**Using equality legislation as a sword**

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**Abstract**

This paper argues that there is potential for equality legislation to be used proactively to contest attempts by public authorities to remove funding from groups who share protected characteristics. This follows on from the first empirical study of the impact of the Equality Act 2010 on charities in the UK, conducted by the Charity Law and Policy Unit, University of Liverpool (the study). One finding of the study was that charities in the UK are using the Act to challenge local government funding cuts. Strict austerity measures have led to widespread funding cuts for service provision. As many charities are commissioned by local governments to provide social services, this has had a direct impact on the charities’ funding. However, some charities and service users found a useful sword in the Equality Act and predecessor legislation. They used judicial reviews to challenge whether local governments have properly fulfilled their Public Sector Equality Duty (PSED) when making the funding cuts. In some cases successful challenges prevented or restored funding cuts, while others simply resulted in the same cuts after a better process. However, cuts to legal aid and judicial review reforms may well blunt this sword. Charities’ motivations and successes, the impact of judicial review and the uncertain future for the strategy are discussed.

Key words: Public Sector Equality Duty, charities, voluntary sector, austerity, judicial review

**Introduction**

It is orthodoxy that in the UK there is little legal accountability over questions of social justice, with courts exercising limited oversight over the distribution of resources by public authorities. The mechanisms of legal accountability controls in the UK are not designed to effect distributive justice by ensuring a fair distribution of resources to all (O’Cinneide, 2013). Harlow and Rawling’s ‘green light’ or functionalist approach, whereby law is held to be the tool by which political decisions are enforced, without interjecting its own normative standards, is still paramount (2009). However, there are ‘tantalising hints’ in the case law that courts are becoming more willing to scrutinise the substance of resource distribution in some circumstances (O’Cinneide, 2013: 399). Although judicial deference is shown in the areas of social policy, resource allocation is justiciable under human rights law (King, 2007). King (2012) and Young (2012) have argued for constitutionalising and constituting social and economic rights. Although Young argues that UK courts practise only a deferential review, higher courts do adjudicate ‘macro’ level disputes regarding public authorities’ allocation of resources, while tribunals take thousands more ‘micro’ level decisions about social welfare law issues (King, 2012, Sunkin et al., 2007).

Although such cases remain uncommon, one mechanism that has proved a useful sword for challenging resource allocation decision-making at the ‘macro’ level is the Public Sector Equality Duty (PSED) under the Equality Act 2010 (‘the Act’) and predecessor equality legislation. The PSED provides ‘powerful grounds of judicial review,’ and it has resulted in a number of successful challenges to budgetary decisions, even though these are ‘extremely difficult’ to challenge successfully (Hickman, 2013: 332). Indeed, statutory duties, such as the PSED, ‘raise, augment or supersede’ the pre-existing common law requirements for procedural fairness (Grace, 2015).

The rise of the PSED has been driven by the climate of austerity in the UK. In 2010, the Conservative – Liberal Democrat Coalition government presented its Emergency Budget, which was the first of a series that focused on spending cuts. These cuts have been particularly keenly felt at the local government level, with an estimated 37% cut in government funding to local government from 2010/11 to 2015/16 (National Audit Office, 2014). The Coalition government promised greater protection to funding for pensions, schools and the NHS, with the result that unprotected services such as adult social care, housing and children’s services, which are largely delivered at the local level, have received cuts of one-third or more (Lupton et al., 2015: 57). Moreover, the Coalition envisaged a major restructuring of the social welfare system, with a shift from public provision to the voluntary sector, and permanently reduced spending (Taylor-Gooby, 2012). As a result, the opportunities to develop the case law under the PSED have been rife.

This article will discuss one case study from a larger qualitative study exploring the impact of the Act on charities in Great Britain (Morris et al., 2013). In the early stages of the project, it became apparent that the PSED was an important part of the picture for charities. Charities have used the PSED under the Act and predecessor legislation to challenge decisions by local government to cut funding for public services. The empirical data provide insight into how the PSED is working in practice. This mechanism for challenging resource allocation decisions helps to make government accountable to the people who will be most affected by funding cuts, which, rather than undermining democratic legitimacy, affirms it. Moreover, the involvement of charities, with their requirement to provide public benefit, provides another bulwark of legitimacy for challenges to funding cuts under the PSED. It is an uneasy fit, however, to attempt to use a mechanism of formal equality to try to achieve substantive equality results. Moreover, the process is under threat from multiple government reform measures intended to blunt this sword.

