20Scotland.pdf)

<sup>26</sup> <http://www.scottishhumanrights.com/eqhria>

## 4.2 Support for ‘interested parties’

The analysis of the use of judicial review highlights that civil society groups and individuals as interested parties have made extensive use of this PSED enforcement mechanism. They have relied on the lack of appropriate EIA as the legal lever to demonstrate non-compliance with the PSED and to seek judicial review. The ability to do this, of course, depends on a relatively sophisticated understanding of the law and a technical knowledge of EIA, which is likely to be a barrier to utilising this form of enforcement for most and therefore reduces the responsive potential of the PSED. A number of voluntary sector organisations have produced resources to support interested parties in developing and understanding EIA. This section examines two of these: The Coalition for Racial Equality and Rights in Scotland and the Warwick University Centre for Human Rights in England.

### 4.2.1 The Coalition for Racial Equality and Rights (CRER)

The CRER is based in Glasgow and was formally the Glasgow Anti-Racist Alliance. CRER’s mission statement is:

The Coalition for Racial Equality and Rights key mission is to: Protect, enhance and promote the rights of ethnic minority communities across all areas of life in Scotland; and to empower ethnic minority communities to strengthen their social, economic and political capital, especially those at greatest risk of disadvantage. CRER takes a rights based approach, promoting relevant international, regional and national human rights and equality conventions and legislation.

One of CRER’s main objectives is to engage with public sector organisations to mainstream race and other equalities in policy development. In relation to this aim, CRER has developed guidance for interested parties ‘Better Impacts: Using the Equality Impact Assessment Duty – A Guide for Voluntary and Community Organisations in Scotland’ (2015)<sup>27</sup>. The aims of the guide are stated as:

- Explore how groups can use the public sector equality duty to challenge unfair decision making
- Explain what you should expect from an equality impact assessment
- Provide information to help you take steps to challenge or improve decisions about public sector services (p.2).

The guide is written in accessible language and provides a useful step-by-step guide of how understanding what is required of an EIA can help interested parties challenge decisions that they feel do not meet the requirements of the PSED.

### 4.2.2 Warwick Centre for Human Rights in Practice

The Centre was formed in 2006 and gives its main aim as providing “a focus for academics, students, practitioners and activists who wish to advance the study and promotion of

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<sup>27</sup> <http://www.crer.org.uk/publications/better-impacts-public-sector-equality-duty-toolkit>

human rights at local, national or international levels.”<sup>28</sup> . The centre has worked collaboratively with the Scottish Human Rights Commission in the development of EQHRIA detailed above and one of the eight projects on which the centre focuses is equality and human rights impact assessment. The web pages under this project contain a wide array of resources with a particular focus on challenging decisions that result from the implementation of spending cuts in public authorities. One of the aims of this project is to produce independent EIAs and to support and provide information to other voluntary organisations who seek to do the same by offering a resources data base, which has six sections:

1. Reports on the impacts of public spending cuts and welfare reform on different disadvantaged groups and different nations and regions within the UK
2. Key resources and statistical data for monitoring ongoing impact of public spending cuts
3. Legal challenges made against public spending cuts (including judicial review)
4. Toolkits and guides to using human rights and equality legislation to challenge spending cuts
5. Academic papers on impact assessment of the cuts

Interestingly the web pages note that, although EIAs are a widely used tool “there is still relatively little consensus on how such assessments should be conducted, nor is there a great deal of critical engagement with existing practice.”<sup>29</sup>

The Centre has close links with a number of local voluntary organisations and has undertaken EIAs for Coventry Women’s Voice. The template for these EIAs has been used by Bristol and East London Fawcett Society groups and Women’s Resource Centre and NE Women’s Network.

## 5. Summary and conclusions

Section 1 indicates that EIA has its equality roots in the concept of gender mainstreaming, a concept promulgated by the European Commission and Union following the women’s summit in 1995 in Beijing. EIA is a tool that is integral to the concept of mainstreaming since it allows policy-makers to know where equality issues need to be considered in decision-making. The analysis highlights that where mainstreaming was taken up seriously in Europe and related concepts in Canada and Australia, it was located at high levels of decision-making both in central and local governments in an ‘expert-bureaucratic’ form that was voluntary rather than statutory. Therefore, whilst central positioning provided the concept with immediate legitimacy and standing, it also meant it was crucially dependent on political support. It would seem that, regardless of where mainstreaming is practiced, if it takes a voluntary centralised form then, when its political favour wanes, so too do the structures that support it.

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<sup>28</sup> <http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/about/>

<sup>29</sup> <http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/projects/humanrightsimpactassessments/>

The PSEDs, first in Northern Ireland and then in Great Britain, were the first steps to a statutory duty to mainstream equality into the decision-making processes of public authorities. The form of the duties is quite different from anti-discrimination law and follows more closely the theoretical models of responsive and reflexive law. Although often used interchangeably, these two models are conceptually different. Responsive law is concerned with codifying and encouraging the participation and engagement of civil society groups in aspects of the law that affect them. It is particularly intended to support the position of minority groups who might not otherwise have influence or 'voice' and is closely related to achieving good relations with these groups. Reflexive law is primarily concerned with encouraging institutions and organisations to reflect on and change their behaviour in relation to social issues. The difference between the two conceptual forms of law is that responsive law places emphasis on participative–democratic analysis of impact whereas, on its own, reflexive law uses largely expert-bureaucratic methods. The PSEDs have potential for both responsive and reflexive elements. The purpose of combined responsive and reflexive law is to encourage organisations and civil society groups to work together proactively, that is to say anticipate problems before they arise, which most often means assessing the impact of new decisions before they are made and retrospectively where historical decisions have a continuing impact. Since the passing of the Equality Act there has been some political distancing from the PSED in general and the use of EIA specifically. This is evident in the approach that has been taken towards the secondary legislation required for the specific duties. The responsive elements in the English duty have largely been lost following the Equality Act 2010 because of the weak nature of the specific duties, which lack a requirement for participation of civil society groups for this region. The reliance in England on reflexive elements of the PSED mean it takes on a centralised expert-bureaucratic form, which as the earlier analysis identified, is reliant on political support. Whilst enthusiasm for the PSED has waned in Westminster, the Scottish Government and the Welsh Assembly have maintained responsive elements in the specific duties for their respective regions. The operation of the PSED and its influence on the behaviour of public authorities is therefore likely to vary extensively between the regions.

