

**Empowering Civil Society**

Using the Public Sector Equality Duty to Tackle Race Disparity in the Criminal Justice System

Find this guide and the rest of the toolkit at [criminaljusticealliance.org/PSED-toolkit](https://criminaljusticealliance.org/PSED-toolkit)



## GUIDE 1

# Understanding the Public Sector Equality Duty (PSED) and whether public bodies have complied

## THIS GUIDE EXPLAINS:

**1. What the PSED is and what it requires public bodies to do**

- Origins of the PSED
- Section 149 Equality Act 2010
- Public authorities
- What is 'due regard'?
- Important principles from the PSED case law

**2. How to identify whether a public body has complied (or not) with the PSED**

- How can a public body show it has complied
  - Documentary evidence
  - Equality Impact Assessments (EIAs)
  - Consultation and evidence gathering

**3. The overlap between the PSED and actual discrimination**

- The PSED, direct and indirect discrimination
- Justifying indirect discrimination

# What the PSED is and what it requires public bodies to do

## The origins of the Public Sector Equality Duty

The PSED is set out in section 149 (s.149) of the Equality Act 2010. This Act consolidated previous anti-discrimination laws into a single Act and now covers nine 'protected characteristics'. They are:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

Previous anti-discrimination laws were set out in the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1975. These Acts prohibited discrimination and harassment on the grounds of race, sex and disability.

The Macpherson Inquiry (1999) into the death of Stephen Lawrence examined the failings of the police in investigating the racist murder of Stephen. It concluded that the Metropolitan Police were 'institutionally racist'. One of the recommendations made by the Inquiry was that the law on race discrimination be amended so that rather than being limited to liability *after* unlawful acts of discrimination or harassment, public bodies should **proactively consider race equality** when making decisions and developing policies.

This resulted in all three anti-discrimination statutes being amended to include **a duty on public bodies to have 'due regard' to the need to eliminate unlawful discrimination and promote equality of opportunity** when exercising their powers and duties. At the time these were called: the race equality duty, the sex equality duty and the disability equality duty.

## Section 149 Equality Act 2010

Section 149 (s.149) of the Equality Act 2010<sup>1</sup> applies to eight of the nine protected characteristics (it does not apply to the protected characteristic of marriage and civil partnership). It provides that:

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

*(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

*(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

*(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

In relation to the need to advance equality of opportunity, it states:

*(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –*

*(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*

*(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*

*(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*

In relation to fostering good relations between those who share a protected characteristic and those who do not, Clause 5 of s.149 states that this involves:

*in particular having due regard to the need to tackle prejudice, and promote understanding.*



These three aims are sometimes referred to as 'the equality objectives'.

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**Certain issues will need to be addressed at the outset when considering a challenge to a public body on the grounds of a breach of the PSED:**

**1**

Is the 'public authority' one that is subject to the PSED?

**2**

What is 'due regard'?

**3**

How does a public authority show that it did have 'due regard' to the 'equality objectives' set out in s.149? Or, how can you show that it did not?

# Is the ‘public authority’ subject to the PSED?

The Equality Act 2010 lists those bodies that must comply with the PSED. In relation to criminal justice matters, it includes:

- Government ministers and government departments, such as the Ministry of Justice and the Home Office (but not the Security Services, the Secret Intelligence Service or the Government Communications Headquarters).
- The police.

It also includes:

- Local authorities.
- The National Health Service (NHS).
- Educational bodies such as schools and universities.
- The armed forces.

In relation to the criminal justice system, the following are expressly subject to the PSED:

- HM Chief Inspector of Constabulary.
- HM Chief Inspector of the Crown Prosecution Service (CPS).
- HM Chief Inspector of Probation.
- The Parole Board.
- Probation trusts established under the [Offender Management Act 2007<sup>2</sup>](#).
- The Youth Justice Board.

As well as ‘public authorities’ like those listed here, private organisations and charities must also comply with the duty if they carry out public functions.

