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# Does the law think that black lives matter? A reflection upon the role of the public sector equality duty in promoting racial equality before the law

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## ABSTRACT

Racism is often perceived as a conscious choice an individual makes to abuse another, or an explicit statement that a group of people are inferior to another. Less often is racism construed as a product of institutional culture. This inability to accurately depict the problem has stunted the ability of lawmakers to craft legislation that will adequately combat racism. This paper explores attempts in the recent past that have provided remedies for those subject to racism rather than addressing its systemic causes. S149 of the Equality Act in the United Kingdom bucked this trend by obligating public authorities to take proactive steps to eliminate discrimination. This paper examines the challenges the provision has faced, explores how it could work to prevent racism in the coming years, and argues that it remains important today.

**KEYWORDS** Legislation; public sector equality duty; racism; diversity; London; policing

## 1. Racism as a societal, rather than an individual wrong

In the first half of 2020, George Floyd and Breonna Taylor were just two of many African Americans killed by police officers in the United States. These tragic events catalysed a series of anti-racist protests across the world. In the port city of Bristol in the United Kingdom, activists tore down an effigy of former slaver Edward Colston in defiance of their country's reverence for figures that have oppressed black people. The UK government response was mealy-mouthed; ministers purported to empathise with the desire to tackle equality, but argued that relatively few Britons hold racist views.<sup>1</sup>

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<sup>1</sup>Sophy Ridge, Interview with Matthew Hancock MP, Secretary of State for Health and Social Care, Her Majesty's Government (London, 7 June 2020) [https://twitter.com/RidgeOnSunday/status/126953462232393089?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E126953462232393089%7Ctwgr%5E%7Ctwcon%5Es1\\_ref\\_url=https%3A%2F%2Fnews.sky.com%2Fstory%2Fsophy-ridge-on-sunday-live-health-secretary-matt-hancock-faces-questions-on-testing-lockdown-easing-protests-12002084](https://twitter.com/RidgeOnSunday/status/126953462232393089?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E126953462232393089%7Ctwgr%5E%7Ctwcon%5Es1_ref_url=https%3A%2F%2Fnews.sky.com%2Fstory%2Fsophy-ridge-on-sunday-live-health-secretary-matt-hancock-faces-questions-on-testing-lockdown-easing-protests-12002084)

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These comments fell into the trap of many contemporary discussions of racism; construing racism as a series of agentic decisions by malignant individuals, emphasising the moral responsibility of outliers, rather than looking at the collective burden of discrimination, ‘othering’ and lack of representation across a society. The speaker of a racist statement is not an isolated sprocket, but a cog in a much bigger machine, and if policymakers myopically focus on the individual actions of that cog they can fail to diagnose and remedy the system that dispensed that discrimination.

The deaths of almost half a million British soldiers in the Second World War saw the UK government invite Commonwealth citizens into the country from the 1950s to supplement the workforce. This demographic change was resisted by a substantive minority of the white population who treated the new arrivals acrimoniously.<sup>2</sup> Policymakers turned their attention to ‘micro’ matters of discrimination, providing remedies where individuals were discriminated against in public spaces,<sup>3</sup> and three years later in housing and employment.<sup>4</sup>

The latter legislation also prohibited advertisements and notices that would discriminate.<sup>5</sup> This was badly needed in an era where ‘no dogs, no blacks, no Irish’ signs were said to be prominently displayed in overnight accommodation hotels, but also showed the narrow-sightedness of legislating for surface-level manifestations of racism.

Though laudable, focus on these ‘micro’ issues drew attention from the ‘macro’ consideration of reducing socioeconomic injustice and ensuring that *groups* are treated with equality. The Commission for Racial Equality (CRE) criticised the provisions on the basis that they did not account for the delivery of public sector activity by private sector contractors, and also that the law should also ‘promote ... good relations [*sic*] between persons of different racial groups generally’.<sup>6</sup>

## 2. Legislating to promote equality rather than to prevent discrimination

Achieving a paradigm shift required tragic events to galvanise decision makers into taking real action. Like the US, the UK has experienced racist killings. The murder of teenager Stephen Lawrence in 1993 is an event burnt into the collective consciousness of British society.<sup>7</sup> Stephen suffered

<sup>2</sup>The Notting Hill Riots’ are the most notorious example.

