# Discrimination Law Association

## Submission to the Review of the Public Sector Equality Duty
## Call for Evidence

### Introduction

The Discrimination Law Association ('DLA'), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

The DLA is a national association with a wide and diverse membership. The membership currently consists of some 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

### DLA submission

The DLA welcomes the opportunity to contribute to the review of the Public Sector Equality Duty (PSED). In this submission we will draw on the experiences of our members and other evidence to respond to certain of the questions highlighted in the Call for Evidence.

Before doing so, we would like to suggest how the Government Equalities Office (GEO) and the Steering Group might begin to answer the basic question posed for the review.

### Is the PSED operating as intended?

To answer this question, which is at the heart of the review, it is necessary first to clarify what was the intention of Parliament in enacting the PSED as contained in Chapter 1, Part 11 of the Equality Act 2010.

Baroness Thornton, as government spokesperson in the House of Lords, explained during debate on the public sector equality duty, “The purpose of the equality duty is to oblige public bodies to consider equality issues in respect of all their functions.”

It would have been accepted by the government of the day and parliament that the way was paved for this single equality duty by the enactment of and general public support for the race equality duty, disability equality duty and gender equality duty. The drafters of the Equality Bill 2009 used the legislative framework of the three existing equality duties to define a single equality duty that would apply to eight protected characteristics. Therefore, we suggest, for a fuller understanding of what was intended in enacting the PSED it is necessary to look further back and to understand the intentions of parliament in enacting the first of these earlier equality duties, namely the race equality duty in the Race Relations (Amendment) Act 2000.

There is little disagreement that a main impetus for the Race Relations (Amendment) Act 2000 was the Report of the Stephen Lawrence Inquiry published in February 1999. That Report identified failings -- wrong and inappropriate actions and omissions -- by the Metropolitan Police which occurred because of race. The Report makes clear that “collective failure is apparent in many [other institutions and organisations]. It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.” [1]

The first change introduced by the Race Relations (Amendment) Act 2000 was prohibiting race discrimination by any public authority in the carrying out of any of its functions. This brought within the scope of the Act all aspects of policing (recommendation 11 of the Stephen Lawrence Inquiry ) as well as all of the functions of other public bodies that were not ‘services’ including various regulatory and enforcement functions.

By 2000, there was an equality duty on public authorities in Northern Ireland under s.75 of the Northern Ireland Act 1998, and s. 404 of the Greater London Authority Act 1999 imposed an equality duty, which applied to race, sex, disability, age, sexual orientation or religion, on the Greater London Authority, the Metropolitan Police Authority and the London Fire and Emergency Planning Authority. Additionally, by 2000 many public authorities had adopted voluntary equality policies often limited to race and/or sex. Without any binding obligations or means of enforcement, such policies were unevenly and inconsistently implemented within and between public authorities, and could be sidelined or overridden when other policy matters assumed greater urgency or importance.

[1] Stephen Lawrence Inquiry Report para. 46.27

The findings and recommendations of the Stephen Lawrence Inquiry created a strong pressure on the government of the day to take action to bring about a change of culture within the police service and across the public sector generally.
After some time it agreed to do so by enacting as part of the Race Relations (Amendment) Act a race equality duty that was mandatory, proportionate and enforceable and would apply across the public sector.

Thus the second change introduced by the 2000 Act was to amendment of s.71 of the Race Relations Act 1976 to make it a statutory duty of all public authorities in carrying out their functions to have 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.

In introducing the race equality duty provisions in the Race Relations (Amendment) Bill, Mike O'Brien, MP, then Parliamentary Under-Secretary of State for the Home Department stated:

> *'The Bill is one of the most significant steps that the Government will take on race equality in Britain ... The Bill will create a positive duty on all public authorities to promote race equality. It will be a major change in law.... The public services must recognise that it is no good simply paying lip-service to race equality: they must ensure that race equality is at the heart of their organisation's considerations when providing services - it should be part of the mainstream of policy consideration.'*

The critical part of this statement was that the race equality duty would be "a major change in law". Since 1965 there had been laws prohibiting race discrimination, which enable individuals to seek redress for acts of discrimination after they have occurred. As the Stephen Lawrence Inquiry had shown, such laws were not sufficient to change the cultures of organisations which, possibly unwittingly, perpetuate disadvantage and inequality. The "positive duty on all public authorities to promote race equality" would, for the first time, make it an enforceable legal obligation for bodies across the public sector to go beyond the avoidance of discrimination and to consider proactively what they can do to enable real progress towards race equality.

Returning to the explanation by Baroness Thornton, "The purpose of the equality duty is to oblige public bodies to consider equality issues in respect of all their functions," the intent is very similar to the intent underlying the race equality duty: "to oblige" – that the Equality Act will make it mandatory, not optional, and enforceable; for "public bodies in respect of all their functions" -- not selectively but comprehensively and consistently; "to consider equality issues" -- that equality must

be taken into account. We suggest that to "consider equality issues" may not be adequately summarise that the overall purpose is, as for the race equality duty, to enable real progress towards equality.

Is the PSED working as intended? We submit that the fact that the PSED is mandatory and that it can be enforced through the courts has been key to its meeting its intended purpose. Public authorities increasingly are taking equality into account in carrying out their functions: their in-house lawyers should be reminding them that they have a legal duty to do so. As many of the examples provided by DLA members indicate, because it is a statutory duty, when a policy or a decision is challenged most public authorities do take notice and at an early stage stop or change or review or take whatever other action is required to be able to show that they have given proportionate weight to relevant equality considerations.

We acknowledge that in April 2013, exactly 2 years since the present duty covering eight relevant protected characteristics and new specific duties came into force, there are gaps in compliance; we suggest that it is wrong to treat the fact that not all public authorities at every level understand and fully meet the PSED in all of their relevant functions as conclusive evidence that the duty is not working as intended. It is right that the review should be scrutinising the reasons why there are gaps and how fuller compliance can be secured. In other areas there is rarely a conclusion that a new law is failing to achieve its intended purpose because it is not yet fully understood or always obeyed; a new law might need to be better publicised or it might need more effective enforcement.

**How well understood is the PSED and guidance?**

This first question posed by the Review is difficult to answer. The fact that public authorities continue to be challenged when there appears to be a failure to comply with s.149 suggests that it is not the case that at every level in every public authority the implications of the duty are yet fully understood. The DLA is aware, however, that of the published decisions of more recent judicial review cases, more often what is alleged is not that the public authority wholly omitted to take any steps to meet the PSED but that the steps they had taken to demonstrate compliance were inadequate; we submit that this suggests that awareness and at least partial understanding of s.149 is at a higher level than had been the case a few years ago when the early challenges under the previous equality duties were mounted.

