The effectiveness of the race and disability public sector equality duties as positive legal duties and legal accountability tools

Leander Oneta Neckles

A thesis submitted to the Business School at Edge Hill University in fulfilment of the EHU requirements for the degree of Doctor of Philosophy

Edge Hill University

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Declaration

The work presented in this thesis results from research undertaken by Ms Leander Oneta Neckles at Edge Hill University’s Business School.

Leander Oneta Neckles
Dedication

I dedicate this thesis to my father, Errol Findlay Neckles, who died in 2010, and to my mother, Carmen Ione Neckles, who promised herself, and me, that she would live to see me submit this thesis.
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This thesis examined substantive race and disability claims heard between 2001 and the middle of 2014. It presents evidence that the race and disability public sector equality duties (pseds) – the Race Equality Duty and the Disability Equality Duty replaced by the Public Sector Equality Duty (PSED) in April 2011 – have been used successfully to challenge institutional race and disability discrimination and, to some extent, to advance equality of opportunity. Quite simply the pseds made a positive difference to the lives of some individuals who successfully took legal action and to thousands of others who benefitted from that action. However, neither judicial review (JR) nor the pseds were perfect systems of legal redress and two questions loom large on the horizon. The first is, whether part four of the Criminal Justice and Courts Act 2015 will undermine the ability of individuals and organisations to take successful PSED JR claims? The second is, will the planned full-scale review of the PSED, take place in 2016 and, if so, will the Conservative Government place a commitment to challenging discrimination and advancing good relations and equality of opportunity at the heart of that review?

On a much more personal note, writers often talk about ‘a process’ and ‘challenges experienced’ and I will as well. This thesis has been a long-time in the making; it, and I, survived the death of one parent and the near death of my mother. Without the support provided by my two Directors of Studies and my joint supervisor – Stuart Speeden, Dr Julian Clarke and Dr John McGarry – and Edge Hill University, getting to the point of submission would simply have been impossible. However, Julian deserves much more than just an acknowledgement. One sometimes hears students refer, in less than fulsome terms, to the support that they have, or sometimes, have not received. For my part, Julian’s support provides a model for the active, supportive and expert supervisor – he is a credit to the academic world, to Edge Hill University and, in the words of Tina Turner, ‘Simply the Best’. Nevertheless, I am my own person so I take full responsibility for the contents of this thesis including its weaknesses and, hopefully, strengths.
UK primary legislation

Chronically Sick and Disabled Persons Act 1970
Chronically Sick and Disabled Persons (Amendment) Act 1976
Civil Procedure Act 1997
Constitutional Reform Act 2005
Criminal Justice and Courts Act 2015
Data Protection Act 1998
Deregulation Act 2015
Disability Rights Commission Act 1999
Disability Discrimination Act 1995
Disability Discrimination Act 2005
Disabled Persons (Employment) Act 1944
Disabled Persons (Services, Consultation and Representation) Act 1986
Enterprise and Regulatory Reform Act 2013
Equality Act 2006
Equality Act 2010
Fair Employment Act 1989
Freedom of Information Act 2000
Human Rights Act 1998
Immigration Act 2014
Local Government Act 1988
Northern Ireland Act 1998
Race Relation Act 1976
Race Relations (Amendment) Act 2000
Race Relations (Remedies) Act 1994
Senior Courts Act 1981
Sex Discrimination Act 1975
Town and Country Planning Act 1990
Tribunal Courts and Enforcement Act 2007
Abstract

The modern public sector equality duties (pseds) have been described as positive duties, ground-breaking and transformative. Described in these terms because the pseds partly addressed limitations in anti-discrimination laws by placing designated public bodies, and others exercising public functions, under a legal obligation to proactively consider various equality aims. The duties were introduced in England, Scotland and Wales between 2001 and 2011.

This thesis investigates the Race Equality Duty, the Disability Equality Duty and related provisions in the Public Sector Equality Duty. It provides an interdisciplinary, socio-legal analysis of these pseds by investigating two interrelated research questions: 1) Have the race and disability equality duties been effective positive legal duties and legal public accountability tools? 2) Does Scheingold’s theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality?

This study makes a unique contribution to the literature by analysing: the justiciability of the pseds and their effectiveness as legal tools to hold public bodies to account; the outcomes of substantive race and disability public sector equality duties (pseds) judicial review judgments; and the significance of the roles played by cause lawyers, community activism and legal empowerment in extending the race and disability pseds’ reach and impact. The unique contribution made to the literature is augmented by the inclusion in this thesis of a socio-political analysis of the impact on these pseds of major changes in the UK’s anti-discrimination framework, equality laws and developments in relation to immigration, community cohesion, integration and austerity over the last fifty years.
### Abbreviations, acronyms and terms

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ADA</td>
<td>Americans with Disabilities Act</td>
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<tr>
<td>ALBA</td>
<td>Constitutional and Administrative Bar Association</td>
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<tr>
<td>BAILII</td>
<td>British and Irish Legal Information Institute</td>
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<tr>
<td>BAME</td>
<td>Black Asian and Minority Ethnic</td>
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<tr>
<td>BIS</td>
<td>Department for Business, Innovation and Skills</td>
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<tr>
<td>BME</td>
<td>Black and Minority Ethnic</td>
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<td>BRTF</td>
<td>Better Regulation Task Force</td>
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<tr>
<td>CA</td>
<td>Court of Appeal</td>
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<tr>
<td>CASE</td>
<td>Centre for Analysis of Social Exclusion</td>
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<tr>
<td>CBI</td>
<td>Confederation of British Industry</td>
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<tr>
<td>CEHR</td>
<td>Commission for Equality and Human Rights¹</td>
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<td>CJ&amp;CA</td>
<td>Criminal Justice and Courts Act</td>
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<td>CLEP</td>
<td>Commission on Legal Empowerment of the Poor</td>
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<td>COIC</td>
<td>Commission on Integration and Cohesion</td>
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<td>CoP</td>
<td>Code of Practice</td>
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<tr>
<td>CPS</td>
<td>Crown Prosecution Service</td>
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<tr>
<td>CRE</td>
<td>Commission for Racial Equality</td>
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<td>CSOs</td>
<td>Civil society organisations</td>
</tr>
<tr>
<td>DCSF</td>
<td>Department for Children, Schools and Families</td>
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<tr>
<td>DCLG</td>
<td>Department for Communities and Local Government</td>
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<tr>
<td>DPAC</td>
<td>Disabled People Against Cuts</td>
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<tr>
<td>DCA</td>
<td>Department for Constitutional Affairs</td>
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<tr>
<td>DDA</td>
<td>Disability Discrimination Act</td>
</tr>
<tr>
<td>DDPOLN</td>
<td>Deaf &amp; Disabled People’s Organisations Legal Network</td>
</tr>
<tr>
<td>DED</td>
<td>Disability Equality Duty</td>
</tr>
<tr>
<td>DES</td>
<td>Disability Equality Scheme</td>
</tr>
<tr>
<td>DfEE</td>
<td>Department for Education and Employment</td>
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<td>DFES</td>
<td>Department for Education and Skills</td>
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¹ Commonly called the Equality and Human Rights Commission (EHRC)
## Abbreviations, acronyms and terms