<sup>3</sup>Race Relations Act 1965 s1.

<sup>4</sup>Race Relations Act 1968, ss3 and 5.

<sup>5</sup>*ibid*, s6.

<sup>6</sup>Commission for Racial Equality, Review of the Race Relations Act 1976: Proposals for change, (July 1985) p36 cited by Doug Poyer The Public Sector Equality Duty and Equality Impact Assessments <https://researchbriefings.files.parliament.uk/documents/SN06591/SN06591.pdf>.

<sup>7</sup>Stephen Lawrence murder: A timeline of how the story unfolded <https://www.bbc.co.uk/news/uk-26465916>.

a dual slight; he was killed for the colour of his skin, and the subsequent police investigation dehumanised him and his family.

Both issues were considered by Sir William MacPherson, who held up an unforgiving mirror to the face of British society. Staring back was a discriminatory society whose capital police force, housing and education providers were marred by the ‘disease’ of ‘institutional racism’ that required ‘specific and co-ordinated action’.<sup>8</sup> The CRE provided the Home Secretary with an updated version of its 1985 publication in which it made parallel calls for failure to comply with equality duties becoming a ground for judicial review.<sup>9</sup>

The force of these challenges mandated a response, and the government of the day introduced The Race Relations (Amendment) Act 2000. This amended s71 of the Race Relations Act 1976 in creating a new positive duty on every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need—

- (a) to eliminate unlawful racial discrimination; and
- (b) to promote equality of opportunity, and good relations, between persons of different racial groups.

The obligation was ‘upgraded’ in April 2011 when an enhanced legislative duty came into force in England, Scotland and Wales extending to all protected characteristics. The new provision, which came to be known as the ‘The Public Sector Equality Duty’ (PSED) was contained in S149(1) of the Equality Act 2010. The provision required that 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.

The PSED is more fulsome than its predecessors. It requires public authorities to ‘advance’ rather than ‘promote’ equality of opportunity. It urges

<sup>8</sup>Sir William Macpherson of Cluny, The Stephen Lawrence Inquiry Report of An Inquiry, February 1999 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277111/4262.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf).

<sup>9</sup>Commission for Racial Equality, Review of the Race Relations Act 1976: Proposals for change, 30 April 1998 cited by Doug Pyper The Public Sector Equality Duty and Equality Impact Assessments <https://researchbriefings.files.parliament.uk/documents/SN06591/SN06591.pdf>.

public bodies to work proactively to combat social injustices, going beyond a 'deficit model' of penalising explicit instances of interpersonal discrimination, to tackling the deeper sociopolitical causes of inequality between groups in society. The duty is a monumental contribution to using legislation to change society and has worked to foster a culture of creating a fairer society with less discrimination in it, rather than providing remedies for discrimination after the fact.

The duty applies to all public authorities and those exercising public functions, including ministers and government departments, local authorities, NHS trusts and other health and social services authorities, the armed forces and the police.<sup>10</sup>

Organisations representing racial minorities trumpeted the birth of this duty. Schools were encouraged to set up study skills classes for students from minority groups known to underperform.<sup>11</sup> Local NHS trusts promised to 'deliver more targeted intervention and outreach activities to protected groups'.<sup>12</sup> The Equality and Human Rights Commission (EHRC), the vanguard of equality in the United Kingdom, now had momentum in its mission to encourage public authorities to produce equality impact assessments (EIAs) in order to comply with the duty. EIAs are documents in which civil servants consider and record the potential equality implications of their decisions in order to 'ensure that ... policies, services and legislation do not discriminate against anyone' and to 'promote equality of opportunity'.<sup>13</sup>

It is worth reflecting on the impact of this accomplishment. Minority ethnic groups are under-represented in politics as compared against their share of the population.<sup>14</sup> Electoral registration rates for minority ethnic voters are between 8-22% lower than their white counterparts.<sup>15</sup> The perception that campaigns to promote equality have resulted in legislation has the potential to encourage 'low propensity' groups to believe that they have efficacy in the political process, and where a seemingly intractable problem such as racism captures the attention of politicians, it can rebut the perception that 'nothing changes' when citizens engage in the democratic process.<sup>16</sup>

<sup>10</sup>Equality Act 2010 Schedule 19.