The EHRC assessment of how well public authorities in nine main sectors had met the specific duty to publish information to demonstrate compliance with the PSED[2]

[2] Publishing equality information: Commitment, engagement and transparency, EHRC 2012

could be interpreted in a number of ways. What should be read into the finding that in the first year of the new specific duty only 50% of the 1159 authorities assessed had met the requirement to publish equality information on their workforce and their service users but more than 75% were partially meeting this requirement by publishing information either about their staff or about their service users? What conclusion can be drawn from the fact that only 6% had published no information at all? In terms of the content, the EHRC assessment states that just over half provided "a supporting narrative to explain their equality information"; it found that only 32% provided some evidence that they are "using their equality information to assess the impact on equality of their activities in 2011/12"[3]. This same duty to publish information on compliance needed to be met by these same public authorities on 31 January 2013. The DLA is not aware of any similar assessment having been carried out. As it inevitably takes time for new legislation to be known and implemented within an organisation, we would expect that a similar assessment would find that both the numbers and the quality of compliance with this specific duty would have increased.

The above question also asks how well understood is the guidance? To which the first response must be, "which guidance?" as none of the existing guidance is statutory so none is pre-eminent. There is guidance published by the GEO, different guidance and technical guidance published by the EHRC. In some areas government departments have published guidance focused on application of the PSED to particular areas of activity for which they have responsibility. One example is the recent publication by the Cabinet Office of the Public Procurement Note – Public Procurement and the Public Sector Equality Duty.[4] Or, as discussed in the Prisoners' Advice Service submission (Exhibit E) the Prison Service Instruction – Ensuring Equality. If compliance remains uneven is that because guidance is not understood or is being ignored?

From anecdotal evidence the DLA is aware that some public authorities which had understood the general and specific duties for race, disability and gender had, as early as 2009, begun to anticipate a single equality duty with similar requirements, for example by developing a single equality scheme or structures to assess equality impact for all eight protected characteristics. There is need to acknowledge the impact on such authorities of the government's changing position regarding the content of specific duties and the subsequent adoption of specific duties for national bodies and English public authorities which, on their face, appeared very different from the previous specific duties authorities understood. Making the adjustments to a

[3] Ibid p. 27

[4] Information Note 01/13 28 January 2013

different accountability framework necessarily takes time. We would add that further confusion resulting in fresh lack of certainty regarding what steps a public authority is expected to take was created by the statements of the Prime Minister and members of his Cabinet regarding equality impact assessments.

As we discuss more fully in relation to the changes we recommend, we are concerned that there does not appear to be clear relevant guidance on what authorities within particular sectors need to publish to demonstrate compliance with s.149, with the consequence that many authorities, may still not fully understand this particular specific duty.

**What are the costs and benefits of the PSED?**

The DLA submits that in trying to assess the costs of the PSED it is necessary to put into the equation the costs of no PSED, that is the costs of inaction by government and state bodies. We submit that if this is done the balance sheet will show negative costs, that is, a profit flowing from the PSED rather than a loss.

As stated in the Government's Equality Strategy, "Failure to tackle discrimination and to provide equal opportunities, harms individuals, weakens our society and costs our economy." The Strategy then provides examples of the estimated costs to the economy of "failing to fully use the talents of people from ethnic minorities…around £8.6 billion annually"; of "violence against women in the UK… estimated to be £37.6 billion annually."[5]

The monetisation of such costs does not change the harm to individuals and the ways in which their lives may be permanently blighted by unchecked institutional failures to overcome historic disadvantage, different needs and low levels of participation and power that affect groups within our society. The Report of the Stephen Lawrence Inquiry offers a detailed catalogue of such failures and their impact not only on the Lawrence family and Duwayne Brooks but on ethnic minority communities across Great Britain.

Turning now to the benefits of the PSED, in simple terms, a statutory duty requiring the whole of the public sector to act proactively to eliminate discrimination, to advance equality of opportunity and to foster good relations is a necessary part of the Government's Equality Strategy. Each of the Strategy's five Principles for Change benefits from the obligation on all parts and levels of government to incorporate equality proportionately in all policies, programmes and practices.

[5] The Equality Strategy – Building a Fairer Britain, HM Government, December 2010, p.8.

The PSED provides a means to address institutional policies and practices which result in disadvantage, exclusion and inappropriate treatment of people because of their particular protected characteristics, for which no individual remedies are likely to available.

The PSED fills a significant gap in the Equality Act 2010. Under section 85(10) of the Equality Act 2010, the harassment provisions contained in section 26 do not apply to schools if the harassment is related to gender reassignment, sexual orientation or religion or belief. Thus a pupil who experiences religious, homophobic or transphobic harassment at school is not able to bring an individual claim under the Equality Act.

At the time of the passage of the Equality Bill, the then Minister for Women and Equalities, Harriet Harman, stated that tackling homophobic discrimination was a public policy imperative. The Government Equality Scheme highlights the need for action to tackle homophobic and transphobic bullying in schools.[6]

In 2012, Stonewall published a report "The School Report: Experiences of Gay Young People in Britain's Schools in 2012", the key findings of which were:

- Homophobic bullying continues to be widespread in Britain's schools. **More than half** (55 per cent) of lesbian, gay and bisexual pupils have experienced direct bullying

- The use of homophobic language is endemic. **Almost all** (99 per cent) gay young people hear the phrases 'that's so gay' or 'you're so gay' in school and **ninety six per cent** of gay pupils hear homophobic language such as 'poof' or 'lezza'

- **Three in five** gay pupils who experience homophobic bullying say that teachers who witness the bullying never intervene

- **Only half** of gay pupils report that their schools say homophobic bullying is wrong, even fewer do in faith schools (37 per cent)

- Homophobic bullying has a profoundly damaging impact on young people's school experience. **One in three** (32 per cent) gay pupils experiencing bullying change their future educational plans because of it, and **three in five** say it impacts directly on their school work.

- Gay people who are bullied are at a higher risk of suicide, self-harm and depression. **Two in five** (41 per cent) have attempted or thought about taking their own life directly because of bullying and the same number say that they deliberately self-harm directly because of bullying.

[6] Ibid. Section 4: Changing culture and attitudes, p.20

Tackling homophobic bullying in schools can have positive benefits in tackling bullying more generally - as this can be the most difficult form of bullying to tackle, but once it has been addressed, it can make it easier to deal with all forms of bullying.[7]

A Home Office Crime Reduction Toolkit sets out ways in which a school can tackle transphobic bullying.[8]

The urgent need for effective action to combat homophobic and transphobic bullying in schools is very clear as are the wider benefits of doing so. However, it is only through the general equality duty in section 149 that schools have any legal obligation to tackle homophobic or transphobic bullying through their duty to have due regard to the need to promote equality of opportunity and to foster good relations. The PSED therefore provides the only means by which a school can legally be held to account if it fails to take necessary action in this regard.