It can sometimes be difficult to decide whether a private body is ‘exercising a public function’ and this will depend on factors such as: whether they receive public funds, whether they are doing something that otherwise the state would have to do, and the level of regulation they are subject to.

## What is ‘due regard’?

The PSED **does not require public bodies to eliminate** unlawful discrimination, harassment or victimization but to **‘have due regard to the need to’ do so.**

The courts have said that ‘due regard’ means ‘the regard that is due in all the circumstances’. This sounds unhelpful but it reflects the fact that some types of decisions and policies are more likely to have an impact on **protected groups**, such as specific racial and ethnic groups, than others. These policies and decisions will therefore require policymakers to have a higher level of consideration of the equality objectives.

However, the aim of the PSED is to ensure that public bodies consider any possible impact at an early stage when developing policies. A policy that appears on the face of it to be neutral might have an **adverse impact** in practice. So, in many cases public bodies will need to gather evidence and/or consult about the policy as part of complying with the duty.

For the purposes of this toolkit, **‘public body’** refers to criminal justice and policing bodies which are subject to the PSED. **‘Protected group’** refers to racial and ethnic groups. **‘Adverse impact’** refers to indirect discrimination.



The aim of the PSED is to ensure that public bodies consider any possible impact at an early stage when developing policies.

Civil Society Organisations (CSOs) can highlight to public bodies the fact that an apparently neutral criminal justice policy or decision may have an adverse impact on a specific racial or ethnic group (who are protected groups). The CSO may be able to:

- provide evidence to support their claim.
- point out that the public body should gather more or better evidence.

If a public body is persuaded to gather evidence at an early stage, it may then make a better policy or decision. If a public body ignores the CSO's representations, this would strengthen an argument in any eventual legal proceedings that a CSO might bring that the public body had failed to have 'due regard'.

However, it is possible for a public body to **comply with the duty** (to have due regard to the objectives set out in s.149) **but to still devise a policy or make a decision that does have an adverse impact on a protected**

**group.** The PSED is closely related to indirect discrimination. It is intended to ensure that public bodies consider **in advance** whether a policy might be indirectly discriminatory so that they can take steps to avoid or minimise any discrimination. However, even if a policy is indirectly discriminatory, it may still be lawful if the discrimination can be justified by the public body.

#### Case study

#### EIAs – Indirect discrimination in suspicion-less stop and search 'justified'

In July 2021, the Home Office relaxed safeguards on the police use of Section 60 (s.60), a suspicion-less stop and search power. The EIA conceded there was indirect discrimination as data suggested a disparity in the use of s.60 stop and searches for individuals from racially minoritised groups, particularly Black people. The Home Office said that 'this can be objectively justified as it is a proportionate means of achieving the legitimate aims of tackling crime.'

## Important principles from the case law about the PSED


- Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
- Recording the steps taken by the decision maker in seeking to meet the PSED is an 'important evidential element' in demonstrating the discharge of the duty.
- The decision-maker must be aware of the duty to have due regard to the relevant matters. The duty is upon the government minister or other decision-maker personally. It cannot be assumed that they know what their officials know or may have been in their minds when they advised the minister.
- The decision-maker must assess the risk and extent of any adverse impact and how the risk may be eliminated before adopting a proposed policy, not merely as a 'rearguard action', following a concluded decision.
- The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
- While it is not necessary to expressly refer to the duty, reference to it and to the relevant criteria reduces the scope for argument.
- General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.
- The duty is an ongoing duty, which means that it may be necessary to monitor or review the impact of a policy after adopting it.

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## SECTION 2

# How to identify whether a public body has complied (or not) with the PSED

## How can a public authority show that it did have 'due regard' to the 'equality aims' set out in s.149?



1) Documentary evidence

2) Equality Impact Assessments

3) Consulting and gathering evidence

### 1) Documentary evidence

It is not essential for a public body to document how it has complied with the PSED. But, as the courts have repeatedly said, it will be very difficult for a public body to prove to a court that it did have the required level of 'due regard' if they have no written record of the decision-making process.