<sup>11</sup>Equality and Human Rights Commission, Guidance Public sector equality duty guidance for schools in England, November 2012 [https://dera.ioe.ac.uk/16086/1/public\\_sector\\_equality\\_duty\\_guidance\\_for\\_schools\\_in\\_england\\_final.pdf](https://dera.ioe.ac.uk/16086/1/public_sector_equality_duty_guidance_for_schools_in_england_final.pdf).

<sup>12</sup>Central London Community Healthcare, Public Sector Equality Duty Report, 2018 [https://clch.nhs.uk/application/files/2115/4158/6411/CLCH\\_-\\_Public\\_Sector\\_Equality\\_Duty\\_Report\\_2018.pdf](https://clch.nhs.uk/application/files/2115/4158/6411/CLCH_-_Public_Sector_Equality_Duty_Report_2018.pdf).

<sup>13</sup>Ministry of Justice, Equality Impact Assessments, 2010 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217265/equality-impact-assessments-2010.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217265/equality-impact-assessments-2010.pdf).

<sup>14</sup>Runnymede Trust, Ethnic Minority Representation in UK Local Government, 2021 [https://www.runnymedetrust.org/uploads/RaceandElectionsFINAL\\_interactive.pdf](https://www.runnymedetrust.org/uploads/RaceandElectionsFINAL_interactive.pdf).

<sup>15</sup>Electoral Commission, Explore the data: Who is and isn't registered to vote? <https://www.electoralcommission.org.uk/who-is-registered>.

<sup>16</sup>Simon Wooley (Operation Blackvote), Submission to the Speaker's Conference (on Parliamentary Representation), April 2009 <https://publications.parliament.uk/pa/spconf/167/167we03.htm>.

This would be a short-lived honeymoon period. One month after the Equality Act received Royal Assent, the incumbent Labour Party lost the 2010 General Election. The new coalition government ushered in a neoliberal philosophy, premised on the notion that it would ‘shun[] the bureaucratic levers of the past’ and ‘enable people to make better decisions for themselves’ and create a ‘smaller state’.<sup>17</sup> This philosophy had the potential to curtail the work of bodies such as the EHRC in prescribing actions that public authorities could take to make society more equal.

It became patently clear that this minimalist statecraft *would* target equalities legislation. The then-Prime Minister described EIAs as ‘bureaucratic nonsense’, stating that the government was ‘calling time on Equality Impact Assessments’.<sup>18</sup> In a ministerial statement to the Commons, the then-Home Secretary claimed that the government would act on its ‘strong desire to reduce unnecessary bureaucracy’.<sup>19</sup> Organisations such as the Race Equality Commission stated that the repeated characterisation of the duty as ‘red tape’ was misleading and reactionary.<sup>20</sup>

The government subsequently established a steering committee to review the PSED. Campaign groups were concerned that this represented a cynical ploy to remove the duty. Petitions gathered thousands of signatures in attempts to ensure that the duty would be retained after the review.<sup>21</sup> Sitting over 10 months, the steering committee heard a wide range of evidence from across the stakeholder community, including interviews with lawyers, charities, government departments, unions and community groups.

Despite the government scepticism of the PSED, and the fear of civil society organisations that the steering committee was a rubber stamp for a predetermined outcome, the PSED was not scrapped. Neither was the final report a chastising rebuke.

The committee did claim that the interpretation of the PSED was uncertain, creating litigation risk that encouraged public authorities to ‘an overly risk averse approach’ ‘in order to rule out every conceivable possibility’.<sup>22</sup>

<sup>17</sup>David Cameron and Nick Clegg, *The Coalition: our programme for government*, May 2010 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78977/coalition\\_programme\\_for\\_government.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf) Pgp 7–8.

<sup>18</sup>David Cameron, Speech to the Confederation of British Industry, November 2012 <https://www.gov.uk/government/speeches/prime-ministers-speech-to-cbi>.

