## **Submission to the Public Sector Equality Duty Review (PSED) Steering Group**

## On behalf of the Institute of Equality and Diversity Practitioners (IEDP)

## **1 Introduction**

The UK's Institute of Equality and Diversity Practitioners was formally launched in Birmingham on 26 January 2009. The Institute is the professional body of equality, diversity and human rights practitioners.

The Institute promotes excellence in equality, diversity and human rights professional practice. The Institute is independent and run by practitioners for practitioners. All activities are funded by individual and corporate member subscriptions and by corporate sponsorships.

We are making this submission to the Steering Group in response to its Call for Evidence. We note from the Minutes of the Group meeting, dated 25 March 2013, that “Another roundtable has been held with equality and diversity practitioners from across the public sector. The group received evidence from this roundtable.” We are perturbed that the Institute has not been approached to take part in this roundtable or in the Review process. An Institute member posted a message on our LinkedIn discussion group on 29 March asking “Have any of our practitioner readers or your colleagues been asked to submit evidence to the review or sit on a review roundtable?” No positive responses have been received.

We therefore urge the Group to contact the Institute at info@iedp.org.uk so that we can arrange a meeting between the Group and the Institute, including members who have direct experience of the PSED.

The Institute also held a briefing on the PSED Review on 12 March 2013. You can find a report upon it in our March Newsletter (<http://www.iedp.org.uk/media/news/IEDP_newsletter_19.pdf>). There was some disquiet expressed at the meeting about the narrowness of this Call for Evidence. As the note sets out, “The discussion also emphasised that qualitative evidence is just as important as quantitative evidence and that informed opinion and verifiable anecdotes are important sources of evidence. We should also be proposing improvements to the working of the PSED.”

We are therefore including ‘informed opinion’ in this submission. However we would still urge you to arrange a meeting with us.

The Public Sector Equality Duty (PSED) in s 149 of the Equality Act 2010 is backed up by specific duties, which differ across England, Scotland and Wales. Northern Ireland has a separate duty in section 75(1) of the NI Act 1998, predating the first duty in GB, the race equality duty in the Race Relations Amendment Act 2000. Parallel duties were also established on gender and disability before the duty was extended to cover protected characteristics in the 2010 Act.

The key words in the PSED are “due regard”, that is, it is largely a process duty without necessarily bringing about equality outcomes. The PSED has developed out of an alternative approach towards equality called ‘mainstreaming’, i.e., making equality considerations central to decision-making, in particular public policy development.

The ECHR does have powers under the Equality Act 2006 to investigate how the PSED operates. However, it is also possible to bring judicial review proceedings.

# **2 Relationship of the PSED with rights-based equality law**

## A ‘rights-based’ model has operated on GB since 1975 through the Sex Discrimination Act 1975 (SDA), followed by the Race Relations Act 1976 (RRA) and then other equality statutes such as the Disability Discrimination Act 1995 (DDA) and now the Equality Act 2010. The PSED grew out of what might initially appear to be an alternative approach to the pursuit of equality, namely ‘mainstreaming’ equality and, in particular, gender equality. However we submit that the PSED and the rights-based model complement each other.

Statutes such as the SDA and the RRA therefore embraced a ‘rights-based’ model but retained investigation powers from earlier race relations legislation. For many reasons, the ‘legacy agencies’ in both GB and NI focused on assisting individual litigants and investigation powers largely fell into disuse. The underlying rationale behind the ‘rights-based’ model is that threat of litigation, and the indirect consequences of litigation, bring about challenges and changes to discriminatory policies and practices.

Both models are reliant on both direct and indirect discrimination concepts. The former is largely targeted at ‘behavioural’ discrimination, namely blatant discrimination, or reliance on stereotypes to influence or determine decisions. The latter, in practice, is, or ought to be, an auditing tool to identify ‘systemic’ discrimination’. Even if a policy or practice appears to be neutral, does it, in practice, have a discriminatory impact on those protected by the legislation?

## An alternative (or complementary?) model has developed since the 1990s. ‘Mainstreaming’ involves processes whereby the objective of the promoting equality of opportunity is made a focal point of policy-making.