The benefits of a combination of responsive and reflexive law are that, if it is operating well, issues that might otherwise have led to legal cases should be resolved before judicial intervention is needed. Fredman (2011) argues that once the PSED needs enforcement by judicial review, the proactive element of the legislation has failed. Since there has been a great deal of use made of judicial review in relation to the PSED by civil society groups in England there may be some argument that the lack of a responsive element means that the PSED is not reaching its proactive potential.

Judicial review can only be sought of the general duty and not the specific duties. Therefore, the focus of judicial review cases is compliance with 'due regard'. Public authorities, and more specifically decision-takers in public authorities, must demonstrate how this was achieved in relation to relevant protected characteristics when reaching decisions. EIA, although not a statutory requirement, is by far the most common way that due regard is demonstrated even following the weaker requirements in the Equality Act 2010 and the discouragement of their use by the government.

Early case law in relation to judicial review of the PSED gave rise to the *Brown Principles*. These principles and subsequent case law indicate that two sets of issues arise in relation to EIA. The first is in relation to the content and quality of EIAs and the second is in relation to how and when they are used by decision-takers. In relation to the latter point the timing of EIA has resulted in some contradictory rulings. Where the impact of new decisions is considered to be suitably assessed retrospectively, the proactive benefits of the PSED are further diminished.

Its central position in relation to judicial review means that understanding EIA is important for both public authorities and civil society interested parties. For public authorities rigorous use of EIA is a strong defence in the face of judicial review. For civil society groups with limited statutory participation or engagement rights, *ex-post* judicial review of the general duty based upon critiquing the quality of public authority EIAs may be the only way of having a voice in relation to the decisions that have a negative impact on them. Support in relation to understanding and undertaking quality EIA has therefore grown for both public authorities and civil society groups. Once a decision has been taken to use EIAs then improving their quality can only be a good thing regardless of where the pressure comes from, but for public authorities the lack of clarity and statutory guidance given to EIA means that their quality is likely to be inconsistent. Faced with uncertainty public authorities pressed for resources may see a 'tick box' approach as a gamble worth taking, particularly if the route to judicial review becomes more difficult and accountability to civil society groups is lessened. This will mean, however, that the reflexive potential of the PSED is weakened.

There is some similarity between the position of EIAs in relation to the PSED and the use of job evaluation in relation to equal pay. In the latter case, although job evaluation is not mandatory, where it is used by employers to determine equal value clear guidance is given in the Equality Act 2010. An examination of this example might be the starting point for a clearer understanding of the role of EIA in the PSED.

## Appendix 1

Table. 1 Leading Judicial Review Cases recorded on EDF Website <a href="http://www.edf.org.uk/blog/case-law/">http://www.edf.org.uk/blog/case-law/</a>			
Case	Link to ruling	Grounds	Summary
R (on the application of Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin)	<a href="http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2008/2062.html&amp;query=kaur+and+shah&amp;method=boolean">http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2008/2062.html&amp;query=kaur+and+shah&amp;method=boolean</a>	Race	Council had failed to assess the impact that its change to funding for domestic violence policy would have on ethnic minority women. (upheld)
R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2008/3158.html">http://www.bailii.org/ew/cases/EWHC/Admin/2008/3158.html</a>	Disability	Decision to close accessible post office did not have sufficient evidence of 'due regard' of impact on disabled service users. (failed)
Basildon District Council v McCarthy & Ors [2009] EWCA Civ 13	<a href="http://www.bailii.org/ew/cases/EWCA/Civ/2009/13.html">http://www.bailii.org/ew/cases/EWCA/Civ/2009/13.html</a>	Race	Unauthorised development of Travellers' site. (failed)
R (Domb) v London Borough of Hammersmith and Fulham & Ors [2009] EWCA Civ 941	<a href="http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2009/941.html&amp;query=domb&amp;method=boolean">http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2009/941.html&amp;query=domb&amp;method=boolean</a>	Disability, race, gender	Introduction of charges for non-residential care home. (failed)
Pieretti v London Borough of Enfield [2010] EWCA Civ 1104	<a href="http://www.bailii.org/ew/cases/EWCA/Civ/2010/1104.html">http://www.bailii.org/ew/cases/EWCA/Civ/2010/1104.html</a>	Disability	Local authority's responsibility to re-house after eviction. (upheld)
R (Macdonald) v Royal Borough of Kensington and Chelsea [2011] UKSC 33	<a href="https://www.supremecourt.uk/cases/docs/uksc-2011-0005-judgment.pdf">https://www.supremecourt.uk/cases/docs/uksc-2011-0005-judgment.pdf</a>	Disability	Removal of night care assistance for toileting needs and replacement with incontinence pads. (failed)
R (W and others) v Birmingham City Council [2011] EWHC 1147 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2011/1147.html">http://www.bailii.org/ew/cases/EWHC/Admin/2011/1147.html</a>	Disability	Decision to restrict council funded care for disabled adults to 'critical needs' only. (upheld)



R (Bailey and others) v Brent Council and others [2011] EWCA Civ 1586	<a href="http://www.bailii.org/ew/cases/EWCA/Civ/2011/1586.html">http://www.bailii.org/ew/cases/EWCA/Civ/2011/1586.html</a>	Race	Decision to close libraries impact on Asian community to a great extent. (failed)
O'Brien & Ors v South Cambridgeshire District Council [2008] EWCA Civ 1159	<a href="http://www.bailii.org/ew/cases/EWCA/Civ/2008/1159.html">http://www.bailii.org/ew/cases/EWCA/Civ/2008/1159.html</a>	Race	Injunction against Travellers. (failed)