Many public bodies publish minutes of meetings and other policy statements on their websites. Looking at publicly available documents can help to work out how a decision was taken or a policy developed. Also, you can ask the public body how they reached the decision and what evidence or information they considered through a Freedom of Information (FOI) request (see [FOI request template letter](#), page 11 of [Guide 3](#)).

### 2) Equality Impact Assessments

Many public bodies carry out Equality Impact Assessments (EIAs) and publish these. These documents are not always entitled 'Equality Impact Assessments' and may be called 'Equality Statement', 'Equality Assessment', 'Equality Analysis', or something similar. The document will usually make express reference to the duty in s.149 and summarise the duty.

The fact that an EIA has been produced does not necessarily mean that the public body has had 'due regard', so as to have complied with the PSED. If there is a published document, it is important to check it carefully to see whether it does show compliance.

#### Case study

#### **FoI request - Evaluation of the decision to remove stop and search safeguards**

The CJA submitted an FoI request that the government release the evaluation findings of their pilot study leading to the relaxation of s.60 safeguards and the related EIA. The Home Office refused to publish these documents under several grounds in the FoI Act. See [CJA's website](#) for full summary of *R (on the application of StopWatch) v Secretary of State for the Home Department*.



## Things to check:

- When was the EIA carried out? It should be at an early stage, before the decision was taken.
- Does it set out clearly the decision or policy being assessed?
- Does it set out the aims and objectives of the decision or policy?
- Does it set out the evidence that has been obtained that may show or be relevant to any adverse impact on protected groups?
- Does it seem like any evidence of the potential impact on protected groups is missing?
- Does it identify any possible impact on all protected groups and address the issue of people who fall into more than one protected group?
- Does it state that further information or evidence is being gathered and/or that the impact of the policy will be monitored in future?
- Does it state that it is an 'initial EIA' or a draft EIA, and/or that there will be a final EIA or further EIAs carried out? If so, has this been done before the policy was implemented?
- If there was a consultation, does the EIA take on board and address any concerns raised in the consultation?
- Are any measures suggested to mitigate any adverse impacts?
- Are any measures proposed for further monitoring or gathering of evidence to see if there will be any adverse impacts in the future?
- Does it adequately address all three elements of the PSED (as opposed to, for example, referring generally to 'equal opportunities')?

There is no prescribed form and no prescribed content for an EIA. The courts are often reluctant to closely examine the detail of an EIA or to accept detailed criticism of how it could have been done better. But if a CSO raises concerns with a public body at an early stage (for example, about an EIA's lack of data or lack of consideration of potential impact on protected groups) and these concerns are ignored, this would support a legal argument that the public body breached the PSED. Alternatively, if the concerns are responded to and addressed, this may result in a better evidence base and consideration of further monitoring and/or mitigating measures.

### 3) Consulting and gathering evidence

A public body does not have a duty in all cases to consult those likely to be affected by a new policy, or to gather particular kinds of evidence. However, if the public body does not consult and fails to seek relevant evidence about any potential adverse impact, this is likely to mean that it cannot demonstrate that it did have 'due regard' to all of the equality objectives.

If there was a consultation or evidence-gathering exercise, it will be important to look carefully at the questions asked, the consultation responses and the evidence obtained, and whether any changes were made following a consultation.

## Consultation

There is no general duty to carry out a consultation before making or changing a policy. However, if a public body fails to consult, this may support a CSO's legal challenge.<sup>3</sup> If a consultation exercise is carried out, it should comply with the following principles:

- It should be conducted at a time when proposals are at a formative stage.
- Adequate information/sufficient reasons for the proposal should be given so those consulted can give intelligent consideration and make an intelligent response.
- Adequate time should be given for respondents to consider and respond to the proposals.

The Cabinet Office also sets out principles for government consultations, which includes the following:<sup>4</sup>

- Consultations should be targeted and take account of the groups being consulted.
- Consultations should last for a proportionate period of time.
- Consultation should facilitate scrutiny.
- Government responses to any consultation should be published in a timely manner.