**Methods**

The study used a grounded theory approach. In depth qualitative interviews were conducted with 45 different stakeholders in several stages. An initial round of 18 interviews was conducted with lawyers, umbrella bodies for the sector and regulators, and the resulting data were analysed and coded for themes. In the subsequent round of interviews, purposive sampling was used to locate participants for case studies focussed on particular themes that emerged from the initial round. One such case study related to organisations using the PSED to challenge funding cuts. For this case study, 8 interviews were conducted with representatives from six organisations: a law firm specialising in public law challenges; a large national charity that has brought a challenge on its own and trained service users to challenge funding cuts; two large national umbrella bodies that have enabled their membership to challenge funding cuts; another large umbrella body charity that has brought a judicial review of its own and also enabled its member charities to bring challenges; and a community and voluntary sector organisation that provides advice to a local authority that has been the subject of a challenge, as well as to other charities that contract to provide public services. Online searches were made for published guidance for charities and service users wishing to pursue judicial review. Additionally, two focus groups were held in order to complement the interviews by triangulating the results and checking validity (Morgan 1997). All previous research participants were invited, and 18 were reconvened for a presentation of the research themes and preliminary conclusions. Participants were then divided into smaller groups to discuss the research findings. Finally, a desk-based review of legal databases was used to compile a dataset of published judicial reviews related to challenges to funding cuts.

**The Public Sector Equality Duty and judicial review**

Section 149(1) of the Act establishes the ‘general duty’ of the PSED, and requires public authorities, or private bodies carrying out public functions, to show ‘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.[[1]](#endnote-1)

The PSED in the Equality Act 2010 developed from similar duties in the predecessor equality legislation. The first such duty, relating to race discrimination, was section 71 of the Race Relations Act 1976[[2]](#endnote-2), which came into effect in April 2001 after the Macpherson Report (Macpherson, 1999). Similar duties to take ‘due regard’ for sex[[3]](#endnote-3) and disability[[4]](#endnote-4) were introduced in the corresponding legislation. The unified duty has broadened the predecessor duties by expanding the protected characteristics, and by including intersectional discrimination (Hepple, 2014). In addition to the general duty, there are specific duties in secondary legislation, which are less stringent for the PSED than what was required under the previous legislation.[[5]](#endnote-5) Conley and Wright have argued that these reduced specific duties, including the failure to include an explicit requirement to consult with stakeholders, were a step back from the predecessor equality duties (2015). Moreover, with the decision on the part of the Coalition Government to not enforce section 1 of the Act, which addressed socio-economic disadvantage, it is not possible to address disadvantage outside of the specific protected characteristics. The resulting piecemeal approach may cause a particular group sharing a protected characteristic to be protected at another’s expense (Hepple, 2014, Fredman, 2011).

The PSED may be enforced in a number of ways. Apart from statutory enforcement by the EHRC,[[6]](#endnote-6) it is possible for either the EHRC or a party or parties with sufficient interest[[7]](#endnote-7) in the matter to apply to the High Court for judicial review in order that a decision or policy may be subject to judicial scrutiny to decide whether the duty has been breached. Judicial review is the process by which a party can attempt to challenge a decision, action or failure to act on the part of a public body or other body exercising a public law function. It can only be used when there is no other recourse, such as a right of appeal. It is the judicial review route, rather than the statutory powers, that has been used on a number of occasions and this has allowed the courts to ‘flesh out’ what the duty entails and in particular what the authority, or other body exercising public functions, must do in order to be found to have had ‘due regard’ to its obligations. Although it is common for judicial reviews to include a number of different grounds for the claim, according to study participants, the PSED has become a popular ground for judicial reviews to challenge funding decisions because it is successful. A participant lawyer specializing in judicial review said that the duty has been evolving:

But before the equality duties were introduced, or before they became a realistic strategy for challenges, I just used general public law grounds… But the equality duty has become more significant as it has evolved over the last, I **would** say, six or seven years (Interview 29).

