
THE FAIRNESS AND MERITOCRACY COMMISSION:

THE PUBLIC SECTOR SERVICES TEST

1. I have been asked by the Leader of the Conservative Party to lead the Fairness and Meritocracy Commission (the “**Commission**”) comprised of barristers, solicitors and academics (to whom I am very grateful).¹
2. This document contains the Commission’s legal advice to the Leader and the Shadow Cabinet on the Equality Act 2010 (the “**EA 2010**”) in the context of: what legal duties apply to the UK’s government and public services that could affect performance? This is broken down into the following legal considerations:
 - 2.1. The operation of the Public Sector Equality Duty (“**PSED**”) and its impact on government decision-making and exposure to judicial review.
 - 2.2. The extent to which the public sector is subject to legal challenges arising from the PSED or other aspects of EA.

EXECUTIVE SUMMARY AND REFORM

3. The legal duty that affects the performance of the UK government and public services is the Public Sector Equality Duty (“**PSED**”), which places a substantial burden on the public sector. This is not surprising, as the duty is unclear and difficult to define precisely:
 - 3.1. It is not clear to which bodies it applies: whilst there is a list of bodies within Sch. 19 of the EA 2010, the PSED applies to non-public authorities who “*exercises public functions*” (s. 149(2) of the EA 2010). This is open to endless legal challenge.

¹ This document ultimately contains my advice and I take full responsibility for it.

- 3.2. It is not clear what the duty entails: whilst on the one hand the case law encourages clarity and prescription, on the other it maintains that it must be flexible in its application with much of the focus being on the circumstances of the individual case. As a result, it is not possible for an individual nor a public authority to know whether the duty has been complied with prior to commencing a legal challenge. This too is open to endless legal challenge.
- 3.3. It is not clear what its remedy might be because, again, this is fact-dependent and a matter of the Court's discretion. Sometimes a breach of the PSED will result in the decision in question having to be re-taken, but there are no clear rules governing when.
4. Although the duty is said to be purely procedural, in practice it does not operate as such because individuals often seek to quash decisions so that their substance can be reconsidered. This therefore becomes a further (vague) opportunity to legally challenge public authority decision-making in addition to the extensive grounds of judicial review (which include procedural grounds like legitimate expectations, taking into account irrelevant considerations and failing to take into account relevant considerations) and substantive grounds to challenge decisions under the EA 2010.
5. As a result, my view is that the PSED should be abolished and public authorities should be given more freedom to comply with their substantive EA 2010 rights (bearing in mind the broader grounds for judicial review that apply to procedural errors). This would bring significantly improved legal clarity without reducing the substantive rights of individuals to challenge claims that infringe their rights under the EA 2010. This should, in turn, remove technocratic managerialism, remove a cover for activism and thus reduce the costs of government and increase its efficiency.

THE ANALYSIS

1. The operation of the PSED and its impact on government decision-making and exposure to judicial review

6. The PSED comprises an onerous and general duty arising under section 149 of the EA 2010. It is supported by specific duties found in The Equality Act (Specific Duties and Public Authorities) Regulations 2017 (the “**2017 Regulations**”), which includes publishing (i) information on equality objectives every four years;² and, (ii) information on general duty compliance and the gender pay gap annually (depending on the number of employees).³
7. The PSED came into force on 5 April 2011. It replaced and enhanced the former separate equality duties for race, disability and sex contained in previous discrimination legislation.⁴ It now represents a combined equality duty covering all of the protected characteristics set out in the EA: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
8. In summary:
 - 8.1. The PSED imposes an (in theory) procedural duty on public authorities to consciously and rigorously consider equality impacts at the time decisions are made.
 - 8.2. Section 149 of the EA 2010 is drafted in broad, amorphous terms including that a public authority must have due regard to the need to “*eliminate... any conduct that is prohibited by or under the Act*”, “*advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it*” and “*foster good relations*” between those with a protected characteristic and those who do not possess it.
 - 8.3. There is a tension within the goals in section 149 because it is difficult to discriminate against one group in favour of another (in pursuit of the perceived better equality of opportunity) whilst fostering good relations between those two

² See Regulation 5, which requires that public authorities prepare and publish one or more objectives it thinks it should achieve to do any of the things mentioned in section 149(a)-(c) EA 2010. Unlike the general duty, the specific duties are devolved in Scotland and Wales.