<sup>19</sup>Theresa May, Written statement to Parliament Equalities red tape challenge and reform of the Equality and Human Rights Commission: outcome, May 2012 Accessed 9th March 2021 <https://www.gov.uk/government/speeches/equalities-red-tape-challenge-and-reform-of-the-equality-and-human-rights-commission-outcome>.

<sup>20</sup>The Race Equality Coalition, Submission to the Review of the Public Sector Equality Duty, April 2013 <https://www.rota.org.uk/sites/default/files/core/Race%20Equality%20Coalition%20Submission%20to%20the%20PSED%20review.pdf>.

<sup>21</sup>Change.org, The British Government: Keep the Public Sector Equality Duty, 2013 [https://www.change.org/p/the-british-government-keep-the-public-sector-equality-duty-2?utm\\_campaign=petition\\_created&utm\\_medium=email&utm\\_source=guides](https://www.change.org/p/the-british-government-keep-the-public-sector-equality-duty-2?utm_campaign=petition_created&utm_medium=email&utm_source=guides).

<sup>22</sup>Government Equalities Office, Review of the Public Sector Equality Duty: Report of the Independent Steering Group, September 2013 para 15.

This element of the scrutiny did appear to suffer from an affirmation bias amongst the committee members. A later House of Lords report would describe this as a ‘quite possibly misplaced’ focus on ‘overcompliance’.<sup>23</sup> The committee’s other conclusions were somewhat anodyne; the final report stated that the equality duty adopted broad support and that further issues lay ‘in its implementation’.

Staving off this early challenge, the duty became a delectable carrot for public bodies, enticing them to think deeply about the potential impacts of their policies upon ethnic minorities. Where public authorities failed to make those considerations, it served as a potent stick for activists. The duty would be invoked to protect the sale of buildings used by refugee communities to better their lives,<sup>24</sup> to secure employee status for underpaid outsourced black and brown cleaning staff,<sup>25</sup> and a host of other situations in which public authorities had not considered the extent to which their actions could contribute to, or interact with, existing social inequalities. A duty imposed by legislation upon public authorities was having a concrete effect in changing outcomes.

The duty continued to shape public decision making as authorities would create EIAs in the course of their work. Somewhat ironically, these assessments would often be used on a voluntary basis by the government in drafting major constitutional pieces of legislation, such as the European Union Withdrawal Act.<sup>26</sup> This underlines just how transformative the duty is. As noted above, the government-appointed committee was concerned that the PSED created costs where public bodies took greater action on equality than is required in law. Its voluntary adoption by that same government shows the extent of its impact on policy-making culture.

### 3. Institutional racism in police forces in 2021; a matter of guidance?

The frontier in the battle for equality before the law has shifted since the MacPherson report in 1999. In 2021, the introduction of algorithmic processes to public decision making means that black people are more likely to be discriminated against by a machine than a human civil servant in the social welfare system. The UN Special Rapporteur on Extreme Poverty

<sup>23</sup>House of Lords Select Committee on the Equality Act 2010 and Disability, *The Equality Act 2010: the impact on disabled people*, March 2016 <https://publications.parliament.uk/pa/ld201516/ldselect/ldselect/117/117.pdf>.

<sup>24</sup>Mohinder Pal v The London Borough of Ealing [2018] EWHC 2154 <https://southallcommunityalliance.com/wp-content/uploads/2020/07/STH-CO142018-Judgment-4833-20-Jul-2018-FINAL-2.pdf>.

<sup>25</sup>UVW Union, *Campaigns: Great Ormond Street Hospital* <https://www.uvwunion.org.uk/en/campaigns/great-ormond-street-hospital/>.

<sup>26</sup>Department for Exiting the European Union, *Equality Analysis European Union (Withdrawal) Bill*, July 2017 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/629244/European\\_Union\\_\\_Withdrawal\\_\\_Bill\\_equality\\_analysis.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629244/European_Union__Withdrawal__Bill_equality_analysis.pdf).

and Human Rights stated that the proliferation in use of computational analysis systems by governments could lead to ‘stumbling zombie-like into a digital welfare dystopia’.<sup>27</sup>

Decisions made by algorithms are made in greater volume and en masse, and thus have the potential to magnify existing social inequalities especially where the data fed to such algorithms is produced from the pre-existing biases of the criminal justice system. These issues are deeply troubling in the UK legal system, where 85% of black people do not believe that they would be treated equally by the police.<sup>28</sup>