### Process for judicial review

*Correspondence stage*

Judicial review is a front-loaded process, in that much of the work establishing the merits of the claim must be done before proceedings are issued. This makes these initial stages very important for those seeking to bring a challenge. Good practice in conducting a judicial review in England and Wales is set out in the pre-action protocol. The protocol is designed to enable the parties to understand the nature and merits of the claim, in order to decide whether to proceed or to settle the claim, with the aim of avoiding unnecessary litigation and expense and promoting efficient proceedings where litigation is necessary (MoJ, 2015). It does not affect the time limit for bringing a judicial review, which is ordinarily three months.[[8]](#endnote-8) Parties are required to have engaged in some form of Alternative Dispute Resolution. The claimant must send a letter before claim ‘in good time’ after the issue arose. This letter is a substantial piece of work, setting out the nature of the claim, the date of the decision, the facts and legal basis of the claim, any directly interested parties and any information that the claimant is seeking and why (MoJ 2015). The respondent then must reply with a substantive letter of response, ordinarily within fourteen days. The respondent may concede the claim in full, make a new decision or set out the timescale for a new decision, provide a fuller explanation for the decision, or address any points of dispute or explain why they are not addressed. Any information requested by the claimant should be included or an explanation for why it is not included and a timescale for when it will be provided should be supplied. A respondent must also indicate whether or not it will oppose any request for interim relief and/ or a protective costs order (PCO), as appropriate (MoJ 2015).

Confirming the results of other studies, evidence from the study suggests that many matters are resolved at the letter before claim and letter of response stage. Bondy and Sunkin estimated that for every ten threats of judicial review, six are resolved without commencing proceedings (2009: 30). Similarly, a participant lawyer outlined three possible responses to the letter before claim, of roughly equal frequency:

If they come back, they will sometimes say, ‘Okay, you’re right. We’ll withdraw our decision and start again.’ Sometimes they’ll say, ‘Oh, you’ve just misunderstood what’s gone on,’ and they will give a different account to what your client group has understood happened. They might disclose the documents that change the position. Or the third option is they refuse to withdraw the decision and then you start your judicial review claim (Interview 29).

This suggests that the PSED is more useful than the number of cases suggests. If half of the disputes that are resolved early do so in favour of the complainant, then many positive outcomes will not appear in the reported cases. This is in line with Tom Hickman’s speculation that, ‘It might be the case that a particularly high proportion of threatened or actual claims based on the PSED are conceded by public authorities, and therefore that the PSED are a yet more effective grounds of challenge than the reported judgments suggest’ (2013: 332).

Unsurprisingly, umbrella bodies for the charitable sector have run projects to assist charities wishing to use judicial review. From 2006-2012, Empowering the Voluntary Sector, a Big Lottery-funded project was run by the National Council for Voluntary Organisations (NCVO), the National Association for Voluntary and Community Action (NAVCA) and the Public Law Project (PLP) (until 2009). The project was designed to help voluntary sector organisations use public law as a tool, and combined public law training courses via workshops with practical legal assistance. NAVCA explains that the purpose of the workshops was to: ‘Explore the use of public law and the Compact[[9]](#endnote-9) as a tool to develop relationships with the public sector and when necessary, to challenge unfair, unlawful decisions’ (2015). According to the evaluation report for their first three years, the Southall Black Sisters case, discussed later, was an outcome of the project (NAVCA and PLP, 2009). In another outcome of that project, written evidence to the Independent Steering Group’s review of the PSED in 2013 by the Single Parent Action Network (SPAN) recounted how it had received notice to vacate its premises, which were owned by Bristol City Council (SPAN, 2013). As SPAN had nowhere suitable to go, and judged that any move would cause considerable disruption to its clients, it sought assistance via NCVO and PLP. After a correspondence where PLP asserted that the move to evict SPAN was in violation of the Race Equality Duty and the Gender Equality Duty, the situation was resolved with SPAN being allotted premises in the redeveloped site, and an agreement to conduct an equality impact assessment of the impact of the move by Bristol Council.