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<th>Abbr</th>
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<tr>
<td>DFT</td>
<td>Department for Transport</td>
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<td>DH</td>
<td>Department of Health</td>
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<td>DLA</td>
<td>Discrimination Law Association</td>
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<td>DLR</td>
<td>Discrimination Law Review</td>
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<td>DPO</td>
<td>Disabled Person’s or Peoples Organisation</td>
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<tr>
<td>DRC</td>
<td>Disability Rights Commission</td>
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<tr>
<td>DfES</td>
<td>Department for Education and Skills</td>
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<td>DFID</td>
<td>Department for International Development</td>
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<tr>
<td>DRTF</td>
<td>Disability Rights Task Force</td>
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<td>DTI</td>
<td>Department of Trade and Industry</td>
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<tr>
<td>DWP</td>
<td>Department for Work and Pensions</td>
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<td>EA</td>
<td>Equality Act</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECNI</td>
<td>Equality Commission for Northern Ireland</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EDF</td>
<td>Equality and Diversity Forum</td>
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<td>EDM</td>
<td>Early Day Motion</td>
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<tr>
<td>EHRC</td>
<td>Equality and Human Rights Commission</td>
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<td>EIA</td>
<td>Equality Impact Assessment</td>
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<td>ELR</td>
<td>Equality Law Reports</td>
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<td>ENAR</td>
<td>European Network Against Racism</td>
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<td>EOC</td>
<td>Equal Opportunities Commission</td>
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<tr>
<td>ET</td>
<td>Employment Tribunal</td>
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<tr>
<td>ETS</td>
<td>Employment Tribunals Service</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>GED</td>
<td>Gender Equality Duty</td>
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<td>GEO</td>
<td>Government Equalities Office</td>
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<tr>
<td>HC</td>
<td>High Court</td>
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<tr>
<td>HMcps</td>
<td>Her Majesty’s Crown Prosecution Service Inspectorate</td>
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<td>HMIC</td>
<td>Her Majesty’s Inspectorate of Constabulary</td>
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**Abbreviations, acronyms and terms**

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<tr>
<td>HMSO</td>
<td>Her Majesty’s Stationery Office</td>
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<tr>
<td>HoC</td>
<td>House of Commons</td>
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<tr>
<td>HoCSCRR&amp;I</td>
<td>House of Commons Select Committee on Race Relations and Immigration</td>
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<tr>
<td>HoL</td>
<td>House of Lords</td>
</tr>
<tr>
<td>HRA</td>
<td>Human Rights Act</td>
</tr>
<tr>
<td>IA</td>
<td>Immigration Act</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ILF</td>
<td>Independent Living Fund</td>
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<tr>
<td>IRT</td>
<td>Independent Review Team</td>
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<tr>
<td>JCHR</td>
<td>Joint Committee on Human Rights</td>
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<td>JR</td>
<td>Judicial review</td>
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<td>MoJ</td>
<td>Ministry of Justice</td>
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<td>MRS</td>
<td>Market Research Society</td>
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<tr>
<td>NCCI</td>
<td>National Committee for Commonwealth Immigrants</td>
</tr>
<tr>
<td>NIA</td>
<td>Northern Ireland Act</td>
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<tr>
<td>ODI</td>
<td>Office for Disability Issues</td>
</tr>
<tr>
<td>ODPM</td>
<td>Office of the Deputy Prime Minister</td>
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<tr>
<td>OPHI</td>
<td>Oxford Poverty &amp; Human Development Initiative</td>
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<tr>
<td>PCO</td>
<td>Protective Costs Order</td>
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<tr>
<td>PIRU</td>
<td>Public Interest Research Unit</td>
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<td>PLP</td>
<td>Public Law Project</td>
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<tr>
<td>psed</td>
<td>Public sector equality duty(^2)</td>
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<td>PSED</td>
<td>Public Sector Equality Duty(^3)</td>
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<tr>
<td>RADAR</td>
<td>Royal Association for Disability and Rehabilitation</td>
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<tr>
<td>ROTA</td>
<td>Race on the Agenda</td>
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<tr>
<td>RED</td>
<td>Race Equality Duty</td>
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\(^2\) Generic term covering any public sector equality duty for example the RED, DED, GED or PSED.  
\(^3\) The Public Sector Equality Duty introduced as section 149 of the Equality Act 2010.
### Abbreviations, acronyms and terms

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<td>REIA</td>
<td>Race Equality Impact Assessment</td>
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<td>RES</td>
<td>Race Equality Scheme</td>
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<tr>
<td>ROTA</td>
<td>Race on the Agenda</td>
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<td>RRA</td>
<td>Race Relations Act</td>
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<td>RR(A)A</td>
<td>Race Relations (Amendment) Act</td>
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<td>RTC</td>
<td>Red Tape Challenge</td>
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<td>SAS</td>
<td>School of Advanced Study</td>
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<td>SBS</td>
<td>Southall Black Sisters</td>
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<td>SDA</td>
<td>Sex Discrimination Act</td>
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<td>SEDs</td>
<td>Specific equality duties</td>
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<td>SSJ</td>
<td>Secretary of State for Justice</td>
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<tr>
<td>SSWP</td>
<td>Secretary of State for Work and Pensions</td>
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<tr>
<td>TSO</td>
<td>The Stationery Office</td>
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<tr>
<td>TUC</td>
<td>Trades Union Congress</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UPIAS</td>
<td>Union of the Physically Impaired Against Segregation</td>
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<tr>
<td>VOADL</td>
<td>Voluntary Organisations for Anti-Discrimination Legislation</td>
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<tr>
<td>VCOs</td>
<td>Voluntary and community organisations</td>
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Chapter 1: Introduction

Overview and purpose
Public sector equality duties (pseds) were introduced into law between 2000 and 2011. The pseds placed statutory obligations on English, Scottish and Welsh public bodies to give due regard to challenging discrimination and advancing equality of opportunity. These duties have been described by UK parliaments, governments, equality commissions, legal and equality academics, equality campaigners and others, as positive legal duties and measures that can be used to hold public bodies to account (Fredman, 2011b: 414, Hepple, 2010a: 18, O’Cinneide and EDF, 2004: 9). This study examines the race and disability equality duties as positive duties and public accountability tools through two interrelated research questions. The first question is, have the race and disability equality duties been effective positive legal duties and legal public accountability tools? The second question is, does Scheingold’s theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality?

Careful consideration has been given to identifying the academic disciplines and sub-disciplines that could best address these research questions; this led to a focus on public accountability, the law, equal opportunities and social justice. This interdisciplinary approach has enabled the identification of important conceptual interfaces, and differences, between the disciplines and sub-disciplines relevant to this study. These conceptual interfaces and differences have, in turn, informed the development of the interdisciplinary conceptual and analytical framework, set out in the methodology. This chapter briefly overviews the modern pseds and comments on important associated socio-political developments. The relevance of key research into the modern equality duties is then considered. The research methodology, ethical issues and how this thesis builds on previous research and makes a unique contribution to the literature are discussed. The chapter concludes with a description of the chapters and appendices.
The modern equality duties

Four modern pseds, developed between 1999 and 2011, came into force in England, Scotland and Wales between 2001 and 2011. These pseds were regarded as ground-breaking public law provisions. The first three duties – the Race Equality Duty (RED), the Disability Equality Duty (DED) and the Gender Equality Duty (GED) – were replaced by the Public Sector Equality Duty (PSED) in 2011. The PSED was enacted as section 149 of the Equality Act 2010. The RED, DED, GED and PSED built on the local authority race equality duty (Race Relation Act 1976, section 71); the forerunner to the modern RED. Each successive psed was intended to address perceived deficiencies in the previous psed or pseds. These perceived deficiencies, and their impact on the shape of the RED, DED and PSED, are examined in subsequent chapters.