In the recent case *R(Bridges) v Chief Constable of South Wales Police*, the Court of Appeal was asked to consider whether a police force had acted unlawfully in failing to comply with the public sector equality duty when assessing the risks associated with the deployment of a system of facial recognition cameras.<sup>29</sup>

These cameras attempt to identify wanted criminals by scanning the faces of passing members of the public, recording hundreds of thousands of biometric measurements, comparing those measurements against a ‘watchlist’, and generating a ‘similarity score’ that would indicate the likelihood that the scanned measurements belonged to a suspect. Several models of facial recognition systems have been shown to inaccurately create false matches, with black faces more likely to be incorrectly matched.<sup>30</sup>

The Court of Appeal ruled, inter alia, that the police force had not sufficiently understood the inner workings of the algorithm so as to be able to discharge any possibility of bias. This would constitute a breach of the PSED because the preponderance of evidence suggesting black people and women could be falsely matched needed to be rebutted.

The PSED shows the important role that legislation for equality can serve. A police power to prevent crime had to be justified by reference to an established statutory test for lawfulness, and the result was that the use of the police power was ruled unlawful. *Bridges* will temper the enthusiasm of police forces to develop facial recognition systems before these equality issues have been resolved. More importantly, it provides authority for the proposition that where an algorithmic system is a ‘black box’ to the public body deploying it, and there are concerns as to its bias in respect of minority groups, the public body must discharge the possibility of such bias in order to lawfully use the system.

By contrast ministerial guidance has failed to improve relations between black people and the police. The totemic issue of recent years has been the

<sup>27</sup>Philip Alston, Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, October 2019 [https://www.ohchr.org/Documents/Issues/Poverty/A\\_74\\_48037\\_AdvanceUneditedVersion.docx](https://www.ohchr.org/Documents/Issues/Poverty/A_74_48037_AdvanceUneditedVersion.docx).

<sup>28</sup>House of Commons House of Lords Joint Committee on Human Rights, Black people, racism and human rights Eleventh Report of Session 2019–21, November 2020 <https://committees.parliament.uk/publications/3376/documents/32359/default/>.

<sup>29</sup>[2020] EWCA Civ 1058.

<sup>30</sup>Joy Buolamwini and Timnit Gebru, Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, Conference on Fairness, Accountability and Transparency, (2018).



disproportionate use of stop and search against black people. While still a Minister, Theresa May's Home Office launched the Best Use of Stop and Search Scheme (BUSSS) in 2014 with the stated aim of 'achiev[ing] greater transparency', 'community involvement' and 'improv[ing] public confidence and trust' in the use of stop and search powers.<sup>31</sup> The scheme recommended improvements such as lay observation of stop and search, development of community complaints mechanisms and analysis of the effect of the use of the power on black communities.

All police forces in England and Wales voluntarily signed up to implement BUSSS.<sup>32</sup> Despite these universal commitments, the guidance neither created nor sustained lasting change. Her Majesty's Inspectorate of Constabulary (HMIC) independently assessed the compliance of the 43 Home Office-funded police forces with BUSSS and found that only 11 had implemented all aspects of the scheme, and that 13 had implemented fewer than half of its recommendations.<sup>33</sup>

This would be visited again in official statistics, which showed that black people were still nine times more likely to be subject to the use of the power than white people, with 6 stop and searches for every 1,000 White people compared with 54 for every 1,000 Black people in 2018-2019.<sup>34</sup> BUSSS was a fragile initiative; it would be undermined by future Home Secretaries who enabled junior police officers to authorise 'suspicionless' stop and searches and reduce the level of belief required to use the power. These changes were not made through legislation, but in announcements to the press and news items on the government's website.<sup>35</sup>

Even the Metropolitan Police Service (MPS), the alleged perpetrator of 'institutional racism' in the MacPherson report, has mainstreamed the use of EIAs. MPS conducted its own public consultation and EIA into facial recognition in which they show engagement with several publications considering the bias of several facial recognition systems.<sup>36</sup> More impressive are the

<sup>31</sup> Home Office and College of Policing, Best Use of Stop and Search Scheme, 2017 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/346922/Best\\_Use\\_of\\_Stop\\_and\\_Search\\_Scheme\\_v3.0\\_v2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/346922/Best_Use_of_Stop_and_Search_Scheme_v3.0_v2.pdf).