A participant from a voluntary sector umbrella group said that even before the letter before claim they engage in a more informal correspondence with the local authority that would not necessarily evolve into legal advocacy, ‘it’s kind of softer advocacy than that’ (Interview 8). The umbrella group will try to facilitate a better relationship between the charity and the funder before they resort to a more legalistic letter. Over the past five or six years, they have helped with an estimated fifty challenges, some of which became judicial reviews, handled through a partner law firm. Another umbrella body has supplied a guide to using the Equality Act to its member charities, which has proved useful in challenging funding decisions at the correspondence stage: ‘we’ve seen where, when we say, “the Equality Act says this, and these are your obligations under the Public Sector Equality Duty, and have you given due regard,” that public body goes back and does a better process. We’ve definitely had examples of that’ (Interview 35).

*Judicial review proceedings*

If a claim is not resolved at the correspondence stage, proceedings must be issued for a judicial review. Most of the evidence to support the claim must be submitted to the court with the initial proceeding. Legal aid is, in theory, available for judicial review. There are two stages to judicial review, an initial permission stage, usually based upon the paper submissions, that winnows out claims that are unarguable, and a final hearing on the merits. There are several possible outcomes to the proceedings. The first is that permission may be refused on the papers. Permission should be granted if there is an arguable case and interim relief may be granted on the papers. Sometimes a hearing is granted at the permission stage, but this is usually a bound up hearing with the final stage. If permission is granted on the papers, then the matter goes to a final hearing and the defendant has 35 days to file a detailed response.

*Initial consideration: Who is the claimant?*

Some charities enable service users to challenge funding cuts themselves. This is preferable for charities for several reasons. First, bringing their own claim is empowering for the service users, in line with many charities’ missions. Second, it has been easier for service users to get legal aid to support their cause of action, though the Legal Aid, Sentencing, and Punishment of Offenders Act 2012 has made this more difficult. Finally, charities fear an award of costs against them should they be unsuccessful.

In order to enable their service users to bring challenges, some charities bring in lawyers to conduct training, or publish guides to judicial review.[[10]](#endnote-10) A charity reported that a barrister provided some training at the charity, and urged them to consider the strategy of having clients bring judicial reviews, which they have been pursuing, but not without difficulties.

It’s quite difficult to find [clients] to take cases. Not because – because [they are] at the heart of it. Quite often what happens is that the council reinstates any services for [them], so that they go away. However, what we’re wanting to challenge as an organisation is the cut overall. Eventually, you can then put another family forward and another family forward. But at some point you will end up just hitting the silent families that don’t come forward (Interview 45).

The charity has had fewer than ten clients initiate a legal action but none got past the letter before action stage because of this strategy by local authorities. The charity has received differing legal advice as to whether or not a client whose services have been restored would still have a cause of action to pursue on behalf of the larger cause.

### Development of the PSED via case law

Some of the case law relates to the duties from the predecessor legislation. However, it is relevant in assessing how the PSED will be applied. Reported cases based upon the PSED increased after the seminal case of *R (Elias) v Secretary of State for Defence*. [[11]](#endnote-11) A challenge in the High Court to the compensation scheme for prisoners of war in Japan during the Second World War was upheld based upon section 71 of the Race Relations Act 1976. On appeal in the Court of Appeal, Arden LJ stated that:

It is a clear purpose of section 71 to require public bodies to whom the provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement and this provision must be seen as an integral and important part of the mechanism for ensuring the fulfilment of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter.[[12]](#endnote-12)

As McColgan notes, ‘the importance of the decisions in *Elias* cannot easily be overstated. Prior to the judgment of Elias J there was little to distinguish section 71(1) from its predecessor provision and scant reason to regard it as having potentially significant impact. After his judgment, and the Court of Appeal’s endorsement of it, the PSED became an extremely valuable tool in the toolkit of public lawyers and radically altered the parameters of “discrimination law” in British law’ (2015: 456).

What the duty entails was developed further in *R (Baker) v Secretary of State for Communities and Local Government.* [[13]](#endnote-13) Compliance is a matter of substance. Although the organisation need not have expressly referred to discharging its obligations under the PSED, there must be evidence that the organisation has paid due regard to the relevant aspects. Having due regard to the duty does not require the organisation to achieve a result, for example, by eliminating inequality, but it does require the policy-maker to have due regard to the need to achieve that result. Due regard is:

the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged [...] group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.[[14]](#endnote-14)

The strength of the public sector duty is that, as Dyson LJ pointed out in *Baker*, the obligation goes well beyond merely avoiding formal non-discrimination:

the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination.[[15]](#endnote-15)

Some general principles, drawn from the cases, were suggested by Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions.[[16]](#endnote-16)* These were then included by McCombe LJ in *Bracking and others v Secretary of State for Work and Pensions[[17]](#endnote-17)* in his lengthy set of comprehensive doctrinal points regarding the PSED. The principal points (references omitted) are:

(1) equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.