## “‘Mainstreaming' equality is essentially concerned with the integration of equal opportunities principles, strategies and practices into the every-day work of Government and other public bodies from the outset, involving every day policy actors in addition to equality specialists. The concept of mainstreaming is based on the philosophy that the achievement of equality should inform all aspects of the work of all the individuals within an organisation as they go about their business. The mainstreaming of equality is the route to achieving an equality-based culture throughout an organisation.”[[1]](#footnote-1)

## A key development in the mainstreaming approach occurred at the Fourth World Conference on Women in Beijing in 1995.

## Objective H.1 of the Platform for Action:-

## b. Based on a strong political commitment, create a national machinery, where it does not exist, and strengthen, as appropriate, existing national machineries, for the advancement of women at the highest possible level of government; it should have clearly defined mandates and authority; critical elements would be adequate resources and the ability and competence to influence policy and formulate and review legislation;

## d. Establish procedures to allow the machinery to gather information on government-wide policy issues at an early stage and continuously use it in the policy development and review process within the Government;

## e. Report, on a regular basis, to legislative bodies on the progress of efforts, as appropriate, to mainstream gender concerns, taking into account the implementation of the Platform for Action;

## f. Encourage and promote the active involvement of the broad and diverse range of institutional actors in the public, private and voluntary sectors to work for equality between women and men.” (emphasis added)

## There are both internal and external dimensions. Internally, evidence is collected to inform policy decisions and gender equality is taken into account in that policy development. Externally, outside bodies, particularly in the voluntary sector, are encouraged to become involved.

It could be argued that mainstreaming requires organisations to do what they ought to do anyway to protect themselves from indirect discrimination claims. It was initially seen as an alternative to a litigation-driven approach but today it can be seen as complementary.

The Review refers to the ‘management of legal risk’. This presumably refers to the management of the risk of litigation (or possible EHRC inquiry) in relation to the PSED. But public bodies must also ‘manage legal risk’ in relation to potential direct and indirect discrimination claims.

All the functions of public bodies (with some specific exceptions) are covered by the principle of indirect discrimination in the Equality Act 2010. In particular, section 29(6) of the Act provides a prohibition on discrimination in the exercise of public functions. So every public body must audit all its provisions, criteria and practices (PCP) in order to establish whether or not they place members of groups and communities covered by the protected characteristics at a ‘particular disadvantage’ by them. They must collect both quantitative and qualitative evidence of the potential effect on these groups and communities both in order to make this assessment. They must carry out this ‘legal risk assessment of equality impact’ to manage the legal risk of a potential challenge.

If a particular disadvantage is identified, they must have a clearly defined and documented ‘legitimate aim’ of the PCP and must address their minds to whether the PCP is a ‘proportionate means’ of achieving the legitimate aim. Coincidentally this also involves considering alternatives to and mitigation of any particular disadvantage which the PCP may entail. Therefore, although the PSED is a proactive, mainstreaming duty, the management of the legal risk of an indirect discrimination requires a properly advised public body to conduct a ‘legal risk assessment of equality impact’. Unfortunately, the principle of indirect discrimination is perceived to be relatively complex and difficult to enforce. The PSED, although a proactive rather than a reactive duty, actually encourages public bodies to protect themselves from indirect discrimination claims and then adds further, mainstreaming dimensions to that exercise.

Therefore operating the PSED is not some sort of novel, complicated, ‘bureaucratic’ exercise. It involves a significantly enhanced statutory ‘pathway’ for public authorities to do what they ought to be doing anyway.

Since the PSED is ‘non-delegable’, there is some concern that the PSED is being reviewed to ‘ease the bureaucratic burden’ on private contractors seeking to provide contracted-out public services. But private companies ought also, if properly advised, be conducting ‘legal risk assessments of equality impact’. Therefore a properly structured statutory pathway through the PSED should enhance their decision-making also. Indeed, we are entitled to wonder whether private companies should be granted public service contracts if they cannot provide evidence of such risk assessments.