<sup>32</sup> Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, Best Use of Stop and Search (BUSS) scheme: A summary of the findings of an HMIC revisit of the 19 forces that were not complying with the scheme, (2016) <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/best>.

<sup>33</sup> Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, PEEL: Police legitimacy 2015 A national overview, (2016) pg 47 figure 9 <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-legitimacy-2015.pdf>.

<sup>34</sup> Home Office, Best use of stop and search scheme: Guidance for police forces on the implementation of the best use of stop and search scheme, (2021) <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest>.

<sup>35</sup> Government lifts emergency stop and search restrictions, August 2019 [https://www.gov.uk/government/news/government-lifts-emergency-stop-and-search-restrictions?utm\\_source=d1d5a8ad-ed6c-47be-ba62-fe6a245536c2&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=daily](https://www.gov.uk/government/news/government-lifts-emergency-stop-and-search-restrictions?utm_source=d1d5a8ad-ed6c-47be-ba62-fe6a245536c2&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily).

<sup>36</sup> Metropolitan Police Service, Facial Recognition Equality Impact Assessment, (2020) <https://www.met.police.uk/SysSiteAssets/media/downloads/central/advice/met/facial-recognition/equality-impact-assessment.pdf>.

less public-facing circumstances in which the MPS has incorporated diligent use of the duty, including recruitment and policy development.<sup>37,38</sup> Unlike the BUSSS guidance, the legislation had an inescapable gravity and has pulled a troubled police force towards considering equality.

#### 4. The limits of the public sector equality duty

It would be wrong to suggest that the PSED is a panacea to resolving substantive racial disparities. The Black Liberation Movement (the legal name for Black Lives Matter UK) was established to ‘alleviate racial injustice and discrimination specifically amongst the black African and black Caribbean Communities’ and to ‘challenge and remove the injustices faced by these communities’.<sup>39</sup> These lofty aims cannot be achieved by this duty, and the courts have consigned it to a much more limited role. In a litigation context the PSED is an additional option in the toolkit of public lawyers acting in judicial review claims challenging the lawfulness of public authority actions.<sup>40</sup>

This role was set out in the statement of Lord Dyson in *Baker v Secretary of State for Communities* that the ‘duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination ... It is a duty to have due regard to the need to achieve these goals’.<sup>41</sup> This is not ‘goal legislation’ in the sense used by Westerman, where the legislation mandates the state to achieve a certain goal.<sup>42</sup> It is a much less onerous type of statutory duty, to merely consider or have regard to the goal.

This is supported by McCombe LJ’s summary of PSED case law in *Bracking* where he stated that ‘Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision’.<sup>43</sup>

<sup>37</sup>Metropolitan Police Service, Recruitment and Selection Policy Equality Impact Assessment, (2012) <https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/policies/recruitment-and-selection-policy---equality-impact-assessment>.

<sup>38</sup>Metropolitan Police Service, Policy Development Equality Impact Assessment, (2011) <https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/policies/policy-development---equality-impact-assessment>.

<sup>39</sup>Financial Conduct Authority, Registration of New Society, Black Liberation Movement <https://mutuals.fca.org.uk/Documents/Download/585175>.

<sup>40</sup>Tamara Lewis, *Employment Law: An Adviser’s Handbook*, Legal Action Group, (London, 2019) p 418.

<sup>41</sup>[2008] EWCA Civ 141.

<sup>42</sup>P Westerman, *Breaking the Circle: Goal-Legislation and the Need for Empirical Research*, (2013) 1 *Theory and Practice of Legislation*, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2560333](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560333).

<sup>43</sup>R (Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345.