Similarly it is only through the PSED that in relation to provision of services, exercise of public functions and premises public authorities are required to take measures to tackle harassment on the basis of religion or belief or sexual orientation, which are otherwise excluded from Parts 3 and 4 of the Equality Act. In addition, it is only through the PSED that age discrimination of any sort can be addressed in relation to premises.

When a public authority takes sufficient steps to comply with the PSED, including the duty to have due regard to the need to eliminate discrimination and other prohibited conduct, it is far less likely to commit or to allow its employees or agents to commit unlawful acts. This avoids for that authority the costs in terms of time, money and reputation of defending a discrimination claim in the courts. More importantly it creates an environment based on trust rather than suspicion, which inevitably is more productive and successful. Please see, as Exhibit A the anonymised documentation from a recent case in which both discrimination and breach of the race equality duty were alleged.

The DLA is particularly aware of what we see as the double benefit of the PSED in its application to public procurement. Where, to comply with the PSED, a public authority duly incorporates relevant equality considerations into its procurement processes it will benefit by the provision of services, works or goods that best meet the needs of the authority and the needs of its employees and/or its service users. By incorporating equality requirements within contract specifications and/or contract

[7] see case study of Alfred Salter school at http://www.guardian.co.uk/teacher-network/teacher-blog/2012/nov/14/homophobic-bullying-schools.

[8] Transphobic Bullying: Could you deal with it in your school? GIRES, Version 2.2.1, February 2010

conditions a public authority is also able to improve the approach to equality in the employment and/or service delivery policies and practices of its suppliers.

Because of the increasing importance of public procurement in respect of all functions of public authorities, the DLA has given particular attention to this issue for purposes of this response.

Application of the PSED to Procurement

In her major speech introducing the Equality Bill at its second reading in the House of Commons, Harriet Harman, then Minister for Women and Equalities, stated:

> "… the Bill makes it clear that the new public sector equality duty, which the Bill provides for, will apply when public bodies not only employ people or provide services, but use their £175 billion purchasing power. The duty will apply to public procurement, too. The provision will enable us to take the current duty further into those organisations and companies providing goods and services that are funded by the public purse." [9]

While this gives the misleading impression that the previous race, disability and gender equality duties did not apply to procurement, it was an important signal to public authorities and the private and voluntary organisations hoping to contract with public authorities that the Government intends the elements of the equality duty to be an intrinsic part of public procurement.

The Confederation of British Industry, responding to an Equality Bill consultation on procurement in September 2009 was generally positive:

> "6. We welcome proposals for a single equality duty to simplify legal requirements in this area. The new single equality duty should be designed so it can be used flexibly by all the different kinds of public bodies, in proportion to their size, resources and the challenges they face; for example, Cornwall County Council caters for a significant elderly population while for Hackney Council race may be more of an issue.
>
> 7. A flexible duty will require public authorities to develop the skills to identify those contracts where including equality and diversity considerations will genuinely promote quality and benefit users. This will require an emphasis on high-quality guidance and skilled commissioning the lack of these is consistently identified as a major problem by CBI members. In addition, for the duty to work effectively, suppliers need to know at an early stage what criteria they will be measured on, how they will be assessed, and how different factors will be weighted.
>
> 8. CBI members are clear that achievement of value for money outcomes must remain the basis for awarding contracts. Suppliers take equality seriously and believe that there should be a process to measure actual equality outcomes throughout and

[9] House of Commons Hansard 11 May Column 556

> at the end of the contract to ensure that commitments about equality are delivered on."

Detailed guidance had been produced by the former equality commissions to assist public authorities to comply with the race, disability and gender equality duties in carrying out their procurement functions.

Guidance on meeting the equality duties in procurement had also been produced by the Office of Government Commerce in Make Equality Count[10] the first paragraph of which stated:

> "With an annual expenditure of around £175 billion on goods and services, the public sector has an important opportunity to use its purchasing power to promote equality where possible, and it has legal obligations to consider the need to do so in respect of race, disability and gender equality under the public sector equality duties discussed later."

Thus the explicit references to procurement during the parliamentary discussion of the public sector equality duty, and s.155 enabling specific duties to impose duties in connection with public authorities' procurement functions, did not really change what was already recognised as an obligation on public authorities under the previous race, disability and gender equality duties.

Guidance issued by the Office of Government Commerce, and more recent guidance by the Cabinet Office[11] illustrated how at each stage of the procurement process public authorities can meet their equality duties consistent with EU and UK legislation. These government publications sit alongside guidance published by the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission and recently by the EHRC[12], which provided similar assistance, supported by examples demonstrating how in planning a procurement project, selecting tenderers, awarding the contract, imposing contract conditions and monitoring, a public authority should have due regard to equality matters.

Two decisions of the High Court concerning tendering under the EU and UK procurement rules by the Legal Services Commission confirmed that in the context of public procurement decisions a public authority must have due regard to the need to advance equality of opportunity: *Public Interest Lawyers v Legal Services*

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[10] Make Equality Count, OGC, 2008 page 3 http://webarchive.nationalarchives.gov.uk/20110822131357/http://www.ogc.gov.uk/documents/Equality_Brochure.pdf It was intended that this guidance would be updated following enactment of the Equality Bill including a single equality duty.

[11] Procurement Policy Note – Public Procurement and the Public Sector Equality Duty Information Note 01/13 28 January 2013

[12] Buying Better Outcomes – Mainstreaming equality considerations in procurement; A guide for public authorities in England, March 2013

*Commission* [2010] EWHC 3277 and *Hereward & Foster LLP v Legal Services Commission* [2010] EWHC 3370.

From late 2010 public bodies could also refer to Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement[13] published by the European Commission. This document, linking good practice to the rules regulating procurement procedures under the EU Procurement Directives[14] (on which UK Public Procurement Regulations are based) and the Interpretative Communication of the European Commission on public procurement and social considerations[15] which was intended to "clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement." [16]

The huge increase in public contracts for works, goods and services over recent years ( £175 billion in 2008[17] to £ 236 billion in 2012[18] ) has been accompanied by developments within particular sectors or particular authorities to facilitate the procurement process.