(3) The relevant duty is personal to the decision maker and what matters is what he or she took into account and knew. The duty is non-delegable; and is a continuing one.

(4) The risk and extent of any adverse impact must be assessed before the adoption of a proposed policy and not merely as a ‘rearguard action’, following the decision. It is not a ‘tick-box’ exercise.

(5) The court must be 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. It is, however, for the decision maker to decide how much weight should be given to the various factors informing the decision. The concept of ‘due regard’ requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker.

The points from *Bracking* were cited with approbation by Lord Neuberger in *Hotak v Southwark LBC.[[18]](#endnote-18)* As for due regard, he said, ‘However, in the light of the word “due” in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment.’[[19]](#endnote-19)

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#### The PSED and commissioning of public services

As many voluntary sector organisations are commissioned by public bodies to provide public services, this provides an important area of interaction between charities and the PSED. The breadth of the types of decisions that the PSED reaches is enormous. Challenges have been brought under the equality duties to cuts ranging in universality from a service user’s adult social care to the Emergency Budget itself.[[20]](#endnote-20) Decisions are very fact-sensitive, and space constraints prohibit a more lengthy discussion of the case law but a good example, albeit under the predecessor duty in the Race Relations Act is *R (Kaur & Shah) v London Borough of Ealing,*[[21]](#endnote-21)commonly referred to as Southall Black Sisters. Southall Black Sisters provides specialist domestic violence services to Asian and Afro-Caribbean women. It was funded partly by the London Borough of Ealing, but in 2007 Ealing decided that it would commission services from community and voluntary organisations by open competition according to published criteria requiring that the service be provided to ‘all individuals irrespective of gender, sexual orientation, race, faith, age, disability, resident within the Borough of Ealing experiencing domestic violence’. A consultation was held during which Southall Black Sisters suggested that the criteria would have a disproportionate impact on black and minority ethnic women, and that there had been no racial equality impact assessment. Southall Black Sisters stressed the importance of specialist provision, making the point that targeting services did not undermine social cohesion. Ealing wrongly assumed that cohesion could only be achieved through making a grant to an organisation that would provide services equally to all and moreover that they would not be permitted to fund an organisation that would supply services exclusively to one racial group. As a result of Ealing’s failure to give due regard to the race equality duty, and its misunderstanding of what the equality duty required, the Southall Black Sisters succeeded in having the decision quashed.

The case remains relevant, as a requirement to provide a universal service remains a common demand by public bodies commissioning services. Whether due to a misconception about what the Public Sector Equality Duty requires, or out of a desire to cut costs, it is very common for commissioners to require that a charity provide a universal service. One research participant umbrella body charity has had over 100 of its member charities, which had previously provided women-only services, be required by commissioners to open those services to men or lose their funding. ‘When a local authority says that they have to provide services to men, too, they might well open up that service to men, which means that some women will stop using the service. But then, no male users will actually use the service. Because it’s not that they’ve identified some unmet need. It’s just that they’ve misinterpreted the Equality Act’ (Interview 35). That same umbrella body also attributed these demands to provide a universal service as a response to austerity: ‘Because a generic provider can come in and say we can do it for everybody and we can do it at a cut price. So that’s the kind of picture that we’re seeing around the country’ (Interview 35). Rape Crisis England and Wales, which has 38 affiliated rape crisis centres, surveyed its membership in 2007 and found that there was increasing pressure from funders to open services to men, with some members being refused funding for insisting on providing a women-only service (2007).