At best the duty ensures that sufficient work is done to understand the impact that policies will have on underserved groups, rather than to prioritise steps that will benefit those groups when given alternative options.<sup>44</sup>

There is also some doubt as to the efficacy of steps taken by public authorities that *do* apply the duty. The Women and Equalities Committee is the primary parliamentary body holding the government to account on its application of the PSED.<sup>45</sup> When the Committee pressed the government on how it would go about extending the duties under the Act, the government sought to represent itself as having acting diligently in creating four equality-minded public bodies.<sup>46</sup>

One of these bodies, the Office for Tackling Injustices, has been described as ‘a promise not kept’ by the official Opposition.<sup>47</sup> It was reported in national press outlets that the Office had not hired any employees or been granted any offices by the government eight months after it was announced.<sup>48</sup> When pressed on whether the body had received any funding in the twelve months since its announcement, the Minister for the Cabinet Office stated that it had been ‘superseded’ by a new commitment to create a Commission on Race and Ethnic Disparities.<sup>49</sup>

A cynical view advanced by the Shadow Justice Secretary is that this represents a consistent thread of behaviour in which the government creates consultative committees afforded meagre public funding to produce reports that recycle previous committees’ recommendations, resulting in no meaningful improvements to racism.<sup>50</sup>

## 5. Conclusion: a moderate step in the right direction

The PSED has had a positive impact on tackling racism in the UK. In a phrase, it is an encouraging, forward-thinking duty helping public authorities to think about how they will use their resources to improve society in the future. The previous regime was flawed in that it served as a deterrent

<sup>44</sup>This was confirmed in *R (Hotak) v Southwark London Borough Council* [2015] UKSC 30 at [73–75] and *R (Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin).

<sup>45</sup>Women and Equalities Committee, *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission Tenth Report of Session 2017–19*, (2019) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/147002.htm>.

<sup>46</sup>Cabinet Office, PM announces new independent organisation to tackle deep-rooted injustices in society, (2019) <https://www.gov.uk/government/news/pm-announces-new-independent-organisation-to-tackle-deep-rooted-injustices-in-society>.

<sup>47</sup>Dawn Butler, *The Government’s Office for Tackling Injustices – A Promise Not Kept?*, (2020) <https://www.dawnbutler.org.uk/blog/the-governments-office-for-tackling-injustices-a-promise-not-kept/>.

<sup>48</sup>Michael Savage, *Theresa May’s social injustice office ‘doesn’t exist – and never will*, (2020) <https://www.theguardian.com/politics/2020/mar/21/theresa-may-social-injustice-office-doesnt-exist>.

<sup>49</sup>Dawn Butler, *Office for Tackling Injustices Question for Cabinet Office UIN 62329*, tabled on 22 June 2020 <https://questions-statements.parliament.uk/written-questions/detail/2020-06-22/62329>.

<sup>50</sup>David Lammy, *Britain needs leadership on race inequality. Not just another review*, (2020) <https://www.theguardian.com/commentisfree/2020/jun/16/race-inequality-review-boris-johnson-black-lives-matter-david-lammy>.

to racist acts by holding bodies to account for negative acts committed in the past. The latter would incentivise programmes and policies that are ‘no more racist’ but not necessary ‘no less racist’. The duty gave the push for equality in the UK new momentum.

As the trade union UNISON stated during the first PSED review, the duty is ‘a sea-change in public policy, away from a reactive, sticking-plaster response to discrimination to a proactive pursuit of equality outcomes’.<sup>51</sup> This step change can be seen across many sectors. There has been a profound impact in higher education which has developed strategies to make university more equitable and fair for minority ethnic groups.<sup>52</sup> National networks for Equality, Diversity and Inclusion (EDI) have been set up by senior academic leaders tasked specifically with ‘designing, implementing and sustaining EDI interventions across higher education institutions’.<sup>53</sup>

Other forms of intervention, such as guidance, are simply not sufficient to tackle the intractable problem of racism. BUSSS is the clearest example of a change that saw universal adoption by police forces that did not result in clear change, and was eroded flippantly by ministerial press statements. The nature of UK primary legislation is such that it can only be repealed through another act of Parliament. Repeal would likely be politically ruinous to any party that sought to remove the Equality Act.