The pseds were implemented against a backdrop of major, sometimes competing and contradictory, developments in the UK’s anti-discrimination, equality laws and the socio-political environment. A socio-political evaluation has been provided that examines key developments and their impact on the shape of race and disability anti-discrimination, equalities legislation and on the actual pseds. All four pseds applied to England, Scotland and Wales but not to Northern Ireland. In Northern Ireland, a separate statutory duty applied – section 75 of the Northern Ireland Act (NIA) 1998 – which placed requirements on public authorities with respect to the promotion of equality of opportunity. Where relevant to understanding the pseds, consideration has been given to the form, and content, of Section 75.

Until October 2007, the equality bodies with statutory responsibility for oversight of the race, disability and gender equality duties in England were the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC). From October 2007 the Equality and Human Rights Commission (EHRC) replaced the CRE, DRC and EOC and took over responsibility for statutory oversight of the RED, DED and GED. The EHRC then had statutory oversight of the PSED from 2011 onwards. The equality commissions had legal powers to investigate and challenge alleged breaches of the pseds. The pseds each consisted of a general equality

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4 The PSED replaced the RED, DED and GED in April 2011.
duty set out in primary legislation and specific equality duties (SEDs) set out in secondary legislation. These SEDs were intended to promote the better performance of the general equality duties.

The CRE, DRC, EOC and EHRC could bring JR proceedings in their own right, for an alleged breach of the general equality duties, and intervene in judicial review (JR) cases brought by others. The ability of individuals to use JR in pseed cases, and the powers of the equality commissions in relation to the pseeds, have been examined in this thesis. Consideration has also been given to the development of JR in race and disability pseed cases and JR’s role as a legal accountability measure. Claimants’ private law claims, that cite the pseeds, are not examined unless there was a subsequent public law, JR or similar claim⁵ (see chapter 6).

Changing political administrations and socio-political developments
After nearly eighteen years out of political power (1979 – 1997), the Labour Government, elected in 1997, introduced the NIA 1998 which incorporated Northern Ireland’s statutory public sector equality duty (section 75). Between 2000 and 2010, successive Labour Governments shaped, and oversaw the introduction of, the primary legislation containing the general pseeds covering England, Scotland and Wales.⁶ Over this ten year period, three successive Labour Governments also shaped, and introduced, the secondary legislation and the regulatory and enforcement frameworks for the RED, DED and GED. The Equality Act 2010 was one of the final pieces of primary legislation sponsored by the Labour Government, and approved by Parliament, before the May 2010 general election.⁷ Following the 2010 General Election, the Conservative-led Coalition Government introduced the secondary legislation and the regulatory and enforcement frameworks to support the PSED. The Coalition Government, formed by the Conservative and Liberal Democrat Parties in May 2010, laid the necessary secondary legislation before Parliament

⁵ Under the Town and Country Planning Act 1990.
⁷ The Equality Act 2010 received royal assent on 8th April 2010, the general election had been announced on 6th April 2010, Parliament was dissolved on 12th April 2010 and the general election was held on 6th May 2010.
to bring the PSED into force in April 2011. However, in line with the Coalition Government’s Red Tape Challenge to reduce statutory regulations (HM Government, 2015), Parliament approved very limited SEDs for England. Chapter 4 of this thesis explores whether, and if so how, significant socio-political developments impacted on the legislative frameworks upon which the equality duties built and on the actual pseds.

**Research into the duties - an overview**

Research into the RED for England has explored how public sector bodies complied with the RED and whether the RED led to service delivery improvements for Black and Minority Ethnic (BME) communities (Audit Commission, 2004, Schneider-Ross and CRE, 2003). Research into the DED has explored: how well public bodies complied with requirements to publish Disability Equality Schemes (Ipsos Mori, 2007); the implementation of the DED; positive responses by public bodies to involving disabled people; and the DED’s impact on outcomes and results for disabled people (RADAR, 2007c, Office for Public Management, 2007a). The DRC also commissioned research, ‘Up to the Mark?’ to assess whether government departments had complied with various elements of the DED’s SEDs (DRC, 2007b). The CRE and DRC reviewed the impact of the RED and DED as part of their respective assessments of their enforcement, monitoring and legal work (DRC, 2007a, CRE, 2007b). An in-depth examination of the implementation of the DED and a post legislative assessment of the DDA were also published (DWP, 2010, Ferrie et al., 2008).

Research was also conducted into the options for the development of an integrated public sector equality duty and into the cost effectiveness of the specific equality duties for the RED, DED and GED (Schneinder-Ross, 2009, O’Cinneide and EDF, 2004). The Public Interest Research Unit, an independent civil rights focused research unit, undertook a comprehensive analysis of the use by the CRE, DRC and Equal Opportunities Commission (EOC) of their enforcement powers between 2001 and 2006 (Harwood, 2006). Reviews and reports, commissioned by the Labour Government and the EHRC, considered the

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8 This Government is referred to henceforth as the Conservative-led Coalition or the Coalition Government.

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A national assessment of the costs and benefits of the PSED was published by an ‘Independent Steering Group’ selected by the Coalition Government but this was primarily an assessment from the perspective of public sector bodies (GEO, 2013). Evidence of the impact and changes in practice resulting from the PSED was also published by academics in part in response to the limitations of the government commissioned review of the PSED published earlier in 2013 (Clayton-Hathway and Oxford Brookes Centre for Diversity Policy Research and Practice, 2013). Leading legal academics and lawyers also produced detailed assessments of JR claims, reviews of the history of the pseds and analyses of the pseds (Halford, 2013, McColgan, 2013a, McColgan, 2013b, Whitfield, 2011, Halford and Khan, 2011, Halford, 2010, Halford and Bindman and Partners, 2006). A search of the doctoral deposit service (EThOS) operated by the British Library, identified just four doctoral theses that examined the pseds whereas a search for theses addressing equality identified 3944. However, none of these four theses was intended to address the gaps in the research identified below (Crofts, 2013, Effiom, 2011, William John Steven, 2009, Bashford, 2008).

This previous research into the equality duties provides important analyses of the pseds’ purpose, structure and frameworks as well as important insights into the views of lawyers, public bodies, voluntary and community organisations (VCOs) and others about

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10 The search terms used were ‘public sector equality duty’, ‘equality duty’ and variations on these terms. EThOS is the UK’s national thesis service, it aims to maximise the visibility and availability of the UK’s doctoral research theses. As at June 2015, it held approximately 400,000 records relating to theses awarded by over 120 institutions. Records are held for all UK PhD-awarding institutions, but as yet not all records for all institutions are held. 3000 new records are added each month ETHOS. 2015. About EThOS [Online]. Available: http://ethos.bl.uk/About.do [Accessed 14 June 2015].

