

Empowering Civil Society

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

Find this guide and the rest of the toolkit at criminaljusticealliance.org/PSED-toolkit



GUIDE 4

Key legal terms

THIS GUIDE EXPLAINS:

Key terms relating to equality law, Judicial Review and other court proceedings.

TERMS RELATING TO

Equality Law

Direct discrimination

Treating someone less favourably than someone else, because of a protected characteristic. In contrast, indirect discrimination concerns treatment that appears to be neutral and treat everyone equally, but which may have a disproportionately adverse impact on people with protected characteristics.

Due regard

The appropriate level of consideration that needs to be given to the equality objectives set out in s.149 of the Equality Act (the PSED) when making decisions and devising policies.

Equality and Human Rights Commission (EHRC)

The statutory body responsible for enforcement of the Equality Act 2010. The EHRC has powers to bring legal action in its own name against bodies that breach the Equality Act 2010. They sometimes help with the funding of cases brought by others and/or intervene in cases. Their website contains helpful guidance: equalityhumanrights.com.

Equality Act 2010

The statute that consolidated and expanded the law on equality and discrimination. It prohibits discrimination and harassment based on nine 'protected characteristics' (replacing previous statutes that were confined to race, sex and disability). See [page 3 of Guide 1](#).

Equality Act 2010 (Specific Duties and Public Authorities Regulations 2017)

Regulations (see '[secondary legislation](#)' on [page 7](#)) made under the Equality Act 2010 which place specific duties on public bodies to publish information to demonstrate compliance with the PSED, including 'one of more objectives' intended to achieve the PSED objectives.

Equality Impact Assessment (EIA)

This is the usual name for a document that aims to demonstrate how a public body has complied with the PSED when devising a new policy. There is no legal requirement to produce an EIA but it helps a public body to demonstrate the steps it has taken to fulfil the 'due regard' duty. It will usually be a lengthy document setting out (1) the aims and purpose of the policy/decision; (2) the information/evidence considered when making the policy/decision (including details of any consultation and summary of responses); (3) an assessment of any potential adverse impact on protected groups; (4) details of how any potential adverse impact may be mitigated; (5) arrangements for future monitoring and assessment of the policy. Sometimes the same approach/information is contained in documents described as 'Equalities Assessment', 'Equalities Statement' and 'Equalities Analysis'. It is not necessarily unlawful for public bodies not to include all of the above; if challenged, it is for the public body to demonstrate that it had 'due regard' to the aims and duties set out in the PSED.

Indirect Discrimination

When the treatment of people is formally the same but when those with protected characteristics are likely to suffer adverse consequences because of their protected characteristic/s. The Equality Act 2010 refers to a 'provision, criterion or practice' (PCP) that puts those with protected characteristics at a disadvantage. It may be possible to 'justify' a PCP that does result in indirect discrimination if the aims of the policy outweigh the potential discriminatory impact (see [page 10 of Guide 1](#)).

Intersectionality

Intersectionality describes the unique forms of discrimination, oppression and marginalisation that can result from the interplay of two or more identity-based grounds of discrimination.

Intersectional discrimination

This happens when two or more grounds operate simultaneously and interact in an inseparable manner, producing distinct and specific forms of discrimination.

Justification

A public body may be able to 'justify' any indirect discrimination that a decision or policy causes. The courts have held that justification of a particular measure requires four tests to be met: (1) the aim must be sufficiently important to justify the potential discrimination; (2) the measure must be rationally connected to the aim; (3) the measure must be no more than is necessary to achieve the aim, and (4) overall, the discrimination must not be disproportionate to the likely benefit. A similar four stage test is applied to potential breaches of human rights. Broadly, this is referred to as a 'proportionality' test. You may find references to a 'proportionality test' in Equality Impact Assessments which suggests the decision maker is aware of potential discriminatory impact and setting out to justify it.

Protected characteristics

Personal 'characteristics' that the Equality Act 2010 identifies as having the potential to lead to discriminatory treatment, so as to warrant protection from discrimination and harassment. There are nine protected characteristics in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. With the exception of marriage and civil partnership status, public bodies must consider the 'equality objectives' in relation to all protected characteristics when making decisions and devising policies - this is the Public Sector Equality Duty (see [page 2 of Guide 1](#)).

Public Sector Equality Duty (PSED)

The Public Sector Equality Duty is set out in s.149 of the Equality Act 2010. In relation to people with protected characteristics (see [page 2 of Guide 1](#)), it requires public bodies to have 'due regard' to the need to (1) eliminate discrimination, harassment and victimisation, (2) advance equality of opportunity (3) foster good relations between people with protected characteristics and others. See [Guide 1](#) for a fuller explanation.

TERMS RELATING TO

Judicial Review and other court proceedings

Claimant A person applying for relief against another person in an action, suit, petition, or any other form of court proceeding.

Costs In legal proceedings this means the costs that a party incurs in bringing or defending a claim. It includes solicitors' and barristers' fees, and other fees such as court fees or fees paid to expert witnesses.