³ See Regulation 3 and Schedule 1 of the 2017 Regulations.

⁴ As contained in s. 71 of the Race Relations Act 1976, s. 49A of the Disability Discrimination Act 1995 and section 76A of the Sex Discrimination Act 1975.

groups (where the group discriminated against may feel resentful). It is important to appreciate that, depending on the circumstances of the case, the PSED may require consideration of the impact of a decision on a wide-range of groups with protected characteristics, even where an adverse impact may not be obvious.

- 8.4. It (in theory) does not mandate particular outcomes,⁵ but requires decision-makers to demonstrate that equality considerations were properly integrated into the decision-making process.
 - 8.5. Failure to do so exposes decisions to judicial review, in which the court may (and typically will) quash decisions taken without adequate regard to equality considerations.⁶ The Equalities and Human Rights Commission (“EHRC”), a statutory body established by the Equality Act 2006, is also empowered to assess alleged breaches and issue notices of non-compliance.
9. As explained in detail below, my view is that the PSED should be abolished because (i) procedural protections are amply covered by other grounds of judicial review;⁷ (ii) the EA 2010 otherwise protects substantive rights; and (iii) the duty is unclear and incapable of prescriptive definition such that public authorities take a risk-averse approach to limit litigation risk which, in turn, has a chilling effect on public authority decision making.⁸ As a result, the PSED is an unnecessary additional ground of legal challenge to public authorities’ decisions that has led to substantial litigation.

(a) The unknown, and unknowable, boundaries of the duty

10. As set out in the EA 2010, the PSED requires public authorities, and those exercising public functions, to have ‘due regard’ to the need to eliminate discrimination, harassment and

⁵ As noted below, the likelihood is that it has an impact on substantive decisions.

⁶ This is particularly so in the context of budget decisions, homelessness and education.

⁷ For example, a decision can be challenged on the basis that a public body considered irrelevant material or failed to consider relevant material.

⁸ Indeed, there are examples where the public sector struggle to delineate the procedural obligations under the PSED with substantive outcomes mistakenly thinking that the PSED necessitated a certain decision; see *Smith v Chief Constable of Northumbria* [2025] EWHC 1805 (Admin), in which the Chief Constable misunderstood in thinking that the PSED required her to allow officers to march in Pride parades (where it did not), in spite of their statutory duties of impartiality.

victimisation; advance equality of opportunity between persons who share a protected characteristic and those who do not; and, foster good relations between groups.⁹

11. The EA 2010 lists nearly 200 public authorities and categories of public authorities which are subject to the PSED, including the police and the armed forces.¹⁰ Those exercising public functions¹¹ are also subject to the PSED, unless they fall within exceptions relating to children, Parliament, judicial functions, immigration functions and the security services.¹² Otherwise, the duty applies across the full spectrum of public decision-making, including primary decision-making and policy formulation, strategic or budgetary decisions, the award and management of contracts, grants and operational decisions with individual impact.
12. Pausing there, this is another example where the inclusion of an open-ended test of “*exercising a public function*” opens the door to litigation. Whilst my view is that the PSED should be abolished, in so far as it is retained it would be better to limit the duty only to those listed (with a power for a Minister to add further bodies as required).¹³ Doing so would move the arena for debate from the Courts (and litigation on what constitutes “*exercising a public function*”) to politics (where the Minister would have to answer for which bodies were included in the list and which were not).

⁹ Section 149, EA 2010.

¹⁰ See Schedule 19, EA 2010.

¹¹ See Government Equalities Office, ‘[Public Sector Equality Duty: guidance for public authorities](#)’: Factors relevant to deciding whether something is a public function include whether the body is publicly funded, exercises statutory powers and/or takes the place of government or a local authority.

¹² See Schedule 18, EA.

¹³ An example of the lack of clarity as to who the duty applies is *TZA v A Secondary School* [2025] EWCA Civ 200 where the EA 2010 Schedule made clear that the proprietor (i.e. governing body) of the defendant school was subject to the PSED. However, the claimant attacked the legally separate decision of the headteacher (about an exclusion). Counsel had to explain to the Court of Appeal the tortuous route by which the headteacher was subject to the duty even though a headteacher is not listed.