## Appendix 2

Table 2. Selected Recent Judicial Review Cases recorded on EDF Website <a href="http://www.edf.org.uk/blog/case-law/">http://www.edf.org.uk/blog/case-law/</a>			
Case	Link to ruling	Grounds	Summary
R (Winder and Others) v Sandwell Metropolitan Borough Council and the Equality and Human Rights Commission (intervening) [2014] EWHC 2617 (Admin)	<a href="http://www.cpag.org.uk/sites/default/files/Winder%20%20ors%20v%20Sandwell%202014%20EWHC%202617%20(Admin)%20(30%20July%202014).pdf">http://www.cpag.org.uk/sites/default/files/Winder%20%20ors%20v%20Sandwell%202014%20EWHC%202617%20(Admin)%20(30%20July%202014).pdf</a>	Gender and race	Challenge brought by three women affected by the Sandwell Metropolitan Borough Council residence requirement for entitlement to council tax rebate (CTR). (upheld)
R (on the application of UNISON) v the Lord Chancellor and the Equality and Human Rights Commission (intervening) [2014] EWHC 218 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2014/218.html">http://www.bailii.org/ew/cases/EWHC/Admin/2014/218.html</a>	Gender, Race, Disability, Age, Religion or belief	Challenge brought by a trade union on the introduction of higher employment tribunal fees. (failed)
Stuart Bracking and others v Secretary of State for Work and Pensions [2013] EWCA Civ 1345	<a href="http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2013/1345.html&amp;query=bracking+and+\" public+sector+equality+duty\"&amp;method='boolean"'>http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2013/1345.html&amp;query=bracking+and+\"public+sector+equality+duty\"&amp;method=boolean</a>	Disability	Decision by Secretary of State to close the Independent Living Fund (ILF). (upheld)
R (on the application of Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWHC 233 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2013/233.html">http://www.bailii.org/ew/cases/EWHC/Admin/2013/233.html</a>	Age, disability, race	The claim concerned the Secretary of State's decision to put an overall cap on the amount of housing benefit that could be paid to claimants at the level of general inflation, even if inflation in the rental sector was higher. (failed)
R (on the application of RB) v Devon County Council [2012] EWHC 3597(Admin)	<a href="#">R (on the application of RB) v Devon County Council [2012] EWHC 3597(Admin)</a>	Age, disability, gender re-	Abolition of the PCT NHS Devon, the ICS outsourced by a single provider. (failed)

		assignment, pregnancy and maternity, race, religion or belief, sex & sexual orientation	
Aaron Hunt v North Somerset Council [2012]  EWHC 1928 (Admin) [2013] EWCA Civ 1320	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2012/1928.html">http://www.bailii.org/ew/cases/EWHC/Admin/2012/1928.html</a>  <a href="https://www.supremecourt.uk/cases/docs/uksc-2014-0023-judgment.pdf">https://www.supremecourt.uk/cases/docs/uksc-2014-0023-judgment.pdf</a>	Disability	Council's cut to youth budget and impact on users with ADHD. (failed)  Appeal (failed)
R (on the application of S and KF) v Secretary of State for Justice [2012] EWHC 1810 (Admin)	<a href="http://www.judiciary.gov.uk/judgments/s-kf-sec-state-for-justice-judgment-03072012/">http://www.judiciary.gov.uk/judgments/s-kf-sec-state-for-justice-judgment-03072012/</a>	Sex	Challenge to regulations issued to prison governors giving them discretion to make deductions from the earnings of prisoners when they are employed outside the prison. (failed)
HA (Nigeria), R (on the application of) v Secretary of State for the Home Department (Rev 1) [2012] EWHC 979 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html">HA (Nigeria), R (on the application of) v Secretary of State for the Home Department (Rev 1) [2012] EWHC 979 (Admin)</a>	Disability, Race	Policy change made by the Secretary State in August 2010 which made it more likely that people with mental health problems would be detained in immigration detention centres. (upheld)
R (on the application of Hurley and	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html">http://www.bailii.org/ew/c</a>	Race,	Secondary school pupils wishing to go to university

Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2012/201.html">ases/EWHC/Admin/2012/201.html</a>	gender, disability	challenged the Secretary of State's decision to increase the maximum annual amount which universities were permitted to charge students.
R (on the application of Green) v Gloucestershire County Council and R (on the application of Rowe and Hird) v Somerset County Council [2011] EWHC 2687 (Admin); [2011] EWHC 3216 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2011/2687.html">http://www.bailii.org/ew/cases/EWHC/Admin/2011/2687.html</a>	Age, disability, gender	Closure of libraries. (upheld)
R (on the application of JM and NT) v Isle of Wight Council [2011] EWHC 2911 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2011/2911.html">http://www.bailii.org/ew/cases/EWHC/Admin/2011/2911.html</a>	Disability	Change to eligibility rules for adult social care. (upheld)
R (on the application of Luton Borough Council and others) v Secretary of State for Education [2011] EWHC 217 (Admin)	<a href="http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2011/217.html&amp;query=luton+and+schools&amp;method=boolean">http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2011/217.html&amp;query=luton+and+schools&amp;method=boolean</a>	Race, gender, disability	Cancellation of school refurbishments. (upheld)
R (on the application of Hajrula and Hamza) v London Councils [2011] EWHC 861 (Admin) [2011] EWHC 861 (Admin); [2011] EWHC 151 (QB)	<a href="http://currentsite.deightonpierceglynnc.co.uk/news/news_docs/Hajrula%20v%20LondonC%20judgment.pdf">http://currentsite.deightonpierceglynnc.co.uk/news/news_docs/Hajrula%20v%20LondonC%20judgment.pdf</a>	Race, gender, disability	Cuts to voluntary sector grants. (upheld)
R (on the application of Boyejo and others) v London Borough of Barnet and R (on the application of Smith) v Portsmouth City Council [2009] EWHC 3261 (Admin)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2009/3261.html">http://www.bailii.org/ew/cases/EWHC/Admin/2009/3261.html</a>	Disability	Changes in the provision of support services for people living in sheltered accommodation in respect of overnight cover. (upheld)

## Appendix 3

### **R (on the application of Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin)**

43. “There was no full racial equality impact assessment until some time after these proceedings were launched, namely on 5 June 2008. This failure establishes a clear breach of Section 71 of the 1976 Act, the statutory code and the specified duties which Ealing was required to follow under the 2001 order. In determining as criteria that the provider should be a single source of services to all throughout the borough or a consortium with a single leader before a full racial equality impact assessment had been undertaken, the Council acted unlawfully. Moreover it was wrong to fix on a solution with only the prospect of monitoring its effect on minorities in the future.

44. Once the Borough of Ealing had identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution. It erred: in having recognised the problem whilst merely hoping to assess its extent after it had settled on its criteria. “

### **O’Brien & Ors v South Cambridgeshire District Council [2008] EWCA Civ 1159**

“In the present case, I would attach considerable weight to the respondent's decision because it did take into account all material considerations and because it approached the issue in a balanced and proportionate way. Moreover, it had as part of its context a decision by the Secretary of State on the planning appeal, which decision itself took into account the ethnic status of the occupiers and their personal needs. That does not relieve the court of its own duty to consider those matters, but it is nonetheless a relevant factor. In the present case the Deputy Judge gave detailed consideration to the personal circumstances of the appellants and his assessment thereof has not been criticised. The only error into which he fell was the need to carry out a race impact assessment as not applying to the respondent's decision to apply under section 187B, but as I have said earlier the approach adopted by the respondent did in substance amount to such an assessment, even if not produced in such a form. That error does not, in my judgment, vitiate the conclusion to which the judge came. His own exercise of discretion fully took account of the ethnic considerations relevant in this case, as it did of the impact of an injunction on the appellants. In any event, were this court called upon to exercise its own discretion in place of that of the judge, I would exercise it in favour of the grant of the injunction for the reasons given earlier.”