The second point to make about the relationship between the PSED and the rights-based framework is that the original PSED, the race duty, and the prohibition of discrimination in carrying out of public functions both emerged in the Race Relations Amendment Act 2000 from the recommendations of the Macpherson Report into the murder of Stephen Lawrence. When the Report used the term ‘institutionalised discrimination’, it was talking about systemic discrimination as well as ‘canteen culture’. Indeed, in legal academic circles, the term ‘institutionalised discrimination’ was used to denote indirect discrimination before the Inquiry Report broadened its meaning.

So attempts by the then Government to restrict the prohibition on discrimination in carrying out of public function to direct discrimination failed in the legislature and the Macpherson recommendation that police forces should audit their policies and practices for ‘institutionalised discrimination’ was the basis for the inclusion of the race duty in the 2000 Act.

Far from being seen as alternatives, they have always been seen as complementary, even from their inception.

The third point to make is that is that many court cases on the PSED also include submissions and decisions on indirect discrimination in the exercise of public functions. . In the first case on the race duty, Secretary of State for Defence v Elias,[[2]](#footnote-2) the courts ruled that a failure to take into account adverse impact on BMEs in a World War II compensation scheme was both a breach of the race duty and indirect discrimination in carrying out of public functions. In the Court of Appeal, it was stated:-

“It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play."[[3]](#footnote-3)

As far as we can see, nearly every PSED case is also argued under the indirect discrimination principle.

Finally, the principles underlying direct and indirect discrimination and the PSED were exhaustively examined by the Supreme Court in the JFS case.[[4]](#footnote-4) Although the case was largely argued on whether the school’s admissions policy was directly or indirectly discriminatory, some the Justices commented that it would be very difficult to justify indirect discrimination if the body had failed to fulfil its race duty. Hence, the PSED and indirect discrimination are not merely complementary, but are also inextricably linked.

**3 The PSED in NI**

## Initially mainstreaming exercises in NI and also GB were on a voluntary basis but, in 1998, NI introduced a unique experiment of statutory mainstreaming. Gender equality proofing had operated across UK since the late 80s, partly in response to the UK ratifying CEDAW in 1985.

## Policy development in NI in the mid 90s operated, across a wide range of grounds, under voluntary guidelines called Policy Appraisal and Fair Treatment (PAFT). Despite being remarkably innovative in 1993, PAFT was not perceived to be a success. As part of a review of fair employment law in NI, Osborne et al stated, “It noted that the development of equality proofing in Northern Ireland had proceeded well beyond equivalent action in Great Britain. However, it also found that the priority given to the guidelines varied between Northern Ireland Departments.”[[5]](#footnote-5)

In answer to the proposition, ‘do we need a PSED?’, the evidence from NI is that a strongly promoted voluntary system did not work and that ‘lip-service’ was paid to it.

## The fair employment review, ‘Employment Equality: Building for the Future’ (SACHR, 1997) proposed a statutory basis for PAFT. A Government White Paper, ‘Partnership for Equality The Government's proposals for future legislation and policies on Employment Equality in Northern Ireland’ (NIO, 1998) proposed a statutory duty on designated Public Authorities, including ‘second-level’ bodies such as local councils, Education and Library Boards, Health and Social Care Trusts etc.

These proposals became enmeshed in the Good Friday Agreement negotiations and eventually the Good Friday Agreement and hence are included in section 75 of the NI Act 1998.

## Section 75(1) provides:-

## *“A public authority shall in carrying out its functions relating to Northern Ireland 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.”*

An interesting aspect of this development is that what are called EQIAs in NI are modelled on Environmental Impact Assessments with the screening of policies for potential adverse impact with full EQIAs if there is sufficient quantitative and qualitative evidence of adverse impact.

## The focus in section 75, and more particularly in Schedule 9 of the 1998 Act, is not the duty itself but the development of equality schemes, approved by the ECNI, which set out the mechanics of the duty in some detail. The ECNI conducted an Effectiveness Review of section 75 in 2006-7.[[6]](#footnote-6) Far from jettisoning the need for equality schemes, ‘second generation’ equality schemes were approved by the ECNI in 2011-12. This has led to some optimism that section 75 might be reinvigorated.[[7]](#footnote-7)

A second aspect of the revised NI system is that public authorities are strongly encouraged to undertake an ‘audit of inequalities’ within their remit and use the audit to produce an action plan across all section 75 grounds to address inequalities identified.