13. The PSED applies in England, Scotland and Wales.¹⁴ It does not require public authorities to consider equality implications extra-territorially, i.e. in countries outside the United Kingdom.¹⁵
14. The duty to have due regard is (in theory) procedural rather than outcome-driven. It is said not to be a duty to achieve particular equality outcomes, nor to prioritise equality considerations over other relevant considerations.¹⁶ Instead, the duty regulates the manner in which decisions are taken: decision-makers must be properly informed of equality implications and must turn their minds to those implications.
15. The meaning of ‘due regard’ is commonly captured by what are known as the (broadly drafted) *Brown* principles:¹⁷
 - 15.1. There should be an appreciation of the duty to have due regard and a proper analysis of all the relevant material.
 - 15.2. The duty to have due regard applies before, and at the time, a particular policy is considered.
 - 15.3. The duty to have due regard should be exercised with rigour and an open mind. It is said not to be a ‘box-ticking’ exercise (on which see further below) but should instead be an exercise integrated in the decision-making process.
 - 15.4. The duty is non-delegable and will always remain the responsibility of the body subject to the duty.

¹⁴ A similar duty exists in Northern Ireland to have due regard to the need to promote equality pursuant to section 75 of the Northern Ireland Act 1998.

¹⁵ See *R (on the application of Marouf and another) v Secretary of State for the Home Department* [2023] UKSC 23, [54]: There is no general duty under the PSED to attempt to bring about the kind of societal change that would see the elimination of discrimination and promotion of equality of opportunity in countries outside the United Kingdom.

¹⁶ See Government Equalities Office, ‘Public Sector Equality Duty: guidance for public authorities’: The duty is not a positive action programme and the use of positive measures to alleviate disadvantage or under-representation, or meet the particular needs of those who share a protected characteristic, is voluntary.

¹⁷ See *R (Brown) v Secretary of State for Work and Pensions and others* [2008] EWHC 3158 (Admin), [90]-[96], as approved by the Court of Appeal in *EWCA Civ 89* and as further affirmed in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.

- 15.5. The duty is a continuing one.
- 15.6. It is good practice for those exercising public functions in public authorities to keep an adequate record demonstrating consideration of the duty.
16. No procedure has been prescribed for compliance with the PSED. The Government guidance confirms that undertaking an Equality Impact Assessment (“**EqIA**”) is not a legal requirement for compliance with the duty.¹⁸ Nevertheless, in demonstrating compliance before a court, contemporaneous documentation (often in the form of an EqIA or embedded equality analysis in a business case or policy paper) can be important evidence of whether due regard was in fact had. A *post-hoc* assessment prepared in the context of a challenge is generally unlikely to satisfy a court that the duty was performed at the material time.¹⁹
17. In terms of practical implications on government decision-making:²⁰
- 17.1. Decision-makers should identify at an early stage whether any protected characteristics are engaged by their decision and how.
- 17.2. They should gather adequate qualitative and quantitative evidence proportionate to the decision’s scale and potential adverse impact.
- 17.3. They should evaluate impacts, including potential indirect discrimination and cumulative effects, and consider mitigations or alternatives.
- 17.4. They should record their reasoning contemporaneously and ensure that the equality analysis is brought to the attention of the person or body taking the decision in time to influence the outcome. There should also be an explicit recognition of the outcome of the assessment within the substantive decision-making document.²¹

¹⁸ Government Equalities Office, ‘Public Sector Equality Duty: guidance for public authorities’.

¹⁹ Compliance with the PSED must be prospective and not merely operate as a ‘rearguard’ action: *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [26]. See also *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [194], where the Court noted that a witness statement relied upon by the public authority was obtained in response to the judicial review challenge, not proactively in order to fulfil the PSED.

²⁰ See Government Equalities Office, ‘Public Sector Equality Duty: guidance for public authorities’. See further Chapters 5 and 6, *EHRC Technical Guidance on the Public Sector Equality Duty*.

²¹ See Section 4, *The Judge Over Your Shoulder*, 6th edition, 2022.

17.5. If new information emerges, decision-makers should, if necessary, revisit the equality analysis before final decisions are taken. Where policies are implemented over time or subject to periodic review, then the duty bites at the subsequent decision points as well.