Costs capping The court can make an order at an early stage of Judicial Review proceedings that any adverse costs order will be capped, (so limited to a set amount of money). This is called a 'Costs Capping Order'. It is to make sure that important public interest cases can be brought, by limiting the exposure of an individual or charity to an adverse costs order (see [page 10 of Guide 2a](#)). The rules about when the court will make such an order are complex and solicitors should be asked for advice at an early stage about this possibility.

Costs order The order the court makes, usually at the end of the case, about whether one party should pay the costs of the other party. The usual rule is that the unsuccessful party will be ordered to pay the costs of the successful party. This is also known as an 'adverse costs order'.

Declaration One of the orders the court can make in a claim for Judicial Review (see [Remedies in Judicial Review, page 10 of Guide 2a](#)). The court might make a declaration instead of quashing the decision that is challenged (see [page 10 of Guide 2a](#)). This could be for a number of reasons. It may be because quashing the decision would cause injustice or inconvenience to other people who have relied on the decision; or because the issue between the actual parties has been resolved.

Declaration of Incompatibility This is an order that can be made in cases involving human rights. The Human Rights Act 1998 means that UK courts must interpret the law in a way that is compatible with the European Convention on Human Rights (ECHR). If the law can't be interpreted so as to be compatible, the court can strike out (quash) subordinate legislation (e.g. regulations and rules) but can't strike out primary legislation (Acts of Parliament). So, if the court decides that primary legislation is incompatible with human rights, it can make a declaration of incompatibility. There is no rule that says the government must then change the law, but they usually do.

Defendant A person or company in a law case that is accused of having done something illegal, or of harming someone else.

European Convention on Human Rights (ECHR) This is the international treaty which the UK signed in the early 1950s. The rights guaranteed under the Treaty are known as Convention Rights. They are listed as 'Articles' in the Treaty, e.g. Article 5: the right to liberty (see [page 17 of Guide 2a](#)).

Human Rights Act 1998 This statute brought into domestic law the rights which are protected under the European Convention on Human Rights. It means that the UK courts must interpret and apply the law in a way that is compatible with human rights. If this is not possible the courts can make a declaration of incompatibility.

Judicial Review This is the procedure under which challenges are brought against public bodies, including government departments. The rules are different to those applying to other cases. The most significant differences are that claims must be started within three months of the date of the decision and the court must give permission for the claim to proceed.

Intervening/ Interventions This is when an individual or organisation is given permission by the court in an existing Judicial Review to provide legal submissions and/or evidence to assist the court.

Primary legislation This refers to Acts of Parliament (Statutes). The general rule is that the court must apply Acts of Parliament. The court cannot refuse to apply an Act of Parliament or 'quash' provisions in an Act of Parliament. The senior courts (High Court and above) can make 'declarations of incompatibility', stating that certain provisions of an Act of Parliament are incompatible with Convention rights (see [European Convention on Human Rights](#) above and [Section 7 in Guide 2a](#)).

Remedy This is what the Claimant in a Judicial Review is asking the court to order. Also sometimes referred to as 'relief'. All of the remedies in Judicial Review are 'discretionary', which means that the Claimant may succeed in establishing that a decision was made in an unlawful way but the court can nevertheless refuse to grant any remedy or relief. The possible remedies in Judicial Review include: a quashing order, a declaration, a mandatory order, a prohibiting order, and damages (see [Section 7 in Guide 2a](#)).

Quashing order This is the order that is most commonly sought in Judicial Review. It has the effect of making the decision that is being challenged 'null and void', so it is as if the decision had never been made. In most cases this means that the public body must make the decision afresh, but approaching it in a lawful way, for example, after having due regard to the PSED.

Mandatory order

This is an order that a person or organisation must do something, for example, make a fresh decision or decide something in a particular way.

Prohibiting order

This is an order that a person or organisation must not do something, for example, implement a policy found to be unlawful.

Oral renewal

When permission is refused on the papers but the Claimant asks for reconsideration at a short hearing.

Rolled up hearing

When the court orders that both permission and the substantive grounds be considered at the same hearing instead of considering permission separately at the start of a Judicial Review.

Secondary legislation

Regulations and orders which an Act of Parliament authorises Ministers to make. They not subject to the same level of scrutiny as Acts of Parliament and may be amended more easily. Also known as 'subordinate' or 'delegated' legislation. If the court finds that secondary legislation is unlawful, or was made in an unlawful way, it can 'quash' the legislation.


Standing

The right to bring a claim for Judicial Review. A claimant must have 'sufficient interest' in the decision/policy being challenged. This may be a direct interest, such as an individual who is directly affected by the decision/policy. But the courts have recognised that representative bodies and charities may have 'sufficient interest' because of their special knowledge or because they represent a sector or individuals who may be affected by the decision, particularly if it might be difficult for the individuals to bring the claim. If a claim relies on human rights grounds, there must be an individual who is the potential 'victim' of the breach, to raise the human rights arguments. An organisation will not be a potential victim of a breach of human rights so will not have standing to make those arguments.



Criminal Justice Alliance

Criminal Justice Alliance
CH2.26 Chester House
Kennington Park
1-3 Brixton Road
London
SW9 6DE

 @cjalliance
www.criminaljusticealliance.org.uk

Registered Charity No 1143038 (England and Wales)
Company Registration No 06331413