### Consultation – Evidence on indirect discrimination in new serious violence powers ignored

The Home Office ran a public consultation on the introduction of Serious Violence Reduction Orders (SVROs) which would expand suspicion-less stop and search powers. The consultation gave minimal information regarding how the policy would work in practice, had a restricted word count and limited answer options. No EIA was published alongside the consultation. Although SVROs were introduced, as a result of consultation responses highlighting indirect discrimination, the Home Office announced it would start as a pilot in order to monitor and evaluate the impact.

## Gathering evidence

Generally, courts are reluctant to interfere with the way a public body has gathered evidence or to accept that they could or should have gathered more, or different, evidence. But in some cases, it may be that without specific evidence, the public body cannot properly assess the likely impact of a policy on protected groups (for example, see the case of *Bridges v Chief Constable of South Wales* below).

If the CSO believes important evidence is missing from an EIA, this should be drawn to the attention of the public body as soon as possible. If the public body ignores representations or refuses to seek further evidence, the courts may be more likely to find that a public body has acted unlawfully.

### Case study

#### Evidence gathering – police pilot of facial recognition software

South Wales Police (SWP) had decided to pilot the use of Assisted Facial Recognition (AFR) software. The decision was challenged as there was a risk that the software's algorithms might indirectly discriminate against people because of their race (as well as their sex).

SWP argued that there was no PSED breach, as it had carried out an 'initial EIA' and there was no evidence the software operated in a discriminatory way. However, the court found that there was a PSED breach, because SWP had failed to properly investigate whether there might be a risk of discrimination on the basis of race.

See [CJA's website](#) for full summary of *Bridges v Chief Constable of South Wales*.

### Case study



## Public bodies' specific duties to publish relevant information

As well as having to comply with the PSED, under the [Equality Act 2010 \(Specific Duties and Public Authorities\) Regulations 2017<sup>5</sup>](#), certain criminal justice and police bodies listed in a schedule to the Act must publish specific information on a regular basis. This includes:

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### Criminal justice

- The Criminal Cases Review Commission.
- Her Majesty's Chief Inspector of Constabulary.
- Her Majesty's Chief Inspector of the Crown Prosecution Service.
- Her Majesty's Chief Inspector of Prisons.
- Her Majesty's Chief Inspector of Probation for England and Wales.
- The Parole Board for England and Wales.
- A probation trust established under [Section 5\(1\) of the Offender Management Act 2007<sup>6</sup>](#).
- The Youth Justice Board for England and Wales.

### Police

- The British Transport Police Force.
- A chief constable of a police force maintained under [Section 2 of the Police Act 1996<sup>7</sup>](#).
- The College of Policing.
- The Commissioner of Police for the City of London.
- The Commissioner of Police of the Metropolis.
- The Common Council of the City of London in its capacity as a police authority.
- The Independent Office for Police Conduct
- The Mayor's Office for Policing and Crime established under [Section 3 of the Police Reform and Social Responsibility Act 2011<sup>8</sup>](#).
- A police and crime commissioner established under [Section 1 of the Police Reform and Social Responsibility Act 2011<sup>9</sup>](#).

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This includes 'equality objectives', which are 'specific and measurable' objectives it thinks it should achieve to do any of those things mentioned in s.149(1). This duty is limited to 'one or more objectives' and need only be published every four years. The published policies may be relevant to the way the body makes a decision that you want to challenge, so it is worth searching the website of the public body for a statement of their general approach/strategy to compliance with the PSED.

# The overlap between the PSED and actual discrimination

## The PSED, direct and indirect discrimination

Arguments that a public body has breached the PSED will usually be made in claims in which other grounds are also relied on, such as: direct or indirect discrimination and/or breaches of human rights. The PSED is separate from the provisions about actual discrimination but the arguments often overlap.

- **Direct discrimination** is when a decision or policy means that people with protected characteristics are treated differently from other people.
- **Indirect discrimination** is when the decision or policy is applied equally to everyone but has a disproportionate impact on those with protected characteristics.