11 Two of these theses, written respectively by Crofts and Effiom, used a case study approach to look at the impact of the PSED on Higher Education and the implementation of the PSED in a local authority. Crofts focused on race and disability equality and Effiom on disability equality. Steven focused on the Gender Equality Duty whilst Bashford examined organisational changes following the introduction of the Race Relations (Amendment) Act 2000.
the value of the pseds and associated challenges. However, the research provides a limited analysis of: the psed equality aims; public accountability and the pseds; legal empowerment and the pseds; the duties as legal tools; and psed JR judgments. Government commissioned or led reviews and lawyers’ assessments of the equality duties and associated JR cases offer important secondary research resources. Issues, that warrant further research, include the purpose, content and structure of the pseds and the associated regulatory and enforcement frameworks. In terms of gaps, limited integrated and focused research has been published on the justiciability of the duties and the pseds as tools for facilitating public accountability. The literature review undertaken indicates that the body of knowledge would be enhanced by an examination of the significance of roles played by cause lawyers, legal empowerment and community activism in operationalising the duties as tools for promoting public accountability.

Research methodology, research methods and ethical considerations
This is a qualitative study which utilises a number of research methods including primary research, secondary research, doctrinal analysis, document analysis, case analysis, case studies and participant observation. A database was designed to support the research programme and analysis. A number of primary and secondary research resources have been drawn together for this study including: parliamentary debates and statements recorded in Hansard; assessments of the pseds, and psed judgments, by leading public law and equalities academics, lawyers and other legal commentators; and psed JR judgments. Over two hundred psed JR judgments, handed down between April 2001 and July 2014, have been identified including 136 substantive race and/or disability psed cases.\(^{12}\) 136 substantive race and disability cases have been analysed for this study. The analysis includes: decisions at first instance; appeals and appeal outcomes; psed principles; important psed judgments; the involvement of lawyers, legal firms and chambers; the involvement of VCOs and the CRE, DRC and EHRC as third party interveners; and the outcomes for claimants’ JR psed claims by reference to a number of considerations.

\(^{12}\) This includes first instance cases as well as appeals heard by the Court of Appeal, the Appellate Committee of the House of Lords or the Supreme Court.
As part of the development and design of the research framework, consideration was given to the University’s Research Ethics Framework, the British Sociological Association’s statement on ethical principles, King’s College London’s Equality and Ethics statement, guidance on equality and ethical consideration (King’s College London and Social Care Workforce Research Unit, Market Research Society, 2006, Social Research Association, 2005, British Sociological Association, 2004). Consideration was also given to relevant legal enactments, in particular the Data Protection Act 1998 and the Freedom of Information Act 2000. Assessments were undertaken to ensure compliance with legislative requirements, ethical requirements and good practice. No unresolved ethical issues were identified and relevant information is incorporated in the methodology chapter.

**Making a unique contribution to the literature**

A contribution to the body of knowledge has been made by: assessing and identifying gaps in the research into the pseds; and building on previous research into the pseds. Fredman (2009: 13, 178, 2005: 4-6), Hepple (2011: 127, 2010b: 13, 18, 21) and O’Cinneide (2004: 43-48) proposed that positive legal duties could be transformative in addressing institutional discrimination and advancing equality. They, and others, have described the pseds as positive duties and posit that anti-discrimination legislation has had a limited impact on institutional discrimination and advancing substantive equality (Fredman, 2005: 2-4, 2004: 7). Scheingold’s theory of the Politics of Rights (2004) challenged assumptions that legal provisions or legal action on their own can achieve social justice. Scheingold, Sarat and others also contend that cause lawyers and legal empowerment have played, and can play, important roles in advancing social justice objectives (Rahman, 2012, Waterstone et al., 2012, Ziegler, 2010, Scheingold, 2004). In relation to public accountability Bovens, Scott and others have proposed that effective public and legal accountability requires public bodies to explain and justify their actions, be available to be questioned and challenged by others (e.g. individuals and communities) and face the consequences of any significant public accountability failings (Bovens et al., 2014, Bovens, 2008, Bovens, 2007, Bovens, 2006, Bovens, 2005, Scott, 2000).
Key conceptualisations of, and theories in relation to, public accountability, positive equality duties, progressive equality laws, cause lawyers and legal empowerment have been examined. A conceptual and analytical framework has been developed for assessing the purpose of the pseds and their impact as legal tools for holding public bodies to account. This analytical framework builds on: Bovens’ and Scott’s concepts of public accountability; Fredman’s, O’Cinneide’s and Hepple’s conceptualisations of positive equality duties; Scheingold’s theories of the Myth of Rights and the Politics of Rights; and Scheingold’s theories in relation to cause lawyering and legal empowerment. A narrative socio-political assessment has been provided that informs our understanding of the role and purpose of the pseds and the place of these duties within broader developments in the legislative and socio-political spheres. This narrative assessment, and the analytical framework created, inform this study’s examination of: the pseds; the 136 substantive race and/or disability psed judgments identified for this study; and the relevance of cause lawyering, community activism and legal empowerment in operationalising the pseds. Key elements of this assessment focus on how cause lawyers and community activists have used JR, and key psed JR judgments, to challenge institutional discrimination, advance race and disability equality and promote public accountability.

Organisation of this thesis
This dissertation is organised into eight chapters and the bibliography. Eight appendices have been provided to support this thesis.

Chapter 2 – Literature review, public law, key terms, concepts and theories
This chapter identifies central conceptual and theoretical frameworks and explains the rationale for focusing on the key authors selected. The central conceptual and theoretical frameworks are: public accountability, the limitations of public law, JR and justiciability; institutional race and disability discrimination, the social model of disability, the limitations of anti-discrimination laws; positive equality duties; Scheingold’s theories of the Myth of Rights and the Politics of Rights; and cause lawyers, community activism and legal empowerment. These concepts and theories have informed the development of a conceptual and analytical framework to support the analysis of the duties and JR cases.
Chapter 3 - Research questions, methodology, methods, ethics, legalities and equalities

The methodological approach and the rationale for the focus on race and disability equality pseds are explained. The rationale for the adoption of the qualitative research methods selected, and how these methods have been deployed, are also explained. The conceptual and analytical framework developed, for assessing both the pseds and psed JR judgments, is described. The rationale is advanced behind the development of two interrelated research questions. The two interrelated research questions are: 1) Have the race and disability equality duties been effective positive legal duties and legal public accountability tools? 2) Does Scheingold’s theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality?

Chapter 4 – The call for, and development of, race and disability equality duties in the context of wider legislative and socio-political developments [1963 to 2014]

This chapter provides a rich socio-political narrative assessment of the UK’s anti-discrimination and equalities race and disability legislative regimes. It reflects on, and analyses, key developments in the UK’s race and disability anti-discrimination regimes, the equalities legislative regimes and the associated socio-political spheres. This chapter also assesses the development of the race and disability pseds as positive legal duties and public accountability tools. In the socio-political sphere, particular consideration has been given to the impact of agendas in relation to anti-terrorism, austerity and small government, cohesion and integration, equality, immigration and institutional discrimination on the pseds.

Chapter 5 – The public sector equality duties – a comparative assessment

A doctrinal and socio-legal evaluation is provided which examines the form, structure, content and purpose of the general race and disability duties, the associated SEDs and other key elements of the associated regulatory and enforcement frameworks. This evaluation draws on the analytical framework created, the socio-political assessment provided in chapter 4 and a range of source materials. Relevant primary and secondary source materials drawn on include primary legislation, statutory regulations, Hansard, legislative explanatory notes as well as statutory guidance published by the CRE, DRC,
Government Equalities Office (GEO) and EHRC. Comparative assessments, as at the end of July 2014, have been provided of the psed regimes that assess the duties as positive equality duties and public accountability tools.