17.6. The burden is said to be a procedural one, which is not intended to affect the substance of the decisions (indeed, the substance of decisions is protected elsewhere in the EA 2010 and in judicial review generally).²²

(b) The inherent difficulty of prescription and flexibility

18. The Independent Steering Group’s report on the PSED review and government response, published 6 September 2013 (the “**Independent Report**”)²³ identified that a key challenge identified as part of a review of the PSED in 2013 was that the meaning of ‘due regard’ is ambiguous and dependent on the circumstances. This created uncertainty for the public sector and led to the adopting of an overly risk-averse approach in order to rule out every conceivable possibility.²⁴ The Independent Report recommended clearer guidance from the EHRC setting out what is necessary for compliance (which was then published in 2014). It concluded that the PSED should be retained for now, but that a further review should take place in 2016. That second review has still not happened.²⁵

19. Since the Independent Report, in 2014 (updated in 2023), the EHRC published an updated technical guidance setting out examples both as decided in case law and as illustrating good practice.²⁶ Further guidance has been issued by the Government Equalities Office, Government Legal Department (via ‘The Judge Over Your Shoulder’,²⁷ which is a guide to administrative law) and via a letter to ministers sent by the then Minister for Equalities

²² From my review, it was often the case that a litigant would combine a PSED challenge with other grounds of judicial review.

²³ Accessible [here](#).

²⁴ This risk adverse approach is also seen in the ECHR context and led to an uncontrolled expansion of those rights.

²⁵ The reasons for such are unknown.

²⁶ [EHRC Technical Guidance on the Public Sector Equality Duty](#).

²⁷ See [The Judge Over Your Shoulder](#), 6th edition, 2022.

and Levelling Up Communities, Ms Kemi Badenoch.²⁸ The simple fact that so much guidance is needed highlights the inherent difficulty in prescribing its application.

20. Despite this plethora of guidance, the requirements of the duty remain unclear and are, by definition, incapable of clear exposition and application noting that:²⁹

20.1. The application of the PSED will “*differ from case to case, depending on the function being exercised and the facts of the case*”. As the Court of Appeal noted, the decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing.³⁰

20.2. Further, the duty operates differently as between a broad statement of principle and a detailed policy document, and as between a higher level general policy and a local level detailed implementation.³¹ The courts generally accept that what is “*due regard in one case will not necessarily be due regard in another*”.³²

20.3. Compliance with the PSED involves a duty of inquiry, so that the decision-maker is properly informed before making a decision.³³ The level of inquiry required is dependent on the context and, importantly, does not “*require the impossible*”. As recently confirmed by the Court of Appeal, the duty requires the taking of

²⁸ Government Equalities Office, Letter to public authority leaders from the Minister for Women and Equalities (2023).

²⁹ Indeed, even the EHRC, Reviewing the aims and effectiveness of the Public Sector Equality Duty (2018), pages 94 to 95 accepts that (i) there is a need for clear objectives, outcomes and terms of reference to ensure clarity of interpretation, but also (ii) sufficiently flexible in order for different authorities to apply the duty to fit their respective needs and contexts. Seen thus, the PSED is impossible to clear exposition and will always lead to litigation.

³⁰ Powell v Dacorum Borough Council [2019] EWCA Civ 2, [44].

³¹ See R (United Trade Action Group Ltd) v Transport for London [2021] EWCA Civ 1197, [71]-[72]. It was sufficient for the Mayor and TfL to provide general guidance to local authorities in their implementation of a plan to reduce traffic, including to state that proposals should be carefully assessed for their impact on people with protected characteristics.

³² R (Sheakh) v London Borough of Lambeth [2022] P.T.S.R. 1315, [55].

³³ R (Ward) v Hillingdon London Borough Council [2019] EWCA Civ 692, [71].

reasonable steps to make enquiries about potential impacts on those with protected characteristics when those impacts are not yet fully known.³⁴

- 20.4. It is for the decision-maker to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor, subject to a rationality review.³⁵ In other words, the courts will consider, in light of the material already before the decision-maker and taking into account urgency and context, whether it had been irrational for that decision-maker not to have delayed making the decision pending further enquiries.³⁶
- 20.5. Further, the courts have recognised that where an impact is obvious as a matter of common sense but its extent is inherently difficult to predict, then there may be nothing wrong in making a reasonable judgment and then monitor the outcome with a view to making any necessary adjustments, given that the duty is ongoing.³⁷
- 20.6. Taken together, it is clear that it is not possible to be prescriptive as to what the duty involves and it is, by definition, inherently vague. When combined with the open-ended additional test for bodies that exercise a “public function”, the net result is a lack of clarity as to (i) what the duty involves, and (ii) to whom it applies. That is unsatisfactory as a matter of law.