### **R (Domb) v London Borough of Hammersmith and Fulham & Ors [2009] EWCA Civ 941**

52. “Our attention has been drawn to a number of authorities on the need to have due regard to equality duties, in particular *R (Elias) v. Secretary of State for Defence* [2005] EWHC 1435 (Admin) (Elias J), [2006] EWCA Civ 1293, [2006] 1 WLR 3213, *R (Chavda) v. London Borough of Harrow* [2007] EWHC 3064 (Admin) (HHJ Mackie QC), *R (Baker) v. Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2008] LGR 239, *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), and

*R (Meany, Glynn and Sanders) v. Harlow District Council* [2009] EWHC 559 (Admin) (Davis J). I find the greatest help in the judgments of Dyson LJ in *Baker* (dealing with the RRA) at paras 30ff and of Scott Baker LJ in *Brown* (dealing with the DDA) at paras 89/96, where each of them summarises what is involved in the duty to have "due regard". For present purposes I take from those summaries in particular the observations that there is no statutory duty to carry out a formal impact assessment; that the duty is to have due regard, not to achieve results or to refer in terms to the duty; that due regard does not exclude paying regard to countervailing factors, but is "the regard that is appropriate in all the circumstances"; that the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind; and that it is a non-delegable duty.

53. No authority has been cited as being of particular relevance to the facts of our case. I note, however, that *Chavda* concerned the activities of councils with respect to their provision of social services. In *Chavda*, where Harrow restricted home care services to people with critical needs only, there was a total failure to mention the DDA duty in any of the documents produced for Harrow's decision makers. There was no effort proactively to seek the views of the disabled or to refer to the duty in the planning stages of the consultation. There was no equality impact assessment. Harrow nevertheless submitted that it had observed its duty in substance, and had engaged in consultation and other ways with the disabled. However, what Judge Mackie considered as critical was that "There is no evidence that this legal duty and its implications were drawn to the attention of the decision-takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes" (at para 40). However, I cannot say that I derive any assistance from that, very different, case.

Lord Justice Sedley :

78. I agree that this appeal fails; but I do so with very considerable misgivings because the appeal itself has had to be conducted on a highly debatable premise – that the prior decision of the local authority that council tax was to be cut by 3% had to be implemented. Once this was given, the only practical choice for social services was going to be to raise the eligibility threshold or to charge for home care. That, accordingly, was what the entire consultation and ultimate decision addressed.

79. Members are heavily reliant on officers for advice in taking these decisions. That makes it doubly important for officers not simply to tell members what they want to hear but to be rigorous in both inquiring and reporting to them. There are aspects of the evaluation, quoted by Rix LJ, which strike me as Panglossian – for example the ignoring of actual outcome in favour of "planned outcome" and the limiting of consequential risk to the possibility that charges would not be introduced – and parts of the report to members which present conclusions without the data needed to evaluate them.

80. But these lose significance against the backdrop of a predetermined budget cut. The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, there is at the back of this a

major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court. “

**R (on the application of Boyejo and others) v London Borough of Barnet and R (on the application of Smith) v Portsmouth City Council [2009] EWHC 3261 (Admin)**

“61. That paragraph of the Code is in my judgment directed towards deciding whether to conduct a full impact assessment. The assessment carried out by Ms English concluded that the proposed changes did not and could not have an adverse impact on members of equality groups. That conclusion does not sit easily with her own description, within the same assessment, of the change in service as a radical one. It does not sit easily with the information gathered by Portsmouth during the decision making process that the change is likely to have an impact on the peace of mind of residents and the journey times of the mobile unit are likely to be longer than a response from a resident staff member.

62. Moreover, in my judgment in assessing the impact on disabled persons, it is not sufficient to have regard just to timed experimental journeys. Regard must be had also to the understandable perception and fear amongst such persons that the loss of resident staff would lead to a less responsive support service. As I have indicated, such an impact was acknowledged on behalf of Portsmouth at the 30 July 2009 meeting. In my judgment, for the purpose of determining whether the officer had a responsibility to draw the duty under section 49A(1) to the attention of decision makers, the cumulative effect of these factors was sufficient to make it likely that the impact on disabled persons would be more than minor. In my judgment the duty under section 49A(1) should have been brought to the attention of the decision makers.

63. Both Barnet and Portsmouth had some regard to such impacts on residents as a group, but neither authority in my judgment had any or sufficient regard to such an impact upon those residents with disabilities as a separate group or to the need to recognise that the taking into account of those disabilities may involve treating disabled persons more favourably than others. References in the documentation before the decision makers in each case to disabilities or to rights of equality do not fulfil the requirement of such recognition. Nor does a general awareness amongst officers or decision-makers of the duty under section 49A(1). In my judgment, it follows that in both cases there has been a failure to comply with that duty and in particular sub-section (d). That alone is sufficient to vitiate each of the decisions.”

**R (W and others) v Birmingham City Council [2011] EWHC 1147 (Admin)**

xiii. “...If a risk of adverse impact is identified, consideration must be given to measures to avoid that impact before fixing on a particular solution;

xiv. Impact assessments must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact;

158. ...There was no analysis of how and to what extent any mitigation measures would be effective in addressing adverse impacts. In particular, there was no consideration of the

extent to which alternative resources in the community would be available for those with substantial needs, and no other steps to mitigate the impact on disabled people were identified.

159. As to the Corporate EINA [Equality Impact Needs Assessment], the claimants noted that it acknowledged that there might be a significant impact due to the disadvantage caused to individuals with different kinds of disability, and that some figures were given as to the numbers and percentages of affected people. However the comments about the Section 49A duty did not address the impact of the new policy....The Corporate EINA identified one particular step by way of mitigation – approaching withdrawal of services sensitively – but there was nothing else to mitigate the effects of the policy. Moreover there was no evidence that any decision maker saw the Corporate EINA, and the inference must be that they did not.

160. ...Overall, there had been a failure to provide any rigorous assessment, a failure to consider the extent of adverse impacts, a failure to identify tangible actions to deal with potential adverse impacts, and a failure to consider the relative merits of alternative approaches.