Due to the extent that liability in judicial review incentivises public authorities to act, the PSED has also become an important source of remedy for public law claimants. Manning describes the duty as ‘one of the most important general considerations that authorities are statutorily directed to take into account’.<sup>54</sup>

Despite its successes, the PSED is a moderate achievement. One interpretation of racism viewed through the lens of critical race theory is that the aim of law should be dismantling hegemonic systems of oppression such as white supremacy and patriarchy.<sup>55</sup> The PSED is not so radical, and is ideologically different to that premise; it is attempting to make marginal improvements at a steady pace. The PSED is a neoliberal compromise, and should be viewed as an incremental development from existing prohibitions of indirect and direct discrimination.

The next step in legislating for equality may require even more proactive steps than have already been taken. The post-apartheid Constitution of

<sup>51</sup>UNISON, UNISON gives evidence to the equality duty review, (2013) <https://www.unison.org.uk/news/article/2013/04/unison-gives-evidence-to-the-equality-duty-review/>.

<sup>52</sup>Universities UK, Tackling racial harassment in higher education, (2020) <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2020/tackling-racial-harassment-in-higher-education.pdf>.

<sup>53</sup>Network of EDI Academic Leads (NEDIAL) <http://www.nedial.ac.uk/index.aspx>.

<sup>54</sup>Jonathan Manning, *Judicial Review: A Practitioner's Guide*, Legal Action Group, (London, 2013) pg 170 para 6.74 2013.

<sup>55</sup>Kimberly Krenshaw et al, *Critical Race Theory: The Key Writings that Formed the Movement*, (1995).

South Africa contains a provision that in order ‘to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken’.<sup>56</sup> Socio-economic disadvantages that are the product of historic oppression (forebears not being permitted to own property, or rejected from middle-class occupations) take generations to mitigate, and the provisions in English law do not engage with ‘leveling the playing field’ in a substantive manner.

The PSED is an imperfect tool, but it is the best current provision in British law. It turns itself against an intractable problem about which there is very little agreement, either in respect of its extent or occasionally its existence, and promotes due attention and care to tackling racism.<sup>57</sup> Legislation is merely one influence, albeit a compelling one, in crafting public behaviour. Demographic shifts caused by immigration and cultural changes are equally important in encouraging proactive steps to be taken. It takes many years to change the entrenched practices of institutions and their leaders.<sup>58</sup>

Ultimately, the PSED is a baseline. It compels public authorities to achieve that standard, providing remedies for minority groups that are harmed by such failure. Its true promise is in encouraging those with the ambition and desire to tackle racism to go even further than they currently do through the bureaucratic infrastructure of EIAs, data and monitoring about the effects of their policies upon minority groups.

This was shown by Homes England’s Annual Diversity Report which stated that ‘meeting the Public Sector Equality Duty is not enough’ and that in order to ‘raise[] the bar’ they would ‘do more than just fulfil our legal obligations as a public body’ and work to ‘create a culture of acceptance, inclusion and belonging, where our differences are celebrated’.<sup>59</sup>

Homes England is the successor organisation of the Homes and Communities Agency, one of the first government departments to produce an EIA after the PSED became effective in law.<sup>60</sup> It has thus taken ten years for that department, working within the new culture created by the duty, to begin its journey past the PSED baseline towards creation of a less racist society. This suggests that we may ask too much too early of the PSED and that there is a latency to its impact that we will only be able to fully

<sup>56</sup>S9(2).

<sup>57</sup>Black History Month Volume 682: debated on Tuesday 20 October 2020 <https://hansard.parliament.uk/commons/2020-10-20/debates/5B0E393E-8778-4973-B318-C17797DFB22/BlackHistoryMonth>.

<sup>58</sup>BBC, What was the Race Relations Act?, (November 2018) <https://www.bbc.co.uk/newsround/46310188>.

<sup>59</sup>Homes England, Equality, Diversity and Inclusion Report, accessible version, (2020) <https://www.gov.uk/government/publications/equality-diversity-and-inclusion-report--2/equality-diversity-and-inclusion-report-accessible-version>.

<sup>60</sup>Department for Communities and Local Government, Full Equality Impact Assessment for Affordable Rent, (2011) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/6018/1908006.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/6018/1908006.pdf).

appreciate in the coming years. Voluntary adoption of steps beyond the PSED is where racism shall truly be challenged, and if this approach is typical across the civil service, it points to slow but steady improvement.

### **Disclosure statement**

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