(c) The resultant challenge risk

21. The result of this inherent ill-definition is a tidal wave of legal challenges with failure to comply with the PSED by public authorities resulting in enforcement either by the EHRC or by way of judicial review.
22. First, the EHRC has powers to assess compliance with the PSED. It may issue compliance notices requiring information to be provided on the steps that the public authority has taken

³⁴ *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058.

³⁵ This is a good example where it is unclear what the PSED adds to the irrationality ground of judicial review.

³⁶ See, for example, *The Howard League for Penal Reform v The Secretary of State for Justice* [2026] EWHC 74 (Admin) balancing the urgent need to protect individuals from the risk of serious violence against the making of further enquiries as to the effect of using PAVA spray on neurodivergent children.

³⁷ See *R (Unison) v Lord Chancellor (No 3)* [2015] EWCA Civ 935, [121]

or proposes to take to ensure compliance. In the event of further non-compliance, the EHRC may apply to a court order requiring compliance.³⁸ For example, in 2010, the EHRC found that the Home Office neglected to fully consider its impact of its ‘hostile environment’ measures on black members of the Windrush generation. It issued legally binding recommendations which the Home Office implemented in 2024 (ranging from training on the PSED for all staff and improving the quality of advice to Ministers to the treatment of people from ethnic minorities).³⁹

23. Second, decisions may be challenged by way of judicial review proceedings by any person (an individual or an interest group) with “sufficient interest”.⁴⁰ In this regard:

23.1. The courts will assess if a public authority has complied with the PSED as a matter of procedure. As long as proper and timely consideration has occurred, then the court will not mandate particular substantive outcomes or re-assess the weight given to such implications.⁴¹

23.2. Common pitfalls that have led to successful judicial review challenges include: (i) late-stage or after-the-event assessments;⁴² (ii) over-generalised or boilerplate EqIAs;⁴³ (iii) failure to obtain reasonably available data and to take it into account;⁴⁴ (iv) overlooking particular protected groups (e.g. race and sex);⁴⁵ (v) assuming that

³⁸ Sections 31 and 32, EA.

³⁹ See further EHRC, ‘Home Office makes equality improvements after EHRC intervention’. This is an interesting example because, whilst the duty is procedural, it is well known that this policy changed and it would be reasonable to conclude that challenges such as this contributed to that substantive change of policy.

⁴⁰ Section 31(3), Senior Courts Act 1981. Courts have interpreted the concept broadly and flexibly. A claimant with a “sufficient interest” may have a direct and personal interest in the matter, or a less direct, general interest, based on the public interest in the legality of the decision under challenge (though this is still subject to the scrutiny of the courts).

⁴¹ See *R (T) v Sheffield City Council* [2013] EWHC 2953 (QB), [59]: Analysis of compliance with the PSED should not be “allowed to descend into an impermissible assessment of the merits of the decision”.

⁴² See *R (Blundell) v Secretary of State for Work and Pensions* [2021] EWHC 608 (Admin); *R. (Coulthard) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 3252 (Admin), [114].

⁴³ See *R (Coulthard) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 3252 (Admin) at [112]; *R (MXK) v Secretary of State for the Home Department* [2023] EWHC 1272 (Admin), [87].

⁴⁴ See *R (Law Centres Federation Ltd) v Lord Chancellor* [2018] EWHC 1588 (Admin) at [105]; See *R (K) v Secretary of State for Work and Pensions* [2023] EWHC 233 (Admin), [210].

⁴⁵ See *R (Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058 at [201]; *R (MXK) v Secretary of State for the Home Department* [2023] EWHC 1272 (Admin), [87].

officials' consideration suffices without ministerial or committee engagement;⁴⁶ and (vi) failing to revisit equality impacts when policies are materially modified.⁴⁷