The Department of Transport Highways Maintenance Efficiency Programme (HMEP) has published a suite of contract documents "to remove the burden of maintaining the many bespoke forms of contract that authorities use and replace them with standard examples based on current good practice within the sector …."[19] when tendering for term highway maintenance contracts. The HMEP has adopted the BSI PAS 91 pre-qualification questionnaire for construction industry as a whole including Annex B-2: Equal Opportunity and Diversity Capability with model answers; however as the HMEP documents will be used solely for local authority contracts there is additional guidance for assessment of B-2 referring to the PSED. Additionally, HMEP suggests that authorities should weight B-2 score as 15% of applicants' total score. (Annex B-2 is attached as Exhibit B )

Exhibit C is the Department for Work and Pensions (DWP) Diversity and Equality Requirements Guidance for Contractors. This guidance describes in considerable detail how the DWP intends to meet its PSED obligations through its procurement processes. It states under Legal Requirements (p.1):

> "Contractors must recognise that, as a public authority, DWP must be proactive – DWP must not only deal with the consequences of discrimination, they must take all necessary steps to prevent discrimination happening in the first place and take the opportunity to actively promote equality."

[13] Luxembourg: Publications Office of the European Union, 2010
[14] 2004/18/EC and 2004/17/EC

[15] Brussels, 15.10.2001 COM(2001) 566 final

[16] op.cit. page 3.
[17] Make Equality Count, OGC, p.3
[18] EHRC Buying Better Outcomes, 2013, p. 3
[19] HMEP Pre-Qualification Questionnaire Notes for Guidance Version 1 February 2013 page 2

The guidance sets out three tiers of contractor responsibilities around diversity and equality:

Tier 1 - Every contractor must as a minimum comply with all equality legislation.
Tier 2 - Contractors delivering a service contract to DWP must promote equality, and if working on DWP premises must abide with DWP diversity and equality policies and Standards of Behaviour.
Tier 3 - Contractors delivering a service to customers on behalf of DWP or to DWP staff "must recognise that they inherit the 'duty to promote' equality. Contractors take on the responsibilities of a public authority and must ensure that this is reflected in all the services they deliver and in all dealings with DWP customers and staff.
The guidance explains the contents of the DWP Diversity and Equality Requirements schedule.

Another important outcome of meeting the PSED in procurement is the improvement of employment and business opportunities for groups defined by protected characteristics.

A prime example is the set of measures taken by the Olympic Development Agency (ODA) to comply with its public sector equality duty requirements in its huge procurement programme. The requirements which the ODA imposed on its Tier 1 contractors significantly influenced the approach to employment on the Olympic site by main and sub-contractors including far greater than average rates of employment of BME workers and women.

Balfour Beatty, which had been a Tier 1 ODA contractor, confirmed[20] that at July 2011 when the project was drawing to a close, of the total workforce of approximately 11,000,

- 21% were of Black, Asian or Minority Ethnic origin and
- Women filled 6% of roles, higher than average for manual trades [21]

The relevance of the race equality duty to increasing equality of opportunity to participate in the supply chain was emphasised by the CRE in its guidance referred to above and in joint CRE – CBI guidance. The DLA is aware that many local authorities are using their duty to have due regard to the need to advance equality of opportunity under the PSED to try to broaden the range of suppliers able to benefit from their procurement functions; they recognise that this fits within their responsibilities to promote and develop the economic well-being of their areas. As one example, the DLA is aware that the London Borough of Hackney, having set a target of 10% of Council spending going to local SMEs and BME businesses is currently exploring the ways they work with their main contractors as well as the ways they support local BME firms, to achieve that target.

[20] As presented to a Workshop held by the Centre for Research in Equality and Diversity, Queen Mary University, January 2013 Report p. 18.
[21] Confirmed by Women in Construction to have been more than double the usual numbers of women. Ibid. p. 22.

Policy and statutory developments relating to procurement

With the significant increase in public sector contracts for services, as well as works and goods, it is not surprising that new policies and new legislation have been introduced aimed at improving the effectiveness and efficiency of public procurement. Both commissioning and the Public Services (Social Value) Act, if properly implemented should reinforce and support public authorities' compliance with the PSED.

Commissioning

Coinciding with the obligations under the race, disability and gender equality duties to incorporate equality considerations in procurement was the gradual establishment and growth of commissioning, which may involve procurement. Commissioning is generally described as an on-going process which applies to all services, whether they are provided by the public authority or the independent sector. Commissioning can be defined as a cycle of activities at a strategic level - concerned with whole groups of people, including:

- assessing people's needs;
- setting priorities and developing commissioning strategies to meet those needs;
- securing services from providers to meet those needs;
- monitoring and evaluating outcomes; and
- combined with an explicit requirement to consult and involve a range of stakeholders and service users in the process.

The DLA notes the similarity of the commissioning cycle to the cycle of good equality practice in the procurement of services. All of the stages could be said to fit very well with what a public authority is expected to do to meet the PSED in its procurement functions.

Public Services (Social Value) Act 2012

The Public Services (Social Value) Act 2012, which came into force on 31 January 2013, imposes new obligations on public authorities very similar to their obligations under the PSED. At the essential pre-procurement stage a public authority must consider how services which it is proposing to procure might improve the economic, social and environmental well-being of the relevant area and, to the extent to which it is proportionate to do so, must consider how they might secure any such improvement; the authority must also consider the need to consult.

The Cabinet Office has published an information note on the 2012 Act.[22] The description of what is required and the benefits of compliance reflect what is

[22] Procurement Policy Note – The Public Services (Social Value) Act 2012 – advice for commissioners and procurers Information note 10/12 20 December 2012

expected of public authorities to meet the PSED in their procurement functions (as a test read the following replacing "social value" with "equality"). For example,

> "…the pre-procurement stage of contracts for services ... is where social value can be considered to greatest effect. Commissioners should consider social value before the procurement starts because that can inform the whole shape of the procurement approach and the design of the services required. Commissioners can use the Act to re-think outcomes and the types of services to commission before starting the procurement process."[23]
>
> "The results of procurement processes can have a significant impact on economic, social and environmental well being in an area. There can often be additional value beyond the economic, social and environmental benefits that may be achieved by the services procured."[24]
>
> "Consultation will be particularly relevant when considering procurements for services which are delivered directly to citizens. The voluntary and community sector, along with other providers and interested groups, should be engaged from the earliest stage to help shape policies, programmes and services."[25]

The DLA looks forward to the Cabinet Office and the EHRC publishing joint guidance that makes the obvious connections between the 2012 Act and the PSED in relation to procurement.

The DLA is aware of the statutory, strategic and policy expectations placed on public authorities in respect of their procurement function. We submit that even without the PSED, equality would be an intrinsic part of effective sustainable procurement or taking social value fully into account at the pre-procurement stage. The fact that public authorities have a duty to give proportionate consideration to equality at every stage of the procurement process involves no additional burden on public authorities or suppliers, it merely ensures that such consideration is given.