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### Results of challenges

McColgan’s recent analysis of the PSED case law found that challenges to funding cuts had a nearly 40 per cent success rate, which she classified as ‘an impressive figure in view of the general judicial reticence when it comes to interfering with socio-economic decision-making’ (2015: 478). Although judicial review has only a procedural remedy – the public body can be instructed to retake a decision with an inappropriate process – substantive victories often result. One participant lawyer said, ‘In every case that I have won, the group has held onto their funding’ (Interview 29). The lawyer continued:

I think that’s partly because when the public body engages properly, they do realise that what they were trying to do wasn’t a terribly good idea. So, I think there is an element of, you know, without overstating it, I think there’s an element of education there. [...]I think the second reason, cynically, is that they don’t want to get judicially reviewed again (Interview 29).

A campaigning charity agreed that, in cases where the public authority decides (or is forced) to go through another process to decide on the cuts, they do not automatically make the same cuts as a result. Sometimes delaying the cut, often initially announced with little or no warning, is enough to allow the charities some time to find alternative sources of funding. However, simply averting or delaying the cuts is not the only reason behind the use of an Equality Act strategy. Even in situations where the cuts will still need to be made, the charity views real engagement by local authorities with service users as leading to better cuts.

My personal opinion … is it’s not just about ... slowing it down. We’re using it tactically to slow down cuts decisions so that they can’t impact on families but we also use it to genuinely engage families in the decisions around how their services are delivered ... They’ll make better decisions if they actually speak to the families ... You make better decisions if you speak to the people that are using the service (Interview 45).

Richardson’s survey of the research on the impact of judicial review on decision makers suggests that it is not very influential (2004). Moreover, where there is an impact it can be negative, with entities making decisions in a way that is designed to shield them from the possibility of a judicial review, rather than attempting real improvement (Richardson 2004). However, a participant in the study who advises local authorities on fulfilling their PSED said that after an earlier judicial review of a local authority’s round of funding cuts, they were now trying to implement the necessary cuts in line with a proper consideration of equality impact issues:

So [local authority] is making a whole range of funding cuts and we’re making sure that there is equality analysis fitting into that, which is obviously going to mitigate risk of legal challenge for the council through judicial review, but also to make sure that those services that are maintained are not discriminating, so services aren’t being cut for the most disabled people, and services are going to be maintained for those where the need is greatest, really … using equality to inform that’ (Interview 1).

Judicial reviews can offer clarity to decision-makers tasked with implementing decisions while at the same time being unhelpful to those higher in the system who are responsible for decisions about resource allocation (Platt, et al. 2010). Research has shown that an increase in the numbers of judicial reviews targeted at a public authority ‘may drive improvements in local authority performance, as measured by official indicators’ (Sunkin 2015: 247).

### Uncertain Future

It may be that judicial review and the PSED has been too successful for its own good. Multiple government policy reforms have been designed to reduce the impact of the PSED and to limit judicial review. The Coalition government brought forward a review of the PSED in 2013, which was widely perceived as threatening to the duty. The Independent Steering Group (ISG) did not recommend that the PSED be scrapped, even though they reported ‘very limited evidence’ of its benefit and labelled many incidences of it being invoked in ‘useless bureaucratic practices’ (Government Equalities Office 2013: 23, 7). The ISG concluded that it was too early to determine how the PSED was working and recommended that it should be reviewed again in 2016. Stephenson has analysed the conclusions reached by the ISG in light of the published evidence and concluded that the evidence ‘often fails to support’ the claims made in the report (2014: 75). In all, 130 of the 140 written submissions were ‘broadly supportive of the PSED, or gave positive examples of its impact’, including submissions by seven of the sixteen Conservative-led local authorities submitting evidence (Stephenson 2014: 77). The report also failed to mention over fifty responses that pointed out the damage caused by government’s mixed messages about the PSED, which confused public authority staff and complicated compliance (Stephenson 2014: 79).

Other risks abound. Although charities themselves were unable to receive legal aid in the past, their service users were frequently able to do so. Although judicial review remains in scope, reforms to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 are likely to have a chilling effect, as advice services have been cut for social welfare issues, breaking a crucial link between service users and charities that might take up their challenge (Sigafoos, 2012). Changes to judicial review regulations that came into effect in April 2014 are also likely to have an impact. One change, allowing legal aid to be awarded only where permission is allowed, was found to be unlawful.[[22]](#endnote-22) However, three days later the government laid new regulations, with the same conditionality for funding, only slightly extending the number of situations where payment would be made.[[23]](#endnote-23) Legal aid may only be granted where permission is granted; where the court neither grants nor denies permission and the Legal Aid Agency considers that a discretionary payment may be made; where the defendant withdraws the decision; where the court orders an oral hearing at the permission stage; or where the court orders a rolled-up hearing. As judicial review outcomes are inherently unpredictable, this means that a potential claimant’s lawyer faces a very real chance of non-payment. Another reform disallows legal aid in cases where the chances of success are determined to be borderline, unless this would constitute a breach of the applicant’s rights under the ECHR or European law, making legal aid unlikely in cases that are attempting to break new ground.[[24]](#endnote-24)