- 23.3. Where a breach of the PSED is established, the appropriate remedy is at the court's discretion and the choice is the same as applies in judicial review generally. As such, the court may quash the decision,⁴⁸ which means that the decision will be remitted to the decision-maker to retake the decision. Alternatively, the court may consider it appropriate to make a declaration that the PSED has been breached if a quashing order would serve no useful purpose.⁴⁹ Declarations have been issued where the public authority is able to make the policy lawful without it being quashed⁵⁰ and where the effects of a quashing order would be disproportionate to the significance of the breach.⁵¹
- 23.4. This is another aspect of the PSED that lacks legal clarity with neither applicants nor public bodies knowing, in advance, what the likely remedy will be and thus being unable to properly assess the risks that any litigation poses. In such circumstances, it is unsurprising that public bodies take a risk adverse approach to avoid litigation altogether.
24. In 2019, the Women and Equalities Committee of the House of Commons reported on the enforcement of the EA 2010, including on the PSED, after a year-long inquiry.⁵² It concluded that the burden of enforcement should shift away from the individual to commence judicial review proceedings in light of the knowledge and cost barriers to litigation and that individual action should only be rarely needed. Further, it recommended a significant increase in enforcement work by the EHRC. In 2025, the EHRC issued its

⁴⁶ See *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [62-63].

⁴⁷ See *R (K) v Secretary of State for Work and Pensions* [2023] EWHC 233 (Admin), [210].

⁴⁸ Per section 29 of the Senior Courts Act 1981 and as applicable to judicial review generally.

⁴⁹ See *The Judge Over Your Shoulder*, 6th edition, 2022, paragraph 4.15.

⁵⁰ *R (AK) v Westminster City Council* [2024] EWHC 769 (Admin), [10] and [69]. The Court found that Westminster City Council could issue guidance on how its discretion under the policy in question could be exercised in a manner to remove the indirect discrimination, or otherwise provide justification for the indirect discrimination. The parties agreed to a timetable for compliance with the PSED.

⁵¹ See *R. (on the application of Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [99].

⁵² See Women and Equalities Committee, *Enforcing the Equality Act: the law and the role of the EHRC* (2019).

‘Strategic Plan 2025 to 2028’ with a priority being to improve compliance with the PSED through enforcement.⁵³ Such a recommendation raises serious policy questions:

- 24.1. It proposes bolstering the role of a body with an appetite to challenge public bodies’ decisions⁵⁴ with the resources to do so.⁵⁵ This is likely to lead to significantly more litigation on a duty that is inherently unclear; and
- 24.2. The fact that the EHRC regularly publishes guidance suggests that the requirements of the duty are not clear on their face and that the EHRC does not, itself, know the boundaries of the duty and what it requires. If so, the likely result of bolstering its policing role is increased litigation where it seeks to further explore its own thinking on the boundaries of the PSED.

2. The extent to which the public sector is subject to legal challenges arising from the PSED or other aspects of EA 2010

25. I have undertaken an indicative review of a sample of 70 cases⁵⁶ to understand any trends reflecting the extent to which the public sector has been subject to legal challenge.⁵⁷ On review, it is clear that the scope for challenge is immense and the duty undoubtedly places a significant burden on the public sector.
26. In terms of context, PSED challenges arise frequently with respect to three key areas of public authority decision making: (i) budgetary decisions and funding allocations; (ii) housing and homelessness; and (iii) education:
 - 26.1. As to (i), budget cuts, restructures and grant decisions typically affect frontline services disproportionately used by disabled people, women, children and ethnic

⁵³ See EHRC, Strategic plan 2025 to 2028 (2025).

⁵⁴ Indeed, on an institutional level, if the EHRC does not bring challenges, its existence is likely to be called into question.

⁵⁵ Indeed, it is inevitable that if such reforms are implemented the EHRC will insist on further resources to be able to play such a policing role and to bring a regular flow of cases.

⁵⁶ Identified from the list of significant cases maintained by Thomson Reuters Practical Law (around 100 at the time of writing). For the purposes of our review, we have excluded cases under the pre-EA legislation and cases heard by any Ombudsmen and courts inferior to the High Court.

⁵⁷ Care should be taken not to generalise the observations below across the entire public sector (in particular given the variety of factual contexts and levels of decision-making and that the below does not represent a comprehensive quantitative analysis).

minorities. Where the period following the 2008 financial crisis was characterised by reductions in public spending,⁵⁸ public authorities were required to make difficult decisions as to redundancies and service reductions.⁵⁹