A leading employment law QC member of the DLA has provided the following example which illustrates how, by incorporating equality requirements in a contract with an external supplier, a public authority can not only secure good equality outcomes for the contract in question but also bring about a change in the culture of the supplier itself. In this case, the resulting high equality standards which the supplier had fully implemented enabled it to satisfy an employment tribunal that it had taken 'all reasonable steps' and was therefore not liable for the alleged discrimination by its employees.

[23] op. cit. paragraph 6, page 2
[24] op.cit. paragraph 12, page 3
[25] op. cit page 6

My client is a large, international private sector business. It submitted a tender for a contract with a London-based public body. To win the contract, it had to demonstrate compliance with various equality and diversity standards and enter into commitments (i.e. in terms of audit, monitoring - with the public body concerned - and review) for the future. The public body concerned set high standards in terms of equality and diversity and joint monthly monitoring meetings were established at a high level.

My client decided to embrace these requirements not just in that part of the business engaged in the particular contract with this public body but across its operations in the UK. It set itself yearly and 5-yearly 'targets', set about a completely new programme of diversity training and awareness and put in place a number of other measures to address what appeared to be areas where it could do more in terms of equality and diversity. Although the company had previously had in place equal opportunities policies, this was a change to a far more pro-active agenda and everyone I spoke to (from the Director of HR, senior management, first level supervisors etc.) said it had brought about an entire change in culture - a real wind of change.

I was instructed by this client in relation to a case in the employment tribunal when it was defending allegations of a 'culture of racism' by four claimants. One claimant withdrew his allegation, two claims were dismissed and the fourth very similar claim was postponed due to illness. Significantly, the employment tribunal found in the alternative that my client had established its defence under s.109(4) - that it had taken 'all reasonable steps' to prevent its employees from doing the acts in question. This is the first time, in over 20 years at the Bar, that I have had personal experience of an employer succeeding in this defence.

The main point in the above example is how a public authority could - by proactively engaging with its statutory equality duty and using a contract with a private sector organisation to do so - bring about a lasting positive change in the culture of that organisation.

**How are organisations managing legal risk and ensuring compliance with the PSED?**

The DLA's main response to this question is to invite the review team to consider examples provided by DLA members. Attached as exhibits are submissions which the DLA is pleased to adopt prepared by Louise Whitfield of Deighton Pierce Glynn (Exhibit D ) and by the Prisoners' Advice Service (Exhibit E) , each of which describes and illustrates the importance of the duty having statutory force and enforceable by the courts.

We set out below other examples which also highlight the significance of the obligation on public authorities being an enforceable statutory duty. This has enabled community groups, service users and employees successfully to challenge decisions and policies of public authorities which appear to conflict with the

requirements of the PSED. In most cases such challenges remain well away from the courts and the costs and burdens of litigation. Representations by a trade union or a letter before claim alleging breach of the PSED, which could form the basis of legal action, very often results in the authority acknowledging its failure and, without more, agreeing to take appropriate steps to comply.

A DLA member who had been the equality adviser at a university until Summer 2012 states: I would say that during the period I was responsible for helping my then-employer comply with the PSED - in terms of ensuring its longer term aims and objectives, and its yearly information was published in good time - the very fact that there was a legally binding equality duty helped me to collect the information required, and, most importantly, to use the data to raise awareness of issues that could benefit from further investigation. I would suggest that without such a legal requirement, hard-pressed public sector organisations in particular would be tempted to let their equality obligations 'slide' in the interests of saving money. My personal opinion is that that approach would be a false economy, since ensuring their decisions are fair to everyone affected by them has got to be the right way forward, and possibly also save them the time, money and other resources necessary to defend themselves in court.

A Borough Council announced a change in their funding stream from race equality to community cohesion. This would have meant the cessation of a complainant aid and immigration service. The Northamptonshire Rights and Equality Council pointed out to the Council the issues their decision raised in respect of the Council's duty to comply with the PSED. This resulted in mitigation of an increased offer of grant to resource both community cohesion activity and the complainant aid and immigration service.

An application for judicial review was made, alleging breach of the PSED when a primary care trust withdrew transport to access tertiary care. The trust quickly responded stating that the withdrawal of the service was an error, and it was promptly reinstated without the need for a full hearing.

Following a study on stop and search in the Ipswich area, commissioned by Suffolk Police, the Ipswich and Suffolk Council for Racial Equality recommended the establishment of a Community Group to study stop and search forms and to feedback to the police. For several years ISCRE received funding by Suffolk Police to facilitate the Stop and Search Reference Group, which comprised about 20 people including a high number of young black men, the group most affected by police stop and search.

In August 2010 ISCRE was notified by Suffolk Police that funding for this project was terminated, citing public sector cuts as the justification. The police would monitor stop and search through an internal Police Authority Group. Aware of the duties of the police under s.71 of the Race Relations Act, ISCRE asked for a copy of the equality impact assessment of this decision; none was provided. The Stop and Search Reference Group then decided to try to bring a legal challenge to this decision.

When the police received a letter before claim on behalf of one of the members of the Group they conceded that they had not done an equality impact assessment and agreed to undertake a full consultation. Many local people indicated their support for this project. The Suffolk Police then carried out a full equality impact assessment of their decision. Following this they agreed a satisfactory basis for funding which has enabled the Stop and Search Reference Group to continue with slightly altered terms of reference.

The ISCRE had a service level agreement (SLA) wih HMP Warren Hill YOI to provide various services to its BME prisoners. HMP Warren Hill YOI has a large proportion of BME prisoners (63%) and few, if any, BME staff. The Community Diversity Officer (CDO) who visited the prison under the SLA provided a positive black male role model and was someone the prisoners could relate to. BME prisoners could raise concerns with him about discrimination in the prison, and he was able to help the young offenders reintegrate themselves into society.

The prison informed ISCRE that it intended to terminate the SLA. Before his decision the prison had failed to consult with ISCRE. It failed to provide sufficient reasons for its decision, or any proof that it had completed an equality impact assessment before making the decision. ISCRE believed that the services it was providing to young BME offenders were valuable and decided, after legal advice, to challenge this decision.

A letter before claim was sent to the prison alleging failure to comply with s.149 Equality Act 2010. Following receipt of the letter before claim the prison agreed to continue funding the SLA.