Chapter 6 – Justiciability, enforcement and the equality duties
This chapter explains the relevance of the concept of justiciability for this study and the purpose of JR. It briefly examines the nature, and limitations, of the legal redress provided by way of JR in relation to the general race, disability and pseds. How JR developed as a legal tool, in relation to pseds between 2001 and July 2014, is examined by reference to assessments by key legal commentators and important JR cases. An analysis of the outcomes of reported substantive race and disability psed JR cases handed down between 2001 and July 2014 has been provided. The focus then moves onto an analysis of the pseds as tools for addressing institutional racism and advancing substantive equality. Important changes made to the JR regime have been identified and the impact on the PSED as a legal tool evaluated.

Chapter 7 - Cause lawyers, legal empowerment and community activism
Drawing on Scheingold’s theories of the Myth of Rights and the Politics of Rights, evidence is presented that cause lawyers, legal empowerment and community activists have played key roles in the development and deployment of the race and disability pseds and in promoting the pseds as positive equality duties and public legal accountability tools. This evidence draws on an analysis of legal firms, chambers and barristers that have represented claimants in substantive race and/or disability psed JR judgments handed down between 2001 and July 2014. An analysis of third party interventions by the CRE, DRC, EHRC, VCOs and others, facilitates an evaluation of the importance for claimants of third party interventions. Case studies have been used to examine the nature of the legal empowerment and campaigning roles played by cause lawyers and VCOs working in partnership.

Chapter 8 – Findings, the research questions and recommendations
The analyses provided in chapters 2 to 7 and the conclusions in chapters 4, 5, 6 and 7 inform the findings and recommendations provided in this chapter. The findings and
recommendations reflect on the conceptual and theoretical framework developed for this dissertation to comment on whether, and, if so how, the pseds, and their associated regulatory frameworks, have provided legal tools that have advanced the ability of individuals and organisations to hold public bodies to account in relation to race and/or disability equality. The recommendations consider what action should be considered in light of this research.

**The appendices:**

Appendix 1: The general RED, DED and PSED.

Appendix 2: Primary legislation [1976 – 2014] - the RED, DED, the PSED, enforcement and compliance provisions.

Appendix 3: Secondary legislation - the RED, DED, the PSED, enforcement, compliance and relevant statutory regulations, statutory orders and statutory codes of practice [1976 – 2014].

Appendix 4: The Supreme Court’s assessment of the requirements of the PSED as at May 2015.

Appendix 5: Analysis of outcomes for claimants in the judgments listed in appendix 8.

Appendix 6: Analysis of third party interventions and legal representation in the substantive race and/or disability equality duty cases listed in appendix 8.

Appendix 7: Key solicitors, legal chambers and other legal representatives listed in Appendix 8 and their status as cause lawyers.

Appendix 8: The analysis of substantive race and disability public sector equality duty JR and equivalent cases in England.
Chapter 2: Literature review, key terms, concepts and theories

Introduction
Given this study’s focus on equality, the law and public accountability, literature that addresses equality, the law and public accountability was a logical starting point. This literature review draws on the work of leading academics and legal commentators; it investigates concepts drawn from a number of separate but related academic disciplines and sub-disciplines and identifies important areas of interface and difference relevant to the public sector equality duties (pseds). The relevance of public accountability and public law concepts and models are assessed first. The focus then moves onto justiciability, JR and its limitations. The relevance of legal empowerment, community activism and cause lawyers have then been evaluated drawing on Scheingold’s theories of the Myth of Rights and the Politics of Rights. The chapter concludes with an assessment of the relevance of conceptualisations of institutional racism, the social model of disability, substantive equality, positive equality duties and important limitations of anti-discrimination legislation. Power, access to power, disempowerment and empowerment have been identified as cross-cutting themes. This literature review has informed the development of the research methodology and the research methods for this study described in the next chapter.

Public accountability
Conceptions of public accountability, and particularly the concept of legal accountability, are central to this study of the pseds as public accountability tools. Those who are disempowered are often unable to hold those in power to account and experiences of poverty, inequality and disempowerment are often linked (Sen, 1999, DFID, 2008: 1). A basic definition of accountability (Scott, 2000: 40) is that it imposes certain duties, requirements and obligations: a duty to give account; a requirement to reveal and explain actions; and a requirement to justify what has been done and how responsibilities, financial or other, have been discharged (Scott, 2000: 40). Taking an international

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13 Academic disciplines may be defined as scholarly communities that: ‘specify which phenomena to study, advance certain central concepts and organizing theories, embrace certain methods of investigation, provide forums for sharing research and insights.’ REPKO, A. F. 2012. Interdisciplinary Research: process and theory, 2nd ed. USA, Sage.
perspective, the World Bank’s definition echoed Scott, defining accountability as ‘the obligation of power-holders to account for or take responsibility for their actions’ (World Bank, 2006: Chapter 2, p.5). Bovens augmented these definitions of accountability, proposing that public accountability focuses on matters in, or about, the public domain and/or matters of public interest (Bovens, 2005: 9-10, Bovens et al., 2014: Kindle locations 396-397). Matters of public concern include spending public funds, exercising public powers and the conduct of public bodies (Bovens et al., 2014: Kindle Locations 391-392). The concept of public accountability raises important questions about how to balance autonomy, given to those exercising public functions and powers, ‘with appropriate control’ (Scott, 2000: 38). Expanding on the issue of control, Bovens (2007: 182) argued that democracy itself could be undermined if those in power cannot be held accountable in public for their acts, omissions, decisions, policies and expenditure.

Organisational accountability incorporates internal account giving requirements, placed for example on public sector managers, and it usually occurs within a hierarchical structure. Such internal account giving requirements are not true forms of public accountability because they are not usually accessible to the public at large (Bovens, 2007: 187). However, effective organisational or internal accountability arrangements are prerequisites for, and essential to, facilitating external public accountability (Bovens, 2007: 187). In order to identify the most relevant forms of public accountability for this study, the meaning of different forms of public accountability are considered briefly. Political, professional, legal, administrative and social accountability have been identified as forms of public or external accountability. Such external or public accountability may open up an organisation to some form of external challenge (Bovens, 2007: 187-188, Bovens, 2005: 16).

Political accountability focuses on elected representatives, political parties and managers’ responsibilities for accounting to political forums and elected representatives. Professional accountability recognises that public sector managers may have accountability relationships with professional bodies and may be subject to professional disciplinary tribunals or similar bodies. Administrative accountability occurs where quasi-legal forums (e.g. auditors, inspectors or inspectorates and controllers) ‘exercise
independent and external administrative and financial oversight and control’ (Bovens, 2007: 187-188). Legal accountability operates where: public managers can be ‘summoned by courts to account for their own acts or on behalf of the agency as a whole’; and specific responsibilities have been formally or legally placed on authorities (Bovens, 2007: 187-188). Legal accountability has been described as the most unambiguous form of accountability because it is based on detailed legal standards, prescribed by civil, penal, or administrative statutes, or precedent (Bovens, 2005: 15). Finally, social accountability focuses on interest groups, charities and other stakeholders; it has been defined as the mechanisms and actions, apart from voting, that ‘citizens can use to hold the State to account’, and actions to ‘promote or facilitate these efforts’ by ‘government, civil society, media and other societal actors’ (World Bank, 2006: Chapter 2, p.6). Such accountability occurs where public managers feel ‘obliged’ to account for their performance to the public or at least to ‘civil interest groups, charities, and associations of clients’ (Bovens, 2005: 16). This study examines the public sector equality duty (psed) regimes by reference to both legal and social accountability models.