In addition to these changes to legal aid, the government took steps to restrict the availability of judicial review. In 2013, the Ministry of Justice published a report proposing reforms to judicial review and invited submissions on proposed changes in several areas. The proposed reforms were targeted at discouraging or preventing judicial reviews brought as part of a campaigning strategy (MOJ, 2013: para 99). The most controversial of these was the proposal to restrict rules on standing to those that have a private interest in the proceedings, which would eliminate interest groups or charities (MOJ, 2013: para 67). This was abandoned after the consultation stage. The proposed changes were moderated by Parliament in some respects but are likely to have a deterrent effect. Protective Costs Orders[[25]](#endnote-25) can now only be granted after the permission stage of a judicial review has been successful.[[26]](#endnote-26) But this leaves the potential for a large order for costs at the pre-permission stage, a substantial deterrent. Additionally, in certain circumstances, interveners in an unsuccessful case may be required to pay the costs of other parties associated with their intervention, in addition to their own costs.[[27]](#endnote-27) Charities intervene in judicial reviews to offer the court a broader picture of the impact of a cut than may be presented by an individual claimant. These charities may well be deterred from providing courts with this important perspective by the threat of an award of costs against them.

### Conclusion

The PSED has become an important ground for challenges to the appropriateness of public decision-making, including decisions around funding. This has been a change from more traditional ideas that there is little legal accountability over resource distributions. The PSED reaches deep into government decision-making and challenges to funding cuts have succeeded beyond what might have been predicted. The evidence suggests that it has proved to be more useful than is revealed by the reported decisions and hearings. Even though the number of reported cases is not large, this may not fully reflect the achieved successes from the strategy. Certainly, the extent of the measures that were undertaken by the government in an attempt to repress these sorts of judicial reviews suggests that it perceives them to be a threat. Even threatening judicial review is often enough to change or avert a funding cut. Moreover, a PSED strategy may allow for challenges to reach matters that might not have been possible under more traditional public law grounds. Although it is a procedural mechanism, substantive victories sometimes result. Charities have become more aware of the potential legal means at their disposal, training service users and providing support to enable challenges to funding cuts. The PSED has thus empowered some charities and service users.

Nevertheless, public law remedies such as judicial review remain difficult to access, expensive and precarious. They also create the possibility of a competition between protected groups. The context of the government spending cuts means that the success of a particular charity or protected group in challenging funding cuts is likely to be at the expense of another or of other deprived people who do not share a protected characteristic. It is truly a zero sum game. ‘Ultimately, the due regard standard cannot produce more funding: at most it can prompt a reconsideration of priorities among those competing for reduced resources. This means that the duty could well give rise to conflicts between status groups and other poor and disadvantaged groups, redistributing poverty without redistributing wealth’ (Fredman, 2011: 41). A judicial review challenge via the PSED cannot create additional resources for a cash-strapped local authority to distribute. It can only effect a considered re-distribution.

However, a considered re-distribution is, in many instances, a preferable outcome for those most affected by a funding cut. As has also been found by others (Sunkin 2015), participants reported that there was value in being heard, that their input into the process could result in what was a better cut for them. Critics of judicial review often focus on a lack of democratic legitimacy, and indeed it is a concern that judges are not as well placed as administrators within a public authority to assess the appropriateness of resource allocations. But the judge’s decision in a judicial review is not the final say in the matter. The public authority will have the opportunity to reconsider its decision in light of the expert opinion of the judge as to whether or not sufficient consideration had been paid to equality issues. More importantly, the service users, sometimes supported by charities or campaigning groups, are given a voice, and able to have direct input into the process, making decision-makers aware of their concerns and preferences. With apologies to Shakespeare, in an age of austerity, perhaps the most kindest cut is the best that can be hoped for.[[28]](#endnote-28)