I readily accept that throughout the process the Council was giving consideration to how to address the needs of the disabled. In that sense its decisions taken in relation to adult social care were decisions which were relevant to its performance of the s 49A duty. That is not the same thing, however, as doing what s 49A seeks to ensure: namely to consider the impact of a proposed decision and ask whether a decision with that potential impact would be consistent with the need to pay due regard to the principles of disability equality...”

### **R (Bailey and others) v Brent Council and others [2011] EWCA Civ 1586**

102. “The importance of complying with s.149 is not to be understated. Nevertheless, in a case where the council was fully apprised of its duty under s.149 and had the benefit of a most careful Report and EIA, I consider that an air of unreality has descended over this particular line of attack. Councils cannot be expected to speculate on or to investigate or to explore such matters ad infinitum; nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s.149 which a QC might deploy in court. The outcome of cases such as this is ultimately, of course, fact specific (see Harris). All the same, in situations where hard choices have to be made it does seem to me that to accede to the approach urged by Miss Rose in this case would, with respect, be to make effective decision making on the part of Local Authorities and other public bodies unduly and unreasonably onerous.

103. As to the second ground, the council was not under a duty to consult as to the contents of the EIA: although, of course, failure to have an awareness of issues potentially arising could vitiate the EIA as failing to demonstrate the appropriate regard for the relevant needs. In the present case officers of the council were plainly aware from the outset of, and they consulted as to, potential equality issues, including on race and ethnicity. The requirements of the 2010 Act were throughout in mind. As already stated, the EIA when finally produced – and it will have taken an amount of time to prepare – was a thorough document...”



**R (on the application of Green) v Gloucestershire County Council and R (on the application of Rowe and Hird) v Somerset County Council [2011] EWHC 2687 (Admin); [2011] EWHC 3216 (Admin)**

118. “The public sector equality duties impose important and onerous burdens on public authorities. In carrying out all of their functions they must have due regard to the statutory equality needs. It is common ground that the question is whether the duties have been carried out in substance by the persons responsible for the decisions in question rather than whether a document referred to as an EIA has been produced. Carrying out an EIA is not an invariable necessity for conformity with the public sector equality duty but nor (conversely) is evidence that an EIA has been produced, evidence that "due regard" has been given to the statutory equality needs. The substance of the analysis is the key in this area.

121. It was also submitted that the duty was not exercised in substance and with rigour and was not based on sufficient information and was not integrated into the discharge of the respective Defendants' public functions on or before and at the time that the policies in question were formally being considered and that none of the EIAs considered whether the substance of the policies in question should be changed in the light of adverse impacts on vulnerable groups or in order to take positive steps to promote the statutory needs. Rather the EIAs proceeded as though their only function was to look at what mitigating steps might be taken to soften the negative impacts of an already formed policy. Indeed, it was submitted that much of the analysis of the effects on the protected groups took place after the formal decisions had been made rather than at a formative stage. To my mind there is no substance in this latter criticism. The formative stage at which the duty is to be performed is not at the early stage when officers are contemplating policy options but as part of the decision making process.

129. It is unfortunate, but not by any means determinative, that no specific reference was made to the statutory duties by the decision makers and I do not consider that in this case it can fairly be said that GCC or indeed SCC had no regard at all to their respective statutory duties in the light of the fact that both GCC and SCC produced a number of EIAs and in the light of the evidence led by both Defendants. On the other hand, nor do I consider that the existence of EIAs is in any way determinative that due regard to the statutory duties was had. It is of course substance not form which is the benchmark.”

**R (on the application of JM and NT) v Isle of Wight Council [2011] EWHC 2911 (Admin)**

*Equality Impact Assessment*

120. “Although there was no statutory obligation to conduct an EIA, the Council relied upon its EIA as evidence in support of its case that it had due regard to the s.49A DDA 1995 objectives when making its decisions. The Court was therefore obliged to scrutinise the content of the EIA.

121. In *R (W) v Birmingham City Council* [\[2011\] EWHC 1147 \(Admin\)](#), the Court accepted the proposition, agreed by the parties, at [151] that:

"xiv Impact assessments must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact;"

122. I accepted Mr Wolfe's submission that there were a number of flaws in the EIA:
- a) the EIA contained no evidence-based information about the specific impact on disabled people of the proposals;
  - b) the EIA did not explain the nature of the 'Substantial' needs that would be excluded from funding by the revised eligibility criteria;
  - c) the EIA did not explain what the detriment would be to disabled people;
  - d) the EIA did not state how many disabled people would be detrimentally affected;
  - e) the suggestions in the EIA for mitigating the effects of the proposal were accordingly made without a proper understanding of the potential detriment.

123. The Council did not comply with its own guidance on EIAs which required an evidence-based assessment. The guidance stated that the EIA should contain 'information about service users' and should identify 'quantitative and qualitative data or any consultation information available that will enable the impact assessment to be undertaken'. If, on the basis of this evidence a negative impact was identified, staff were advised to 'consider measures to mitigate any adverse impact and better achieve the promotion of equality of opportunity'.

124. References in the 'summary report', which followed the EIA, to 'signposting to other sources of support' and 'regular reassessment of processes and policies' were too vague and generalised. They were similar in nature to the assertions which Walker J found to be insufficient to demonstrate due regard to the duty in Birmingham's decision to move to 'critical only' eligibility in *R (W) v Birmingham City Council*, at [177].

125. Finally, the EIA was conducted in respect of version 3 of the Council's proposals for revised criteria. No EIA was conducted in respect of the significantly different proposals in the *Eligibility Review* (version 5) which were actually used to re-assess users following the implementation of the new Council policy.

126. Thus, although the EIA was provided to Members, it did not provide the analysis and the information which Members of the Council needed in order to discharge adequately their s.49A DDA 1995 duty. “

**R (on the application of Luton Borough Council and others) v Secretary of State for Education [2011] EWHC 217 (Admin)**

115. “The Secretary of State has sought to rely on an Equality Impact Assessment which was carried out in July 2010 after the decision had been made and announced. Several counsel have made submissions as to the correct analysis of that EIA and what it shows. Mr

Bell says, and Mr Goudie submits, that the overall differential equality impact was very small. Other counsel submit that if, they say, more correctly, the EIA had compared the impact on the stopped schools compared with the impact on the saved schools (rather than with all schools nationally) the impact is more marked. These statistical issues are, however, outside my remit. What the second Brown principle makes clear is that "attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough." As Sedley LJ said in one case, this is no more than "a rearguard action", and is too late. In any event the later EIA, now at CB 2: 645 – 649 itself says, in its conclusion, now at page 649, that "... a stop now means that these prioritised groups will be inadvertently disadvantaged disproportionately ..." As Miss Stratford submitted, a major purpose of due regard before a decision is made, not after, is to avoid the "inadvertent".