Scott (2000: 41) posed three sets of accountability questions: who is accountable, to whom and for what? Bovens and others (2014: Kindle 470-471) added questions about standards, and why there is accountability, and created an expanded list of five accountability questions: who is accountable, to whom, for what, by which standards, and why? Accountability is identified as a relational concept, ‘linking those who owe an account and those to whom it is owed’ and ‘agents and others for whom they perform tasks or who are affected by the tasks they perform.’ An accountability relationship may be said to exist if seven conditions are met: first, ‘there is a relationship between an actor and a forum’; second, an obligation is placed on the actor; third and fourth, there is an obligation to ‘explain and justify’ the conduct; fifth, the forum has the ability to pose questions and there is the possibility for debating judgements rather than ‘a monologue without engagement’ (Bovens, 2007: 185, 2005: 9); and sixth and seventh, the forum can pass judgement and the actor can be sanctioned. Where substantive accountability standards exist, these may enable the accountability forums to objectively judge the conduct of the accountable actor (Bovens et al., 2014: Kindle locations 514-516). These accountability forums may include regulatory bodies, courts, clients, interest groups, third
parties and other stakeholders (Bovens et al., 2014: Kindle Location 502). The conduct examined could be financial, procedural or related to communication requirements (2014: Kindle locations 391-392). Examples of such conduct include the way money has been spent, the content of policy decisions and/or compliance with legal requirements. Transparency and openness are key so account giving must be open to the general public and widely available (Bovens, 2005: 9). Furthermore, the forum must broadcast its judgment to the general public and account giving must not occur discretely or behind closed doors (Bovens, 2005: 9).

Accountability channels may be upwards, horizontal, downwards, vertical or diagonal (Scott, 2000: 41, Bovens, 2005: 14). Upwards accountability occurs where the account must be rendered to a higher authority. Horizontal accountability occurs where a broadly parallel institution can require another institution to provide answers or it has the power to issue sanctions (DFID, 2008: 8). Downward accountability occurs where a higher level body renders an account to lower level institutions or groups such as consumers (Scott, 2000: 42). Vertical accountability, a form of downward accountability, refers to citizens holding states to account through ‘elections and other formal processes, or through lobbying or mass mobilisations’ (DFID, 2008: 7). According to Scott, public lawyers have tended to view downwards accountability mechanisms as inadequate (2000: 42). Diagonal accountability occurs where ordinary people directly engage ‘with service providers and state budgeting, auditing and other oversight processes’ which have traditionally been the domain of state actors and seek fair outcomes as opposed to simple procedural correctness (DFID, 2008: 8).[^14]

The pseds engage political, professional, organisational, legal, administrative and social accountability. However, given the emphasis on the pseds as legal tools and the ability of individuals, interest groups and others to use the pseds, this study focuses on legal and social accountability. The analytical framework developed investigates whether accountable actors and accountable forums can be identified in relation to the pseds and psed judgments. This study also examines if, and if so how, the pseds enabled external accountability.

[^14]: Diagonal accountability combines elements of vertical and horizontal accountability.
parties to question conduct and required accountability standards to be set, by which the performance of accountable actors could be judged. It also examines whether accountable actors were required to provide explanations and justifications and whether the pseds enabled judicial forums to pass judgments and issue sanctions. This examination of the pseds also engages the concepts of horizontal and vertical accountability. The form, and effectiveness, of the horizontal accountability mechanisms to the judiciary, the CRE, DRC and EHRC are examined in this study. The form, and effectiveness, of the pseds’ vertical accountability arrangements to local communities, their representatives and others have also been examined. The public accountability models and frameworks discussed in this chapter have informed the methodology and research methods designed for this study.

Public law
The pseds are part of the public law framework for England, Scotland and Wales; the duties have been used to challenge government decisions, acts and inactions at national, regional and local level (McColgan, 2013b, McColgan, 2013a). Public law serves as a ‘control mechanism’ placing boundaries, and restrictions, on the actions and/or decisions that governmental institutions can take (Syrett, 2011: 5). JR is a legal procedure that allows individuals, businesses and others to challenge the lawfulness of decisions made by Ministers, Government Departments, local authorities and other public bodies (Horne and Berman, 2006: 8). Claimants may use JR to challenge alleged general psed breaches but only if the courts deem that they have a sufficient interest in the matter. In England, before 2008, responsibility for hearing first instance JR cases normally rested with the High Court (HM Courts and Tribunals Service, 2015). Since 2008, certain Upper Tribunals have had jurisdiction in relation to JR cases subject to a number of conditions being met (Manning et al., 2013: 554). If leave to appeal was given, appeals were heard by the

15 The Queen’s Bench Division, Chancery Division and Family Division are the three divisions of the High Court. The Administrative Court is one of four courts within the Queen’s Bench Division. HM COURTS AND TRIBUNALS SERVICE. 2014b. The Queen’s Bench Guide: A Guide to the working practices of the Queen’s Bench Division within the Royal Courts of Justice [Online]. Available: https://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/guidance [Accessed 1 August 2014].
16 The circumstances in which an Upper Tribunal has jurisdiction to hear a JR case are set out under section 18 of the Tribunals, Courts and Enforcement Act 2007 which amended section 31, and introduced section 31a, of the Senior Courts Act 1981.
relevant superior court.\textsuperscript{17} The rules of judicial precedent generally mean that a judge, sitting in a lower court, must abide by any binding precedents made by a higher court.\textsuperscript{18}

Lord Bingham, a former Lord Chief Justice of England and Wales and former senior Law Lord, contended that decisions of public officials and public bodies exercising their powers ‘should be based on stated criteria’ and it should be possible to legally challenge these decisions (Bingham, 2011: 50). However such a challenge was considered ‘unlikely to succeed if the decision was one legally and reasonably open to the decision-maker’ (Bingham, 2011: 50). Importantly, Lord Bingham also contended that mechanisms should be available to resolve disputes without prohibitive costs or inordinate delay (Bingham, 2011: 85). The issues of costs and delay are considered in the review of the accessibility of the redress framework provided by JR.

Administrative law can be regarded as providing the legal framework within which ‘public bodies and public officials perform their functions’ (Mcleod, 2006: 8). Acts of Parliament, statutory regulations and other administrative legal provisions impose legal duties on the State and other public bodies and enable these bodies to exercise designated legal powers. However, whilst these bodies may expect to operate without undue interference, they are also expected to act within the limits of these legal duties and powers. Barnett has argued that the principle of non-interference has to be set against ‘the demands of individual justice and fairness’ (Barnett, 2004: 708). These demands mean that where rights are adversely affected or individuals have complaints, procedures must exist to enable decisions to be challenged in the courts.