- 26.2. As to (ii), homelessness and allocation decisions directly engage groups with high prevalence of protected characteristics, such as women, ethnic minorities and those with disabilities.
- 26.3. As to (iii), policies on admissions, exclusions, higher education fees and support services can have differential effects on individuals with protected characteristics.
27. In terms of the nature of the decisions challenged, there have been more challenges to specific policies and decisions taken in relation to individuals⁶⁰ rather than to broader statutory or regulatory measures.⁶¹ This clearly cuts across the suggestion that it would be appropriate for the EHRC to play a more prominent role where it could focus on broader issues.
28. In terms of the nature of claimants, the majority of claims are commenced by private individuals directly against public authority decisions (including, for example, beneficiaries of a fund or local residents)⁶² and were often combined with other grounds of judicial review. Relatively few cases were brought by public interest organisations or NGOs. As discussed above, a public interest organisation will need to establish that it has the required standing and ‘sufficient interest’ to commence judicial review proceedings. A court will consider the objects of that organisation: a general interest in public law without a more specific focus on individuals with protected characteristics is insufficient.⁶³

⁵⁸ Institute for Fiscal Studies, How Have English Councils’ Funding and Spending Changed? 2010 to 2024 (2024).

⁵⁹ As knowledge in the EHRC Guidance for Decision-Makers, Making fair financial decisions (2015).

⁶⁰ See, for example, *Hackney LBC v Haque* [2017] EWCA Civ 4 ; *R (IXF) v Chief Constable of West Mercia* [2023] EWHC 2793 (Admin): local authority’s assessment of suitability of accommodation provided to a disabled and homeless individual.

⁶¹ See, for example, *R (on the application of Prichard) v Secretary of State for Work and Pensions* [2020] EWHC 1495 (Admin): Secretary of State’s decision to introduce legislation which excluded mixed age couples from claiming state pension credit.

⁶² *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586

⁶³ See *R (Good Law Project) v The Prime Minister & Anor* [2022] EWHC 298 (Admin), [59] where the court held that the Good Law Project lacked standing to bring a PSED challenge based on indirect discrimination on grounds of

29. In terms of remedy, the courts have frequently made quashing orders for non-compliance with the PSED. In theory, a quashing order does not mean that the public authority has to implement a particular substantive outcome; rather, it must consider the equality implications identified by the court before the decision or policy can be lawfully relied upon or implemented.⁶⁴ There is scope for the courts to issue a declaration in lieu of a quashing order if the latter would serve no practical purpose (e.g. it is too late for the claimant to be granted relief⁶⁵) or if the consequences would be too disproportionate (and not merely cause the public authority a practical inconvenience).⁶⁶
30. Taken together, the most common applicants are individuals who seek to quash decisions:
- 30.1. Whilst in theory the PSED is a purely procedural duty, it is reasonable to infer that such individuals were motivated to challenge a decision because they wished to see a different outcome (e.g. a place in housing or a place for their child in a school).⁶⁷ It is unlikely that they were purely driven by a desire only to ensure that the correct procedure was followed and not also for a declaration that there was a breach in their case.
- 30.2. Further, as a matter of practice, if a decision is quashed it might take a particularly hardy public body to take a purely procedural approach to the decision when it arose again; rather, when faced with a litigant that has already successfully challenged it in court, the public body is likely to change its substantive outcome to appease that litigant pursuant to its risk adverse approach.
- 30.3. It is therefore reasonable to conclude that whilst the Courts reiterate that the PSED is a purely procedural duty with only procedural consequences, in practice it is likely to have a much more pernicious and wide-ranging impact on public authority

race and/or disability. A general interest in public law was insufficient, particularly where there was an “obviously better-placed claimant” (i.e., the Runnymede Trust, which existed specifically to promote racial equality).

⁶⁴ See Section 3, *The Judge Over Your Shoulder*, 6th edition, 2022.

⁶⁵ *Hunt v North Somerset Council* [2015] UKSC 51, [12].

⁶⁶ See *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201, QBD, [99]; See also *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs and anor* [2016] ICR 975, CA, [107] – [108]. The courts found that a quashing order would serve “no practical purpose” where an assessment had since been carried out in performance of the PSED and it went beyond the limits of the section 149(1) obligations.

⁶⁷ The challenge in *R (Bracking)*, for example, was to quash the decision.

decisions making. An impact that is potentially far beyond the substantive rights and obligations contained in the EA 2010.

CONCLUSION

31. In my view, the PSED is unclear yet places a substantial burden on the public sector in circumstances where (i) substantive outcomes are otherwise protected by the EA 2010, and (ii) procedural concerns are otherwise protected through the traditional grounds of judicial review. It is thus unnecessary and should be abolished.

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