116. I am thus satisfied that the Secretary of State's decision making process was also unlawful because of his failure to discharge the relevant statutory equality duties. "

**R (on the application of Hajrula and Hamza) v London Councils [2011] EWHC 861 (Admin) [2011] EWHC 861 (Admin); [2011] EWHC 151 (QB)**

"In a case where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high.

...the court must look not at the result, but at the process... I do find that the flaw that I have identified, which puts this case in the Kaur category in my judgment, is such that the process was vitiated from the outset, and was never put right."

**R (on the application of RB) v Devon County Council [2012] EWHC 3597(Admin)**

63. "Applying the principles set out in Bailey, to which I have referred above, I conclude that the decisions in July 2012 did engage the public sector equality duty. No focus on the duty occurred at that stage. The EIA carried out in March 2012 was not drawn to the attention of the decision makers in Cabinet or on the Board, either because the view was taken that this was a case of change of provider which did not engage the duty, or because there were to be no changes to the service so that no negative impact would occur.

64. I accept Miss Monaghan's submission that such an approach misunderstands the duty. More was required. There should have been focus on the needs identified in section 149.

67. I do not however accept Miss Monaghan's submission that the fact that it was not thought possible at that stage to assess changes in the provision of services has the consequence that the duty was not discharged. On that point I accept Mr Goudie's submissions, which can be summarised as follows:

1. That changes may occur in any system for the provision of such services even when there is no change of provider.
2. That changes are to be expected when there is a change of provider.

3. That such changes can be evaluated in the context of the public sector equality duty only when their detail is sufficiently well established.
4. That the new provider will not be able to make changes unilaterally.
5. That even if the public sector equality duty does not apply to a private organisation (and there may be doubts about that proposition if it is fulfilling a public function) nevertheless, it will apply to the commissioners of services who will be involved in any decision for change; and
6. That the standard form of NHS contract into which the new provider will be required to enter will have the effect of imposing contractually a duty equivalent to that under section 149.

77. Secondly the defendants have now addressed the public sector equality duty by their EIA of September 2012. I accept that Miss Monaghan is critical of its quality but at least the minds of the decision makers have been directed to the duty and, it can safely be inferred, they can focus on it during the remainder of the procurement process. Important decisions have been taken but the final decision is still to be made.”

**Aaron Hunt v North Somerset Council [2012] EWHC 1928 (Admin)**

97 “In approaching these submissions it is as well to have in mind the words of Pill LJ and Davis LJ in R(Bailey) v LB Brent [2011] EWCA Civ 1586. They are set out under paragraphs (xiii) and (xiv) in the judgment of Wilkie J in Williams & Dorrington set out at paragraph 55 above. I summarise by saying that the duty to have due regard under section 149 can have no fixed content; what observance of the duty requires of decision-makers is fact sensitive and varies considerably from situation to situation; councils cannot be expected to speculate, or investigate the potential impact of a decision upon public service equality duties in a manner befitting a lawyer engaged in forensic analysis in court.

98 If that approach is applied I am persuaded that Mrs Oldham is correct when she submits that there is no substance in the criticisms of the EIA advanced on behalf of the Claimant. She acknowledges that the EIA did not set each of the protected characteristics identified in section 149 of the 2010 Act. She says that was and is unnecessary. She submits that the duty to have due regard does not require that every protected characteristic must be considered with the impact upon it, if any, identified and analysed come what may. That, she submits would be an unnecessary and unduly formulaic approach. In the instant case the EIA identified those budget proposals which had a high impact on service users; it dealt explicitly and in detail with the impact of the reduction in the youth service budget; it referred explicitly to impact upon a number of the protected characteristics itemised in section 149(7) of the 2010 Act (see paragraph 24 above); it set out the information upon which it based its conclusions and it set out the steps to be taken to minimise or mitigate that impact.

100 It follows that I have reached the conclusion that the members did have due regard to the public service equality duties when they reached their decision to approve the Revenue Budget on 21 Feb 2012. Accordingly ground 2 fails.”

**R (on the application of S and KF) v Secretary of State for Justice [2012] EWHC 1810 (Admin)**

“100. In the light of the guidance in the cases, I consider that there was no breach of the section 149 equality duty on the part of the Secretary of State when he promulgated the Prison Service Instructions. The implementation of the deductions regime proceeded in steps, from bringing the PEA into force (with consultation with relevant bodies involved with prisons, prisoners and penal policy directed to that question), to promulgating rule 31A (with a further EIA at that stage) to promulgating the Prison Service Instructions (with yet further EIAs at that stage as well). As is clear from the documents and from the evidence of Mr Smith on this part of the case, the Secretary of State plainly sought to have regard to the equality impacts of the deductions regime before bringing it into effect. In the course of consultation there was no major objection raised based on alleged disproportionate impact upon female prisoners as opposed to male prisoners: see para. [11] above and the review in the EIA on rule 31A at para. [15] above. The Secretary of State reviewed such information as was reasonably available regarding possible equality impacts. The assessment cannot be described as perverse or unreasonable: the Secretary of State was entitled to conclude that, while in the absence of available evidence the potential for disproportionate impact in relation to sex could not be ruled out (para. 4.6 of the EIA on rule 31A: para. [15] above), overall the indications were that there would not be a significant differential impact of the Prison Service Instructions on female prisoners as opposed to male prisoners (see the EIAs on the Prison Service Instructions: paras. [20] and [21] above). He is not to be treated as somehow estopped from denying that there would be a disproportionate impact on female prisoners because of the terms of PSO 4800: prisoners, whether male or female, will very often face complex and difficult problems and challenges in their lives, varying widely depending on their individual circumstances far more than on the basis of their sex. Moreover, the one point made in a single response to consultation (that care should be taken not to have a negative impact on women and their children: para. [11] above) was capable of being accommodated by the discretion left to prison governors and the guidance on exceptional cases which the Secretary of State issued: para. [18] above and Annex B to PSI 76/2011 set out at para. [22] above. “

**HA (Nigeria), R (on the application of) v Secretary of State for the Home Department (Rev 1) [2012] EWHC 979 (Admin)**

“196. It was argued on behalf of the Claimant that, even if there was no change in policy, the public sector equality duties were applicable since they do not require there to have been a change: they apply in the exercise of a public body's functions generally. Although I see force in that submission, it is unnecessary to consider it further since the Defendant accepts in these proceedings that, if there was a change of policy in August 2010, the usual practice under the public sector equality duties was not followed. For example, there was no equality impact assessment. In my judgement, there was a breach of the duties in section 71 of the 1976 Act and section 49A of the 2005 Act.”