\textsuperscript{17} Following the implementation of the Constitutional Reform Act 2005, the Appellate Committee of the House of Lords was replaced by the UK Supreme Court. Appeals of High Court or Upper Tribunal decisions being heard by the Court of Appeal. Appeals of Court of Appeal decisions being heard by the Supreme Court or, before its creation, by the Appellate Committee of the House of Lords.

\textsuperscript{18} Precedent refers to a ‘judgment or decision of a court... used as an authority for reaching the same decision in subsequent cases. In English law, judgments and decisions can represent authoritative precedent (which is generally binding and must be followed) or persuasive precedent (which need not be followed).’ The part of the judgment that represents the legal reasoning (or ratio decidendi) of a case is binding, but only if the legal reasoning is from a superior court.  \textit{LAW, J. 2015. Oxford Dictionary of Law, 8th ed. Oxford, Oxford University Press.}
By virtue of section 2 of the Human Rights Act 1998, UK courts are obliged to consider, and take account of, relevant human rights judgments and decisions handed down by the European Court of Human Rights (ECtHR). Section three of the Human Rights Act 1998 requires courts, as far as is possible, to read, and give effect to, primary and subordinate legislation in a way which is compatible with the Convention rights provided under the ECHR. EU laws play an increasingly important role in relation to the UK’s public law regime and there are interfaces between the pseds, the Human Rights Act 1998, the European Convention on Human Rights, EU law and UN Directives. However, the focus in this study is on the pseds as provisions in UK law. Whilst further research is warranted to examine these interfaces – between the pseds, the Human Rights Act 1998, the European Convention on Human Rights, EU law and UN Directives – that research is beyond the scope of this study.

Justiciability, JR and JR’s limitations

The concept of justiciability is critical to this examination of the pseds. One definition of justiciability is that it should be regarded as ‘the judges’ view of the suitability of the subject matter to be judicially reviewed’ (Barnett, 2013: 581). Issues of justiciability have been examined through the lens of JR. JR is ‘the means by which the courts control the exercise of governmental power’ to ensure that such power is exercised lawfully and that public bodies have not acted beyond their powers (Barnett, 2004: 707, Law and Martin, 2009:306). JR, the primary legal means by which psed challenges can be made, allows

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19 Section 2 of the Human Rights Act 1998: (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any— (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.’ The ECtHR, an international court set up in 1959, ‘rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights’

20 Interpretation of legislation. (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. (2)This section— (a ) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.’ Human Rights Act 1998, section 3.

21 Examples of interfaces include: in many of the judgments examined, claimants also made claims under the Human Rights Act 1998; some claimants also referenced the EU Directives; and some made reference to UN Directives.
those with sufficient interest in the case, to ask the Administrative Court to consider whether a public body has exercised its powers in a lawful manner (Mcleod, 2006:126). It is about the legality of the decisions made by public bodies not the merits of a particular decision. There are three broad heads under which a claim for JR may be made: illegality, irrationality and procedural impropriety.\textsuperscript{22} These three broad heads encompass particular grounds such as: whether an Act of Parliament has been correctly interpreted; whether there has been a breach of European Union law; whether there has been a breach of a Convention right under the Human Rights Act; whether any discretion is exercised lawfully; and whether a public body has acted fairly (Mcleod, 2006:126-127, Barnett, 2004: 707-709).

If a JR claim is successful, according to the Civil Procedure Rules (CPR 54.2 & CPR 54.3), a court’s remedies are more limited than in a civil action (Citizen's Advice, 2015).\textsuperscript{23} Nevertheless, important public law remedies include: a quashing order; a mandatory order; a prohibiting order; a declaration; or an injunction. However, a court also has the power to decide to offer no remedy (CPR 54.2 & CPR 54.3). Where there are human rights breaches, a court has the power to offer an award for damages.\textsuperscript{24} Damages may also available in non-Human Rights Act claims but only if they would be available had there been a civil law claim for example for a claim for negligence. By the very nature of the JR regime, JR psed judgments look back at the decisions taken or not taken by those exercising public functions. Nonetheless, JR judgments have the potential to impact on future court judgments and the future behaviour and decisions of public bodies. For example, binding or persuasive precedents may influence future legal judgments and the behaviour of public bodies subject to the pseds.

\textsuperscript{22} Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374, 410).
\textsuperscript{23} For example, if an employment discrimination claim is considered by an employment tribunal (ET), if the ET upholds the claim, it has the power to award compensation. In such cases, there is no cap on the financial award that can be made because a central purpose of the provisions in relation to compensation or damages is to put the claimant back in the position that they would have been in but for the act of discrimination.
\textsuperscript{24} Courts may award damages or order payment of compensation however there are limitations on this power including a requirement to take account of guidance set by the ECtHR (Section 8, Human Rights Act 1998).
Feldman (1990: 2, 3, 4) argued that JR raised important accountability issues including questions about: accountability to Parliament; accountability under the law; and political accountability. Harlow and Rawlings (2009: 127) suggested that the courts: have been cautious about exercising their powers to strike down regulations; have been unwilling to create economic or social rights; and have preferred not to address resource allocation questions. Other areas identified as less likely to be considered to be justiciable by judges included issues of national security and matters of high policy (Barnett, 2013: 581). JR has been identified as posing a range of significant challenges in relation to access to justice. Identified barriers include lack of eligibility for legal aid, lack of costs protection and rationed access to JR by the courts; wider access barriers include technical jargon, difficulty securing advice and the uneven geographical distribution of access to specialist legal advice (Harlow and Rawlings, 2009: 714-717). Access to justice issues related to the pseds and JR are examined in subsequent chapters of this thesis.

**Legal empowerment, the Politics of Rights, community activism and cause lawyers**

Legal empowerment has been defined as ‘strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community’; and ‘ensuring that law is not confined to books or courtrooms, but rather is available and meaningful to ordinary people’ (Open Society Foundation, 2014). Poverty, discrimination, inequality, lack of voice and inadequate access to power are linked (EHRC, 2010b: 42-47). It has long been argued that there must be ‘mechanisms for the effective recognition and representation of the distinct voices and perspectives of those groups who are disadvantaged or oppressed’ (Smith and Stephenson, 2005: 3). Community activism involves campaigning to bring about political or social change. Some political theorists have argued that group representation is essential to the achievement of social justice (Smith and Stephenson, 2005: 1). Community and legal empowerment are regarded as key development tools to address the needs of the world’s poor and marginalised communities (2008, Secretary-General, 2009). The High Level Commission on Legal Empowerment of the Poor (CLEP) and the UN Development Programme argued that the

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25 In this case, rationing access refers to the fact that it is for the courts to determine whether a claimant will be given leave to proceed with a JR claim; access to JR is therefore rationed by the courts.
law should be a tool for the empowerment and betterment of the fortunes of poor and/or marginalised communities. However, they also acknowledged that many poor communities ‘only experience law and law enforcement as instruments of repression’ (2007: 1).