The TUC is a member of the DLA and has provided us with a number of examples from officers of trade unions within public authorities, which illustrate how trade unions have been able to secure greater equality of opportunity for public sector employees and service users using their established negotiating arrangements to secure compliance with the PSED:

- "The various existing Civil Service Pension Schemes are being replaced by a new Career Average Scheme, and members of the current schemes will be moving into the new scheme. As part of the equality impact process the FDA identified a problem for people moving from the Premium scheme to the new scheme, because their death in service protection would fall from 3 times salary to 2 times salary. This would have an unintended adverse impact on those with potentially life-shortening illnesses. The Cabinet Office has agreed that some additional safeguards are needed for this group of people and are now working with the unions on the detail. This would not have been identified were it not for a structured process to consider potential impacts on particular groups of staff." FDA

- "An example of how we have used equality monitoring to help compliance with the equality duties is our work on the Redeployment Pool. We receive information every quarter on its operation.... and we monitor by equality and diversity categories. In recent years, this has shown that contrary to MOD policy and the public sector duty requirements MOD disabled employees are twice as likely as others to find themselves in the Redeployment Pool. In fact when we started digging it became apparent that disabled employees were not more likely to be placed in the Redeployment Pool but it was taking longer for them to be redeployed than other staff. This was because of the way the cost of reasonable adjustments fell entirely on the new employing division. It was agreed that these costs would be better shared and where necessary covered by a central pool to encourage better employment opportunities for disabled people within MOD." Prospect, Equality Officer

- "Recently the Ministry of Defence decided, as part of its green initiative, to shut down two of their banks of lifts in the headquarters building, and to reduce the time over which these lift were operating. The unions challenged this, as part of the PSED, and pointed out the impact this would have on disabled members of staff, as a result of which the policy was reversed." FDA, National Officer and Equality Officer

- Disabled access and audio loops have been installed in all public buildings. Prospect representative, Scottish public authority

- "Improved antisocial behaviour policies, improved services to disabled tenants who may need rehousing for reasons related to their disability, increased awareness of issues for all groups and improved community cohesion." UNISON

**What changes, if any, would ensure better equality outcomes (legislative, administrative and/or enforcement changes, for example)**

The DLA is satisfied that there is no need to make any change to the provisions in Chapter 1 Part 11 of the Equality Act, ss. 149 - 157 covering the PSED or to Schedules 18 and 19. Further we believe that better equality outcomes can be achieved without change to the secondary legislation which provides for the specific duties.

However, we would add, with regard to the specific duties, if the current review, in considering the different forms of specific duties for England, Wales and Scotland should identify benefits in the specific duties for England being more prescriptive, we would hope any amendments might add clarity and might, for example assist public authorities subject to these duties more effectively to link data collection to plans and outcomes and to engage with and consult with groups likely to be affected by the decisions and actions.

In considering the experiences of DLA members and PSED cases, decisions, reports and guidance, the DLA is increasingly persuaded that better equality outcomes can be achieved through a more sector-focused approach.

In their submission the Prisoners' Advice Service (Exhibit A) draws attention to the single and comprehensive policy document (Prison Service Instruction 32/2011 Ensuring Equality) which the Prison Service produced in April 2011 in relation to the management of equalities issues in prison establishments. It is intended to be the key tool for understanding the legal obligations of the prison service in the delivery of its services and response to individual needs. This Instruction is mandatory guidance to the prison service and is meant to be the 'key tool for understanding the legal equality obligations of the prison service. In discussion the Prisoners' Advice Service commented that this instruction, issued to every staff member in every prison establishment across England and Wales is far more accessible and therefore more likely to be followed by prison staff than more generic guidance produced for all public authorities.

The Children's Commissioner for England, in her report, "They Go the Extra Mile – Reducing inequality in school exclusions" (2013) stated that "headteachers, teachers and their organisations have consistently informed us that they would welcome further guidance on equality law."[26] She recommended, as in a previous report,[27] "that the DfE should work together with the Government Equalities Office and the Equality and Human Rights Commission (EHRC) to produce statutory guidance for schools and other public educational bodies in interpreting the Public Sector Equality Duty (PSED) with regard to exclusion."

[26] They Go the Extra Mile, p.27

[27] "They Never Give Up on You" Children's Commissioner for England, 2012

We note that the EHRC assessment of public authorities' implementation of the specific duty to publish equality information[28] was analysed mainly on a sectoral basis. On reflection, the DLA agrees that that approach was the right one; performance by one police force is more appropriately compared with performance by other police forces rather than a university or a local authority. And where there was evidence of poor performance within a particular sector, it is likely that the lessons from examples of good practice will resonate most effectively with public authorities within that sector; they will be expected to meet the duty in relation to the same functions, employing staff with similar duties, having the same or very similar groups as users of their services or persons affected by their actions, as well as being subject to the same or very similar constraints.

Therefore, we recommend the following changes, which we believe could ensure better equality outcomes:

1. **Increased role for inspectorates[29]**

Inspectorates work within defined sectors. Their boards and staff are composed of people with knowledge and experience of the sector concerned. Their inspection criteria are based on their corporate understanding of the functions of the particular type of authorities whose performance they must assess. As a result their reports carry great weight and generally their recommendations for improvement are followed.

The extent to which inspectorates have incorporated assessment of compliance with equality duties into their inspection regimes has varied. We include examples below of recent reports and current criteria used by different inspectorates which demonstrate the capacity of inspectorate bodies to incorporate equality considerations into their assessments of performance of relevant public authorities.

These examples illustrate the potential for all inspectorates to integrate equality matters into their inspection processes. The DLA believes that better compliance with s.149 can be achieved by giving inspectorates a more central role for this purpose. If inspectorates fully mainstreamed equality considerations into their inspection criteria, reports and recommendations, this could make a real difference in ensuring that better equality outcomes are achieved by those who are inspected.

Currently the statutory provision for enforcement of the PSED is by the EHRC, which, under s.32, Equality Act 2006, is able to serve compliance notices where it thinks that a public authority has failed to comply with any of the specific duties and, following an assessment under s.31 of the 2006 Act it can serve a compliance notice for failing to comply with s.149. With respect to the knowledge and resources of the EHRC, the DLA believes that critical assessment by a relevant inspectorate

[28] Publishing equality information: Commitment, engagement and transparency, EHRC

[29] In this submission we use the term 'inspectorates' to refer to the full range of agencies which have responsibilities for inspecting, auditing and/or regulating bodies that carry out public functions.

with clear recommendations for changes to policies or practices may be more likely to achieve compliance with the PSED within the particular sector than the EHRC through its generic statutory enforcement powers which it is able, and more likely, to use selectively and strategically.

Care Quality Commission

The CQC's objectives are outlined in s.3 of the Health and Social Care Act 2008:

(1) The main objective of the Commission in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services.
(2) The Commission is to perform its functions for the general purpose of encouraging—
    (a) the improvement of health and social care services,
    (b) the provision of health and social care services in a way that focuses on the needs and experiences of people who use those services, and
    (c) the efficient and effective use of resources in the provision of health and social care services.