**R (on the application of Hurley and Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin)**

74. “Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para 34) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

*The evidence of compliance.*

79. In this case the Secretary of State relies as evidence of compliance on two documents in particular. The first is what was termed an Interim Equality Impact Assessment ("the EIA") entitled "Urgent Reforms to Higher Education and Funding Finance" dated 29 November 2010 and the second was another document of the same date which is referred to as an Interim Impact Assessment ("IA"). In a witness statement sworn in these proceedings, Mr Martin Williams, the Director of Higher Education Policy in the Department of Business, Innovation and Skills, confirmed that the Secretary of State had specifically considered these reports. He stated that although described as interim, these documents provided in fact a full assessment of the draft regulations laid before Parliament as well as the package of urgent reforms to finance and student funding. Both reports were described as "interim" simply because the intention was that they would be followed by a wider set of reforms to be published in a White Paper in 2011. There was in fact a later equality impact assessment produced in July 2011 but it is common ground that this, being after the event, cannot be relied upon as evidence of compliance in relation to the decision to adopt the 2010 regulations.

80. The EIA focused on the new duty imposed by the Equality Act 2010, although it is conceded that these provisions were not in place at the material time. Nothing turns on that, however. The assessment concluded that taking the whole of the reforms together, they ought not adversely to affect individuals from the lower socio-economic backgrounds disproportionately. The report also stated that ethnic minorities were more likely to benefit from the more generous maintenance support packages; that disabled students should not be adversely affected, noting that existing financial support for them would be continued; that 25% of graduates would be likely to pay less under the new system when compared with the old, and these were more likely to be female, the disabled and ethnic minority students; but that there was a possible negative impact on some Muslim students because on some interpretations of Shariah law on interest, some students would have concerns about making the interest payments on the loans.

81. The EIA set out the evidence for reaching these conclusions, relying in large part upon the material referred to earlier in the judgment drawn principally from the Browne review. Indeed, the Annex to the report, which sets out the organisations consulted, lists those consulted by Lord Browne. The report claimed that many of those consulted had an interest in equality matters. The IA also emphasised the importance of the package as a whole to attract the brightest talent from wherever they came.

85. The Secretary of State has made a judgment as to the potential effect of these policies in the light of available evidence. It is made in good faith and is not irrational. He has recognised that it may be wrong; he has accepted that the impact of these measures must be kept under review.”

**Stuart Bracking and others v Secretary of State for Work and Pensions [2013] EWCA Civ 1345**

62. “In this case, I have come to the conclusion (admittedly with some reluctance) that too much of the Respondent's case depends upon the inferences that Ms Busch invites us to draw from the facts as a whole rather than upon hard evidence. In my view, there is simply not the evidence, merely in the circumstance of the Minister's position as a Minister *for Disabled People* and the sketchy references to the impact on ILF fund users by way of possible cuts in the care packages in some cases, to demonstrate to the court that a focussed regard was had to the potentially very grave impact upon individuals in this group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole.

63 It seems to me that what was put before the Minister did not give to her an adequate flavour of the responses received indicating that independent living might well be put seriously in peril for a large number of people.

**Elias LJ**

73 I agree with McCombe LJ that the appeal should succeed on the grounds that there was a breach of the PSED in this case. I will briefly summarise my reasons for reaching that conclusion.

74 Any government, particularly in a time of austerity, is obliged to take invidious decisions which may exceptionally bear harshly on some of the most disadvantaged in society. The PSED does not curb government's powers to take such decisions, but it does require government to confront the anticipated consequences in a conscientious and deliberate way in so far as they impact upon the equality objectives for those with the characteristics identified in section 149(7) of the Equality Act 2010.

75 In this case there were two facets of the decision making process where there is serious doubt whether the PSED was properly addressed. First, Mr Wolfe QC contended that the documents placed before the Minister painted what he characterised as a Panglossian view as to the effects of the proposed decision on those who would cease to receive payments from the fund. There is in my view considerable force in that submission, for reasons given by my Lord, McCombe LJ in his judgment. In my opinion neither the EIA nor the document setting out the response to the consultations, both published on the same day as the decision was made, identifies in sufficiently unambiguous terms the inevitable and considerable adverse effect which the closure of the fund will have, particularly on those who will as a consequence lose the ability to live independently. It may be that this is because of a tendency for officials to tell the Minister what they thought she would want to hear - a tendency which, as Sedley LJ pointed out in *R (Domb) v Hammersmith & Fulham LBC*

[\[2009\] EWCA Civ 941](#), para.79, must be strenuously resisted. I suspect also that part of the problem may be that these documents are for public consumption and give the impression that they have been drafted with at least half an eye to sending an up-beat message about the merits of the policy. This necessarily involves down-playing the adverse effects of the decision and exaggerating its benefits. As understandable as that may be from a political perspective, forensically it inevitably creates doubt whether the true impact of the decision has been properly appreciated. The Minister cannot then complain if the documents are taken at face value.”

**R (on the application of Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWHC 233 (Admin)**

“28. It is worth spelling out exactly what "impact" that analysis was addressing. It of course obvious that the restriction of increases to the level of increase in the CPI affects protected and non-protected households alike, in the sense that the legislation applies to all (private-sector) households claiming housing benefit. But that will only produce a real impact if and to the extent that the increase in the level of rent actually charged to a particular claimant exceeds the rate of increase in the CPI. In such a case there is necessarily an impact, because the mismatch between rent and benefit necessarily means that the claimant, who will by definition already be on a very tight budget, will have less money to spend on items other than accommodation; but the most serious and particular manifestation of that impact is if the claimant (and their family if any) has to move to cheaper accommodation, which may well be in an area geographically remote from their current home. This is not said in so many words in the EIA, but it is obviously understood (as indeed appears from the references to alternative accommodation and removal expenses in the "mitigation" paragraph). Thus what the "no differential impact" conclusion means is that there is no reason to suppose that rents will rise faster than the CPI, with the consequent increase in the risk of claimants having to move, for a higher proportion of protected than non-protected households. The EIA appears to accept, though again this is not spelt out, that if there were such a differential impact that would engage head (b) under section 149 (1) – "equality of opportunity".