**4 The PSED up to the Equality Act 2010**

Section 75 had not gone unnoticed in GB. The Macpherson Inquiry had proposed race audits but not a statutory duty. Nonetheless, some parliamentarians and concerned equality lawyers campaigned to have a PSED included and were ultimately successful.[[8]](#footnote-8)

The general duty, to eliminate discrimination and to show due regard to the promotion of equality of opportunity, was supplemented by a series of specific duties, in particular to produce a race equality scheme. The CRE had some powers of enforcement of the specific duties, although judicial review was also an option.

The race duty was augmented by a disability duty (DDA 2005) and a gender duty (Equality Act 2006). Each set out the general duties familiar in the race duty and also disability and gender specific duties.

The gender duty was significant in that public authorities had to not only screen new policies but also produce an action plan setting out targeted policies of particular concern to women and men. This development was attributed to a perceived lack of focus in the operation of the race duty.

The point here is that the original race duty was reviewed and developed in 2005 and 2006 and then subjected to close examination during the passage of the Equality Bill. The NI equivalent has also been subject to extensive review. We would therefore welcome sensible recommendations from the Steering Group on how a ‘statutory pathway’ can be provided to public authorities, building on the last 15 years’ experience of various forms of PSED across the UK.

**5 The Equality Act 2010**

As stated above, s149 now sets out the PSED now applying to all major protected characteristics. However, the specific duties have been radically revised, at least in England (and non –devolved bodies in Scotland and Wales):-

“1. Publish information to demonstrate its compliance with the general equality duty. This information must include, in particular, information relating to people who share a protected characteristic who are:

• its employees

• people affected by its policies and practices.

Public authorities with fewer than 150 employees are exempt from the requirement to publish information on their employees.

2. Each listed public authority (including schools and pupil referral units) must prepare and publish one or more objectives that it thinks it needs to achieve to further any of the aims of the general equality duty. The objectives must be specific and measurable.”[[9]](#footnote-9)

There is therefore no longer a specific duty to have an equality scheme.

The Scottish specific duties are[[10]](#footnote-10):-

“Each listed authority is required to:

“report on mainstreaming the equality duty; publish equality outcomes and report progress; assess and review policies and practices; gather and use employee information; publish gender pay gap information; publish statements on equal pay; consider award criteria and conditions in relation to public procurement and publish in a manner that is accessible.”

The specific duties in Wales cover[[11]](#footnote-11):

Objectives; Strategic Equality Plans; Engagement; Assessing impact; Equality information; Employment information; Pay differences; Staff training; Procurement; Annual reporting; Publishing; Welsh Ministers’ reporting; Review; Accessibility”

The EHRC has also published Technical Guidance for England, Scotland and Wales.[[12]](#footnote-12)

We therefore trust that the Steering Group is also seeking evidence from Scotland and Wales, and indeed NI, on the operation of the PSEDs in each devolved country.

**6 The Equality Strategy**

The Group is invited to take the Government’s Equality Strategy into account in its deliberations. At this stage, we would take three points from the Strategy. First, the Strategy, in its action points, manages to address each protected characteristic on at least a number of occasions. If it is possible for the Government to produce an extensive range of ‘equality outcomes’, why should it be any different for public authorities generally?

The second point concerns transparency, a key element in the Strategy. Anecdotal evidence suggests that some public authorities are secretive about their PSED processes. If Government strategy emphasises transparency, should the (UK) Government not follow the lead of the devolved administrations and require publication of how PSED processes are carried out?

The third point concerns community participation. We are deeply concerned at the extraordinary neutralisation of consultation periods which is a flagrant breach of principles of both transparency and community participation.

**7 Enforcement**

The EHRC has enforcement powers in relation to both general and specific duties.