Regulation 17 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2009 requires that 'the registered person must take care to ensure that care and treatment is provided to service users with due regard to their age, sex, religious persuasion, sexual orientation, racial origin, cultural and linguistic background and any disability they may have'.

Under its Equality and Human Rights Essential Standards CQC[30] is required to consider the needs of those relating to the protected characteristics including transgender which was not included in the regulation.

The EHRC and the CQC have entered into a framework agreement with the aim of making compliance with both equality and human rights laws more effective. In its joint publications with EHRC, CQC[31] has acknowledged that monitoring information on equality and human rights should be taken into account when making judgements and regulatory actions as such information is relevant in determining whether essential standards have been met. It is unclear, however, the extent to which in current CQC practice these principles are applied.

[30] op cit P5-6-

[31] op cit

The Office for Standards in Education, Children's Services and Skills (Ofsted)

The Office was first established in 1992; subsequent legislation, most recent being the Education and Inspections Act 2006 has broadened its remit. It currently brings together various inspection functions including those relating to schools, children's services and further education.

Its functions under s116 of the 2006 Act are:-

- To determine strategic priorities for the Chief Inspector in connection with the performance of his functions
- To determine strategic objectives and targets relating to such priorities and
- To secure that the Chief Inspector's functions are performed efficiently and effectively

S117 outlines how Ofsted should perform its functions:

(1) The Office is to perform its functions for the general purpose of encouraging—
  (a) the improvement of activities within the Chief Inspector's remit,
  (b) the carrying on of such activities as user-focused activities, and
  (c) the efficient and effective use of resources in the carrying on of such activities.

(2) In performing its functions the Office is to have regard to—
  (a) the need to safeguard and promote the rights and welfare of children;
  (b) views expressed by relevant persons about activities within the Chief Inspector's remit;
  (c) levels of satisfaction with such activities on the part of relevant persons;
  (d) the need to promote the efficient and effective use of resources in the carrying on of such activities;
  (e) the need to ensure that action by the Chief Inspector in relation to such activities is proportionate to the risks against which it would afford safeguards;
  (f) any developments in approaches to inspection or regulatory action;
  (g) best practice amongst persons performing functions comparable to those of the Chief Inspector.

(3) In performing its functions the Office must also have regard to such aspects of government policy as the Secretary of State may direct.

Ofsted recognises that it also has duties under the PSED.

Having met its obligations to publish equality schemes under previous equality duties, Ofsted published a Single Equality Scheme[32] which included consideration of

[32] Ofsted –Single Equality Scheme 2010-2013

the new protected characteristics as well an action plan outlining 4 equality objectives. These were developed in anticipation of new frameworks coming into effect:-

1. To ensure that best practice in equality is rooted in all aspects of Ofsted's inspection and regulation functions and is based on and supported by a strong evidence base

2. To ensure that Ofsted's inspection and regulatory work is informed by effective and inclusive consultation, engagement and communication with users

3. To ensure that the promotion of equality and human rights and elimination of discrimination and harassment is embedded in all Ofsted practice through leadership and organisational commitment

4. To ensure the development of an effective and diverse workforce

Ofsted has very recently (April 2013) published a Framework for School inspections which, under paragraph 8, states that inspectors "must" consider:-

"the extent to which the education provided by the school meets the needs of the range of pupils at the school, and in particular the needs of disabled pupils and those who have special educational needs." (citing the Equality Act 2010).[33]

One of the principles of inspection outlined in this new Framework is:-

"evaluating the extent to which schools provide an inclusive environment which meets the needs of all pupils, irrespective of age, disability, gender reassignment, race, religion or belief, sex, or sexual orientation " [34]

In the accompanying handbook[35] reference is made in paragraph 102 that it may be relevant to pay particular attention to the achievement of those with protected characteristics under the Equality Act 2010. However there is little explicit reference to equality considerations elsewhere in the Handbook, particularly in the criteria for assessment.

In April 2013 Ofsted published "Inspecting equalities" which is described as

> "a briefing intended to help inspectors judge the impact of schools' work in advancing equality of opportunity, fostering good relations and tackling discrimination. It aims to help inspectors understand schools' responsibilities in relation to the Equality Act 2010, which is that they should have 'due regard' for equalities."

[33] Ofsted- The Framework for School Inspections-April 2013
[34] Ibid P14
[35] Ofsted School Inspection Handbook April 2013

This clearly written 18 page document could also serve all schools as guidance to their obligations under the Equality Act.

In the Inspection Framework for Further Education[36] there is reference to adhering to equality and diversity policies with more frequent reference to equality considerations, including equality and diversity assessment criteria in the accompanying handbook[37].

The direction to which Ofsted appears to be moving in relation to the incorporation of equality assessment criteria appears positive, noting in particular the recent Framework and useful briefing, Inspecting Equality. There is still a need for greater clarity regarding the equality matters which are specifically to be taken into account for all inspections (or all inspections in particular sectors) and included in all inspection reports. This would not only ensure greater consistency and avoid important issues being overlooked but would also give an unequivocal message to the public authorities subject to Ofsted inspection that compliance with the PSED is an essential part of how they carry out their functions.

Ofsted's most recent annual report[38] refers generally to disadvantage and socio-economic inequalities rather than specifically to equality and the protected characteristics. This raises questions regarding the extent to which, in practice, equality has been integrated into their inspections and reports. It remains to be seen whether, having due regard to its own obligations under the PSED, Ofsted now intends to ensure that inspections carried out under the 2013 Framework will be more robust - and indeed more helpful - in improving equality outcomes of the bodies it has a duty to inspect.

[36] Ofsted-Common Inspection Framework for Further Education and Skills September 2012
[37] Ofsted-Handbook for the Inspection of Further Education and Skills September 2012
[38] Ofsted Annual Report 2011/12

HM Chief Inspector of Prisons (HMCIP)

The Chief Inspector's responsibilities are set out in Section 5A of the Prison Act 1952 as inserted by section 57 of the Criminal Justice Act 1982.
They are to:

- inspect or arrange for the inspection of prisons in England and Wales and report to the government on the results;
- in particular, report to the government on the treatment of prisoners and conditions in prisons;
- report on matters connected with prisons in England and Wales and prisoners in them;
- submit an annual report to be laid before Parliament.

The Chief Inspector also carries out inspections in Immigration Service detention centres and on behalf of the Youth Justice Board in secure juvenile accommodation inside and outside the prison estate. The Inspectorate's work constitutes an important part of the UK's obligations under the Optional Protocol to the United Nations Convention against Torture and Inhuman and Degrading Treatment: to have in place regular independent inspection of places of custody.