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**Notes**

1. Equality Act 2010, s 149. The relevant characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation: s 149(7). Public authorities are however required to have due regard to the need to eliminate unlawful discrimination in employment against someone because of their marriage or civil partnership status. [↑](#endnote-ref-1)
2. Race Relations (Amendment) Act 2000. The Macpherson Report investigated the response of the Metropolitan Police to the murder of Stephen Lawrence and found institutional racism. [↑](#endnote-ref-2)
3. S 76(A) Sex Discrimination Act 1975, as amended by the introduction of the duty in the Equality Act 2007. The Gender Equality Duty came into force in April 2007. [↑](#endnote-ref-3)
4. S 49(A) Disability Discrimination Act 1995, as amended in the Disability Discrimination Act 2005. [↑](#endnote-ref-4)
5. Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260. More stringent specific duties were introduced through devolved power in Scotland and Wales: Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, 2011/1064 (W 155); Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, SSI 2012/162. [↑](#endnote-ref-5)
6. Equality Act 2006, s 32. [↑](#endnote-ref-6)
7. Senior Courts Act 1981, s 31(3). [↑](#endnote-ref-7)
8. Rule 54.5(1) of the Civil Procedure Rules. [↑](#endnote-ref-8)
9. ‘The Compact: The Coalition Government and civil society organisations working effectively in partnership for the benefit of communities and citizens in England’ (2010) is an agreement between the government and the voluntary sector, setting out principles for their relationship and establishing way of working together. [↑](#endnote-ref-9)
10. See e.g. Steve Broach and Kate Whittaker, ‘Using the Law to Fight Cuts to Disabled People’s Services’ (2012) based upon on earlier briefing paper for the Every Disabled Child Matters Campaign; Women’s Resource Centre and NAVCA, ‘Keeping it Legal; A guide for third sector organisations on public law and equality rights’ (2010). [↑](#endnote-ref-10)
11. *R (Elias) v Secretary of State for Defence* [2005] EWHC 1835 (Admin). [↑](#endnote-ref-11)
12. [2006] EWCA 1293, [2006] 1 WLR 321 [97]-[98]. [↑](#endnote-ref-12)
13. *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809. [↑](#endnote-ref-13)
14. *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809 [31] (Dyson LJ). [↑](#endnote-ref-14)
15. *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809 [30]. [↑](#endnote-ref-15)
16. [2008] EWHC 3158 (Admin) [90]-[96]. Also known as the Post Office Closures Case. [↑](#endnote-ref-16)
17. *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. [↑](#endnote-ref-17)
18. *Hotak v Southwark LBC* [2015] UKSC 30 (SC). [↑](#endnote-ref-18)
19. *Hotak v Southwark LBC* [2015] UKSC 30 (SC) [74]. [↑](#endnote-ref-19)
20. R (Fawcett Society) v HM Treasury & HMRC [2010] EWHC 3522 (Admin). [↑](#endnote-ref-20)
21. *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin). [↑](#endnote-ref-21)
22. *R (Ben Hoare Solicitors and Others) v the Lord Chancellor* [2015] EWHC 523 (Admin), quashing the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014. [↑](#endnote-ref-22)
23. Civil Legal Aid (Remuneration) (Amendment) Regulations 2015. [↑](#endnote-ref-23)
24. The Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015. [↑](#endnote-ref-24)
25. A claimant can apply to the court for an order shielding them from being held responsible to pay some or all of the defendant’s costs even if the claim in unsuccessful. Orders are available exceptionally in cases where the issues raised are of ‘general public importance’ and where there is a mismatch in the relative capacity to fund the proceedings such that the respondent is much better placed to proceed and the applicant will probably have to abandon the proceedings without the order. The PCO’s inception was *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347 [358], and the governing principles were set out in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. [↑](#endnote-ref-25)
26. Criminal Justice and Courts Act 2015, s 88(3). [↑](#endnote-ref-26)
27. Criminal Justice and Courts Act 2015, s 87(6). The court is free to not impose costs on the intervener in exceptional circumstances. [↑](#endnote-ref-27)
28. *Julius Caesar*, Act 3, Scene 2.

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