The Commission can conduct an assessment into the extent to which, or the manner in which, a body has complied with its general equality duty (s.31 EA 2006).

If, following an assessment, the Commission thinks that a person has failed to comply with their general equality duty, it can issue a notice requiring the person to comply with its duty (s.32(2)).

If the Commission thinks that a person to whom the notice has been given has failed to comply with a requirement of the notice, it may apply to the High Court in England and Wales for an order requiring the person to comply (s.32(8))

The Commission can also issue a compliance notice where it thinks that a listed authority has not complied with its specific duties. It can do this without the need to conduct an assessment (s.32(9)).

However, as far as we can see, there has been little use of these powers.

The Technical Guidance also tells us:-

“In addition to the Commission’s powers to enforce the duty, if a public authority does not comply with the general duty, its actions, or failure to act, can be challenged by means of a claim to the High Court for judicial review.”

We are not addressing the substantial case law on the PSED (and its predecessors) at this time, although would be happy to do so. However, there is a paradox that what was originally conceived as a mainstreaming process, largely divorced from legalism and litigation, is primarily ‘enforced’ through the vastly expensive and inconsistent process of judicial review, with potentially devastating consequences for a public authority which is found not to have fulfilled its duties. These cases frequently occur in highly contentious circumstances and it is hardly surprising that judicial interpretations (and outcomes) vary from case to case.

We are disturbed that those who would wish to diminish the significance of the PSED can ‘cherry pick’ particular judicial remarks, the most notorious being that ‘EIAs are not required under the PSED’, which appears now to be supported by Government edict.

It is hardly surprising that it is easier to establish a breach of the PSED in what might be described as ‘due disregard’ cases, where the public authority has done little or nothing to satisfy the duty. In our view, the courts are not an appropriate forum in which to examine the intricacies of who did what and when. Our administrative law is meant to police situations where public bodies act outside their legal authority and was never intended to let lawyers and judges loose on the minutiae of administrative decision-making.

In our view, investigations into such administrative minutiae should be carried out by the appropriate specialised body, namely the EHRC, under its existing powers in the 2006 Act. It should also be given the resources to conduct such inquiries, despite the apparent assault by Government on every aspect of its work, including now its general purpose clause in section 3 of the 2006 Act. If an EHRC inquiry was seen as a viable alternative to judicial review in more intricate cases, the savings in the vast costs associated with judicial review would be ‘value for money’ of the highest order.

**8 Recommendations**

In our view, public authorities (and those providing contracted-out public services) require a clear statutory pathway on the performance of the PSED. Otherwise, the PSED will become even less effective than it appears to be at present.

That pathway should be set out, first, in the public authority’s equality scheme. It can be argued that the removal of the specific duty to have an equality scheme (at least in England and amongst non-devolved bodies) is a deeply retrograde step. Public bodies, even if anxious to be seen to be fulfilling the PSED, need a pathway through the PSED process. Presumably pre-existing equality schemes are still operative and may well have been revised to include the remaining protected characteristics. The Group should strongly encourage public authorities to retain and revise their schemes and operate under them.

The second element of the statutory pathway is authoritative guidance by the EHRC in the form of a Code of Practice, to which reference can be made in court proceedings, and preferably a range of specific duties for England (and non-devolved bodies in Scotland and Wales) modelled on the more effective Scottish and Welsh duties.

We are concerned at this ‘no EIA’ mantra which is now being invoked. Simply put, all employers, providers of services and public bodies, if properly advised, must conduct some form of equality audit of their PCPs, what we describe as a ‘legal risk assessment of equality impact’, to protect themselves from indirect discrimination challenges. It is not tenable to contend that a ‘due process’, mainstreaming duty requires less process than is indirectly required by substantive equality law principles. At the very least, the higher courts should rule on this, to the extent that they have not already done so, before such assertions are given general currency.[[13]](#footnote-13)

It seems to us that the removal of a requirement to have an equality scheme, this mantra of ‘no EIAs’ and some judicial pronouncements are actually producing even further confusion, rather than clarity, over what this statutory pathway entails.