Since 2001 HMIP has published Expectations, the standards against which the Prison Inspectorate inspects all prisons. The fourth version for adult prisons[39] was published in 2012. Under Respect, one of the four healthy prison tests, there is a sub-category – Equality and Diversity:

> "The prison demonstrates a clear and coordinated approach to eliminating discrimination, promoting equitable outcomes and fostering good relations and ensures that no prisoner is unfairly disadvantaged. This is underpinned by effective processes to identify and resolve an inequality".

There are nine Equality and Diversity 'Expectations' - the standards of treatment and conditions HMIP expects a prison to achieve. For each Expectation there is a non-exhaustive list of indicators suggesting evidence that may indicate whether the expectation has been achieved. The nine Expectations for Equality and Diversity are:

*Strategic Management*

- By employing fair processes the prison ensures that no prisoner or group is unfairly disadvantaged;
- The prison demonstrates strong leadership in delivering a coordinated approach

[39] HM Inspectorate of Prisons-Expectations-Criteria for Assessing the Treatment of Prisoners and Conditions in Prison 2012

to eliminating all forms of discrimination;

- Prisoners are aware of how the prison fosters good relationships, promotes equality and diversity , and how to obtain support;
- Staff promote a respectful and safe environment, in which each of the distinct protected characteristics of prisoners is recognised and addressed with respect and dignity;
- Prisoners play an active role in eliminating all forms of discrimination and are consulted frequently to strengthen and support the elimination of discrimination.

*Protected characteristics*

- 5 separate Expectations that prisoners of all racial groups, all nationalities, all religious groups, all sexual orientations, and prisoners with disabilities, women prisoners and transgender prisoners "are treated equitably and according to their individual needs".

The indicators in respect of each named protected characteristic are unique to that characteristic.

There are parallel Expectations setting out criteria for assessing the treatment of children and young people and conditions in prisons, treatment and conditions of foreign prisoners, as well as Expectations for immigration detention centres and police custody, although not all include equivalent equality and diversity standards.

Local Government Ombudsman

Although the Local Government Ombudsman (LGO) does not appear to have clear policies and procedures for applying the PSED in its regulatory role, in the case of Suffolk County Council the LGO highlighted the Council's failure to meet its obligations under the PSED when cancelling its talking books service for visually impaired service users. In particular it found that the Council did not consider the impact of the cancellation on disabled users and on the need to promote equality of opportunity and take account of people's disabilities even when this involves treating them more favourably. The LGO used evidence of failure by the Council to meet its PSED as evidence of maladministration, the inspection of which is central to the statutory responsibilities of the LGO.r.[40] The Council agreed to follow LGO's recommendations including the provision of training on PSED and reviewing individual decisions to stop funding.[41]

[40] Local Government Act 1974

[41] http://www.lgo.org.uk/news/2012/oct/suffolk-council-criticised-cancelling-talking-books-service-blind-users/

Chief Inspector Borders and Immigration Control

The Chief Inspector of Borders and Immigration Control has published a document demonstrating how compliance with the PSED of those inspected will be assessed.[42]

The Chief Inspector has also confirmed that recommendations for compliance with the Equality Act 2010 will be made when breaches are found. In the report of the inspection of Gatwick North Terminal the Chief Inspector highlighted how immigration and detection functions were not being carried out in accordance with the PSED and referred to white passengers being delayed to avoid discrimination complaints. Recommendations to address this malpractice are made in the Chief Inspector's report.[43]

**2. Authoritative sector-specific statutory/non-statutory guidance**

Many DLA members provide advice and training to a range of public sector organisations about compliance with the equality duties. Our Executive Committee includes a number of individuals who have worked for the Equality Commissions, and have experience drafting both statutory and non-statutory guidance. Drawing on this extensive experience we would emphasise the importance of providing guidance to public authorities which is specifically tailored to the sector within which they work.

Making guidance statutory is one way of raising the status of such guidance in the eyes of practitioners. However, the key to engaging the attention of those with public organisations, and conveying the significance to their work of the equality duties, is to secure clear endorsement from leading agencies and individuals within a particular sector.

EHRC research found that respondents across all sectors identified that the specific duties were effective when:

- leadership is visible through ownership, accountability and support from elected members, Board and the Executive
- equality duties are embedded within other key improvement drivers of an organisation
- audit and inspection regimes have equality and diversity mainstreamed in their assessment criteria, and are addressed rigorously
- those tasked with leading on equality duties, corporately and within departments, are in a position to take a strategic overview.[44]

[42] http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Public-Sector-Equality-Duty_ICIUKBA2.pdf

[43] http://icinspector.independent.gov.uk/chief-inspector-publishes-report-on-gatwick-north-terminal/

[44] Making practice happen, Practitioners' views on the most effective specific equality duties: EHRC 2009)

Research by the Office of Disability Issues emphasised this same point. Thus whilst the Disability Rights Commission (DRC) was said to be an important information source "it was asserted that information that was seen to have emanated from the Department for Transport had a much greater impact (as a policy driver) on organisations within the transport sector.

Likewise, the Criminal Justice Target's Officer was positive about the support received from the DRC. However, they reported that the Target would have liked more support in-house from Her Majesty's Inspectorate for Constabulary and the Association of Chief Police Officers (ACPO), which was said to have issued guidance so late that most forces had already completed their Schemes." (An In-Depth Examination of the Implementation of the Disability Equality Duty in England ODI 2008)

Joint guidance between EHRC and government departments and/or other key agencies within a sector, such as inspectorates, should be published. Such sector-based guidance should refer to the particular functions and resources of bodies within that sector. We suggest that sector-based guidance is particularly needed in relation to what is required for effective compliance with the specific duties.

The particular form of the specific duty requiring publication of information demonstrating compliance with s.149 was intended to enable members of the public to hold public authorities to account. However if a public authority does not fully understand the nature of the information it must publish this cannot happen. Often it will be important to compare how well different authorities within a sector are meeting the PSED; without clear relevant guidance critical equality-related information may not be available.

One example cited by the Children's Commissioner for England is the absence of data published by schools on school exclusions, despite the disproportionate rates of exclusion of black pupils being a major equality issue for schools for many years.[45]

In general, sector-based guidance could be non statutory. However, we are aware that the feeling in the education sector seems to be particularly strong for the need for a statutory code. This is reflects the fact that the education provisions of the Equality Act 2010 have some distinctive features and the existing statutory Codes explicitly exclude Part 6 - Education. Such a Code could cover both the non-discrimination provisions of the Act and the equality duties.

**Discrimination Law Association**
**19 April 2013**

[45] DfES Priority Review: Exclusion of Black Pupils- Getting it, Getting it Right, Sept. 2006