An example of direct discrimination would be a policy that expressly excludes women from certain criminal justice occupations, such as policing. However, if becoming a police officer was available to both men and women, but a criterion was applied to all applicants that would exclude most women, this would be indirect discrimination. If it could not be justified, it would be unlawful.

If the evidence shows that a policy may have an adverse impact on a protected group (indirect discrimination), the burden is on the public body defending the policy to show that any indirect discrimination is justified.

## Justifying indirect discrimination

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The courts have set out a four-stage test that must be met to demonstrate that a particular decision or policy is justified:

- 1**  
The policy aim must be sufficiently important to justify limiting a fundamental right.
- 2**  
The policy must be rationally connected to the aim.
- 3**  
The policy must not go further than is necessary to achieve the aim.
- 4**  
Overall, the discrimination must not be disproportionate to the likely benefit sought to be achieved.

A public body does not have to address this test to comply with the PSED: it may decide that there would be no adverse impact. But if the public body does identify that a proposed policy would or might adversely affect a protected group, and it cannot demonstrate that the impact is 'justified', including that it is proportionate, it may face a legal challenge. Many EIA documents therefore include a 'proportionality assessment'.

It is possible for a legal challenge to be brought solely on the basis of a breach of the PSED without demonstrating that a policy *actually* caused indirect discrimination. Equally, it is possible for there to be compliance with the PSED even if the policy does result in indirect discrimination.

The difference is that the **PSED focuses on the 'process' of making the decision**: the public body must demonstrate that it had due regard to the duty when devising the policy.

**Indirect discrimination focuses on the 'outcome' of the decision**: does it have an adverse impact on (so, indirectly discriminate against) a protected group that cannot be justified?

However, most challenges to decisions or policies will rely on both grounds:

(1) that the decision maker failed to have due regard to the PSED when making the decision or policy and

(2) that the decision or policy is indirectly discriminatory. For example, see *Bridges v Chief Constable of South Wales case*.

### Indirect discrimination - the use of PAVA spray in prisons

In 2019, PAVA (an incapacitant spray) was introduced to adult male prisons, beginning with a pilot in four prisons. HM Prison and Probation Service (HMPPS) were aware that physical restraint was applied to Black men more frequently than their representation in the population. The Equality and Human Rights Commission (EHRC) supported a Judicial Review by a disabled person in prison who claimed the government did not uphold their legal duty under the PSED. In response to the Judicial Review, the Ministry of Justice acknowledged that 'younger people, Black and Muslim people were also subject to disproportionate use of force, which it could not explain.'

- 1 See [www.legislation.gov.uk/ukpga/2010/15/section/149](http://www.legislation.gov.uk/ukpga/2010/15/section/149)
- 2 See [www.legislation.gov.uk/ukpga/2007/21](http://www.legislation.gov.uk/ukpga/2007/21)
- 3 Particularly if the policy decision removes rights that individuals had a 'legitimate expectation' they would continue to enjoy (see [page 13 of Guide 2a](#) on [legitimate expectation](#)).
- 4 HM Government Cabinet Office, Consultation Principles 2018, see <http://bit.ly/3XkoUvQ>.
- 5 See [www.legislation.gov.uk/ukdsi/2017/978011153277](http://www.legislation.gov.uk/ukdsi/2017/978011153277)
- 6 See [www.legislation.gov.uk/ukpga/2007/21/section/5](http://www.legislation.gov.uk/ukpga/2007/21/section/5)
- 7 See [www.legislation.gov.uk/ukpga/1996/16/section/2](http://www.legislation.gov.uk/ukpga/1996/16/section/2)
- 8 See [www.legislation.gov.uk/ukpga/2011/13/section/3/enacted](http://www.legislation.gov.uk/ukpga/2011/13/section/3/enacted)
- 9 See [www.legislation.gov.uk/ukpga/2011/13/section/1/enacted](http://www.legislation.gov.uk/ukpga/2011/13/section/1/enacted)




Links to the cases in this guide can be found on CJA's website here: [criminaljusticealliance.org/PSED-toolkit](http://criminaljusticealliance.org/PSED-toolkit)



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