29. It is convenient to mention at this point a separate Impact Assessment ("IA") relating to the changes effected by the 2012 Order which was produced by the Department in late March 2012 (i.e. after the Order was made and shortly before it was due to come into force). This does not address any equality issues, but it contains a discussion, of a kind not attempted in the EIA, of whether, and if so to what extent, the level of rents would in fact increase above the level of housing benefit. The discussion is, however, inconclusive. The IA predicts a reduction in housing benefit expenditure of £400m. as between 2012/13 and 2014/15. It says, to paraphrase, that if there is no "behavioural change" – either in the form of landlords restricting increases to the level of the CPI or of tenants moving to cheaper accommodation – there is liable to be a mismatch of, on average, £6 p.w. between levels of rent and levels of benefit; but it does not seek to predict the extent of such behavioural change. It is nevertheless of some value in as much as (a) it shows that there is, to put it no higher, a real prospect of such a mismatch arising and (b) it recognises that if there is any such mismatch some tenants will have to move.



49. For the reasons given above I do not accept that in making the 2012 Order the Secretary of State failed to comply with his duty under section 149 of the 2010 Act. I need not in those circumstances consider a fallback argument advanced by Mr Chamberlain to the effect that even if the EIA was defective I should decline to quash the Order since there had been broadly substantial compliance and the consequences of my doing so would be very serious, (cf. the course taken by the Divisional Court in *Hurley* (above)). That submission overlapped with his case on delay. I would only say that the point had in my view some force.

50. I should add that despite my conclusion on this issue I was not – as indeed I have already observed – very impressed by the form of the EIA. It is not of course strictly necessary for the purpose of section 149 that decision-makers should produce any kind of formal document. The value, however, of doing so is twofold: it helps to ensure that the necessary regard is indeed paid to the specified issues, and it provides evidence that that has occurred in the event of a subsequent challenge. From both points of view it is desirable that the document demonstrates real thought about the impact of the measure in question. A formulaic or tick-box approach is dangerous, and those performing EIAs would be well-advised to spell out in concrete terms and ordinary language the contemplated consequences of the measure. If the EIA in the present case had said something to the effect that "if the level of rents increases above the level of benefit, there is a risk that people may have to leave their homes and move to cheaper properties, which may be some distance away", and had then addressed the question whether that risk could be quantified (as was to some extent done in the IA) before considering its equality implications, it would have been less vulnerable to the criticisms advanced by Ms Laing. However, for the reasons given, I do not think that those criticisms went so far as to establish a legal flaw. "

**R (Winder and Others) v Sandwell Metropolitan Borough Council and the Equality and Human Rights Commission (intervening) [2014] EWHC 2617 (Admin)**

"93. Mr Drabble accepted that the EIA for the CTR Scheme may have been adequate; but it was not performed at a time when the residence requirement was an option. The potential impact of that requirement on those with protected characteristics – notably race and sex – was never considered, in a formal EIA or in any other way. Mr Drabble submitted that the Council was in clear breach of its duty to have due regard to the effect of its measure on people with those characteristics.

94. Industrious as he was, Mr Rutledge could not make bricks without straw; or, in this case, a defence without evidence. Section 149 was undoubtedly engaged: indeed, that was well-recognised by the Council, in the way in which it conducted an EIA at various stages before the residence requirement was tabled on 4 December 2012. However, there is simply no evidence that the Council conducted any assessment at all of the race or gender impact of the residence requirement at or before it adopted the 2013-14 CTR Scheme; and scant evidence that it did so prior to the 2014-15 Scheme. I do not consider that the evidence that there is (e.g. with regard to feedback towards the end of 2013, from wherever it came: see paragraphs 27(ii) and 75 above) is sufficient to show that the Council grappled at all with the effects of the requirement on those with the identified protected characteristics."

**R (on the application of UNISON) v the Lord Chancellor and the Equality and Human Rights Commission (intervening) [2014] EWHC 218 (Admin)**

“It is in that context that the factual evidence must be assessed. The factual evidence focussed on eight notional individual claimants. Perhaps inevitably, the evidence as to those hypothetical claimants became enmeshed in competing figures advanced by the claimant and the defendant as to the combined impact of the fees and remissions on those notional individuals. This, as we have already indicated, was profoundly unsatisfactory; conflicting information was presented late and at speed.

46. Ultimately, the most fundamental submission advanced by Miss Chan on behalf of the Lord Chancellor was that the assertion that the introduction of the fees system breached the principle of effectiveness was premature. The Court should not be concerned with hypothetical examples and detailed, fine disputes as to statistics and figures, but should wait and see how the system will work in practice and whether, indeed, it will have an effect which demonstrates a breach of the principle. We have sympathy with that approach. The Lord Chancellor has promised to keep the system under review and can only do so when he is in a position to see how it works in practice (see, e.g., pages 27 and 61 of Equality Impact Assessment 13 July 2012). Unison has been concerned that if it waits, it will be too late to challenge the regime. We do not agree. The Lord Chancellor has now, publicly and in court, announced that the claim is premature. It would thus be quite impossible for him to object to any future claim on the basis that it is too late to launch it. Far better, we suggest, to wait and see whether the fears of Unison prove to be well-founded. The hotly disputed evidence as to the dramatic fall in claims may turn out to be powerful evidence to show that the principle of effectiveness, in the fundamentally important realm of discrimination, is being breached by the present regime. If so, we would expect that to be clearly revealed, and the Lord Chancellor to change the system without any need for further litigation. If further litigation is necessary, then the Lord Chancellor would not be able to resist it on the basis that it was delayed, since it is his own contention that this claim is premature.

47. But at present, we remain unpersuaded by the hypothetical evidence that the principle is being breached. For those reasons, the first ground is dismissed.

69. The essential challenge now advanced relates to the Lord Chancellor's comment in the equality impact assessment that neither the Lord Chancellor, nor the Ministry of Justice, nor any of the respondents "can predict with any certainty what the impact of the introduction of fees will be". Of course, that does not justify a failure to consider the likely impact. But that impact was fully considered, even though its conclusion displeased the objectors. Again, as in relation to the first ground, we underline that the duty continues and the Lord Chancellor is under an obligation to assess the impact of the fee regime on the basis of evidence revealed in practice. If it turns out, as the objectors feared, that the introduction of fees has a damaging effect on the fundamental obligation of the Lord Chancellor and government to eliminate, so far as humanly possible, discrimination against those with relevant protected characteristics and advance equality of opportunity, then the Lord Chancellor will have to take such steps as are necessary by adjusting the regime. We

acknowledge the genuine fear that the introduction of the fee regime will impede the vital goal of eliminating discrimination and advancing equality of opportunity. Whether that fear is well-founded may well depend on evidence yet to be obtained, as to how the regime has worked in practice. For the reasons we have given, we dismiss this ground of complaint

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