In order to restore the ‘mainstreaming’ objective of the PSED, the following should be considered by the Group.

Whether in an equality scheme, and/or otherwise (for example, through an enforceable Code of Practice), public bodies should know that

i) they have a duty to collect both quantitative data (where appropriate) and also qualitative data (through consultations, surveys, analysis of complaints) across the protected characteristics in relation to employment, provision of services, procurement and exercise of other functions;

ii) some form of assessment should be held, at an early stage of policy development, to identify potential adverse impact;

iii) there should be encouragement to make changes to a proposed policy if they can be made at this stage;

iv) other than in exceptional circumstances, they should consult those immediately affected by the proposed policy for a sufficient period of time to allow considered responses;

v) there should be a clearly-defined ‘tipping point’, of material evidence of significant adverse impact, beyond which an EIA should be conducted and

v) where an EIA confirms, or identifies, significant adverse impact, they should consider alternatives to the policy and/or mitigation of the adverse impact.

It can also be argued that cases on the adequacy of processes under the PSED could be better ‘enforced’ through more frequent EHRC inquiries as it is a specialised body with regulatory functions.

**9 Conclusion**

Both section 75 and the original race duty were born out of significant events, in NI, the Good Friday Agreement and, in GB, the watershed Macpherson Inquiry into the murder of Stephen Lawrence. In NI some attempt has been made to reinvigorate section 75 through second generation equality schemes, audits of inequality and action plans. But it appears to be the case that the Macpherson legacy is under assault to the extent that Doreen Lawrence fears for its future. We share her concerns that any weakening of the public sector duty, especially when cuts in budget are necessary, will leave the most vulnerable groups in society open, once again, to injustice and unfairness in the allocation of resources and the priorities set by public bodies and those working on their behalf.

We trust that the Group’s recommendations will make the PSED more and not less effective and we are happy to arrange a meeting between the Group and IEDP members at your convenience.

19 April 2013

1. Scottish Parliament, 2001: Report on Civic Participation Event on the Race Relations Acts. Questions of Equal Opportunities Scrutiny of Policy and Legislation, 3rd Report 2001. [↑](#footnote-ref-1)
2. Elias, R (on the application of) v Secretary of State for Defence & Anor [2005] EWHC 1435 (Admin) (07 July 2005) and Secretary of State for Defence v Elias [2006] EWCA Civ 1293 (10 October 2006). [↑](#footnote-ref-2)
3. By Arden LJ at para 274 of the judgment. [↑](#footnote-ref-3)
4. R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS [2009] UKSC 15. [↑](#footnote-ref-4)
5. E McLaughlin and P Quirk (eds) (1996) Policy Aspects of Employment Equality in Northern Ireland, SACHR, Belfast. [↑](#footnote-ref-5)
6. http://www.equalityni.org/sections/default.asp?cms=Policy\_Section 75 - the statutory duties\_S75 Effectiveness Review&cmsid=89\_98\_189&id=189&secid=6 [↑](#footnote-ref-6)
7. Fitzpatrick, B, ‘The Life, ‘Death’ and Potential Revival of Section 75’, Minority Rights Now! Issue 4 (2011) 22-27 (<http://www.nicem.org.uk/elibrary/publication/minority-rights-now-issue-4->). [↑](#footnote-ref-7)
8. There was a weak pre-existing ‘due regard’ duty on local authorities in the RRA but it was perceived to be unenforceable, further evidence of the need for an effective PSED.. [↑](#footnote-ref-8)
9. EHRC Guidance (3rd revised edition), November 2012 (<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>) [↑](#footnote-ref-9)
10. <http://www.equalityhumanrights.com/scotland/public-sector-equality-duty/non-statutory-guidance-for-scottish-public-authorities/> [↑](#footnote-ref-10)
11. <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/> [↑](#footnote-ref-11)
12. <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice-and-technical-guidance/#techPSED> [↑](#footnote-ref-12)
13. It might also be helpful Steering Group members read some of the judgments on indirect discrimination and the PSED in the Supreme Court case, JFS. [↑](#footnote-ref-13)