According to the UN Secretary General (2009: 2), there is a direct relationship between legal empowerment and legal remedies that recognise that everyone has to have access to ‘justice, including due process’ and that remedies and action must be taken to eliminate discrimination. The CLEP (2007: 1) argued that the law can be a source of opportunities, expanding access to economic benefits, ensuring government accountability and effecting broader social change. Other international bodies, both governmental and non-governmental, engaged in legal empowerment activities have drawn on this work and developed a range of tools to legally empower communities. The International Criminal Court (ICC) developed a broad approach to the concept of legal empowerment and legal tools which included the identification of, and guidance on, legislative provisions as well as a much broader range of resources designed to assist those wishing to be involved in legal cases (2011). As part of its Legal Tools Project, the ICC provided users with legal information, legal digests and legal reference documents, an electronic library, a database and resources to work more effectively with core international criminal cases. The UK’s Anti-Trafficking Alliance adopted a narrower approach to the concept of legal tools. It provided a website that identified key international and national primary legislation related to anti-trafficking activities (Anti Trafficking Alliance, 2011). The concept of legal empowerment is an internationally recognised principle which incorporates a range of potential activities and tools which can make an important contribution to addressing the legal disadvantages faced by the poor and disempowered. Examples of legal empowerment programmes in relation to the pseds are examined in chapter 7.

Scheingold’s theory of the Politics of Rights (2004), first published in 1974, explored the limitations of law, legal rights and legal remedies in achieving social justice. Scheingold contended that legal processes may have a limited ability to neutralise power imbalances and that courts may not be immune from political pressures that may undermine legal
Scheingold’s theory of the Myth of Rights challenged the assumption of ‘a direct link between litigation, rights, legal remedies and social change’ (2004: 7). This theory argued that one cannot count on judges to ‘formulate a right fit to all worthwhile social goals’ (2004: 5). Even if a right does exist, it may be incorrect to assume that there is a legal remedy to a social injustice’ (2004: 5). The assumption that ‘litigation can invoke a declaration of rights from court’ was also challenged as were assumptions that such a declaration could ensure the realisation of such rights and meaningful change (2004: 5). The theory of the Myth of Rights recognised that individual disputes may be symptomatic of underlying social struggles, that not all elements of a political conflict may be justiciable and that fundamental issues may not be justiciable (Scheingold, 2004: 6-8). Furthermore, legal challenges tended to reduce political conflicts to disputes between two parties leading to a narrow focus on a legal conflict between the litigants (Scheingold, 2004: 4-5). The theory also asserted that courts’ coercive powers are limited so winning a legal case might maintain the status quo but not resolve more fundamental issues (Scheingold, 2004: 6-8). The cost of litigation and the potential to drive a wedge between political allies could also undermine building alliances to address broader political problems (Scheingold, 2004: 4-5). Furthermore, litigation might be burdensome for a political organisation and be unfair in so far as those with resources might be more likely to secure success (2004: 6, 126). The theory of the Myth of Rights therefore challenged the assumption that judicial success would result in social justice goals being achieved (Scheingold, 2004: 7).

Scheingold’s Theory of the Politics of Rights argued that whilst direct legal successes in court may be limited, litigation and legal rights can be used as political tools (Scheingold,
The Theory of the Politics of Rights argued that the law, as a political instrument, and litigation can be used as a ‘form of pressure group activity’ (Scheingold, 2004: 95-96). However, to be successful, there needs to be a political strategy, political action and political mobilisation (Scheingold, 2004: 95-96). Three themes – activation, organisation and realignment – are at the heart of this theory (2004: 131). Scheingold argued that ‘perceptions of entitlement associated with rights’ are important and can be drawn on to prompt and ‘nurture political mobilisation’ (2004: 131). The issue of motivating and mobilising the oppressed, central to this theory, involves activating, what Scheingold calls, ‘a quiescent citizenry’ and the political organisation of groups into ‘effective political units’ (2004: 131). Scheingold also argued that political mobilisation can ‘build support for interests that have been excluded’ and promote a realignment of political forces (2004: 131). Concepts of community activism and group representation are closely linked to the concepts of community and legal empowerment. In Scheingold’s Theory of the Politics of Rights, activist lawyers, later called cause lawyers, have key roles to play including as legal strategists, litigators and as players in political movements (Scheingold, 2004: 141-143). The analyses provided by the Myth and the Politics of Rights, and associated key themes, are picked up in subsequent chapters.

According to Shdaimah, the phrase ‘cause lawyering’ was coined by Sarat and Scheingold (2005: 1). A cause lawyer, a public interest lawyer or social lawyer, is dedicated to using the law for the promotion of social change. Cause lawyers have been defined as lawyers who ‘espouse ends that are above and beyond the provision of legal services’ and who ‘explicitly claim to use the law in the service of causes’ (Shdaimah, 2005: 7, 11). Whilst the most of the literature on cause lawyers explores their role in pursuing social justice goals designed to tackle social inequalities, some academics have researched cause lawyering in the pursuit of ‘conservative causes’ (Hensley, 2009, Heinz et al., 2003). This study focuses on Scheingold’s theories of the Myth of Rights and the Politics of Rights and on cause lawyers committed to secure social justice objectives. Scheingold argued that cause

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26 ‘Activist lawyers share a concern for public policy problems and a willingness to use their legal skills in policy-relevant ways.’ SCHEINGOLD, S. A. 2004. The Politics of Rights: Lawyers, Public Policy, and Political Change 2nd ed. USA.

27 Key themes include the limitations of the law and legal action, the importance of political engagement, community activism and the need to address issues of power.
lawyers may view litigation as one tool of a number of tools which may include ‘leveraging the threat of litigation, lobbying’ and, where appropriate, ‘political mobilization’ (2004: xxxvii-xxxix). Scheingold also argued that his research indicated that many cause lawyers prioritised litigation over mobilising social movements (2004: xxxvii-xxxix). Where there are well-organised and well-established movements, it is suggested that they are likely to expect a long-term commitment from cause lawyers whereas ad hoc movements may simply feel that they have no choice but to accept a cause lawyer on whatever terms offered by that lawyer (Sarat and Scheingold, 2006: 3). The concept of cause lawyering, or pursuing legal cases with an underlying social cause agenda, is closely linked to the concept of litigation which raises matters of public interest. Cummings and Rhodes (2009: 611) argued that the Myth and Politics of Rights failed to adequately recognise the contributions made by cause lawyers involved in public interest litigation (2009). They argued that empirical research suggested that cause lawyers often viewed their work as complementing and contributing to political mobilization (Cummings and Rhodes, 2009: 611).

Questions about how to tackle exclusion, oppression, discrimination, disengagement and mobilise disenfranchised people are intertwined with concepts of legal empowerment, social justice and community activism. The roles played by cause lawyers, community activism and legal empowerment are examined. This study also assesses whether the pseds have enabled cause lawyers and claimants to make successful JR claims on the grounds of failures by those exercising public functions in relation to: institutional discrimination; and/or advancing substantive equality. The future of cause lawyers, community activism and legal empowerment are considered in subsequent chapters; this evaluation considers legislative changes made to the JR regime under the Criminal Justice and Courts Act 2015.

**Institutional racism, the social model of disability and structural inequalities**

The importance of, and need to tackle, institutional racism was the subject of academic debate as far back as the 1960s (Turé and Hamilton, 1992: 5, 56). Ten years before the publication of the Stephen Lawrence Inquiry, Solomos identified a mismatch between

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28 Such litigation is commonly called public interest litigation.
successive governments’ publicly stated objectives and the limited impact on reducing institutional racism and exclusion (1989: 3). Solomos called for an expansion of the legislative definitions of discrimination to ‘include institutionalised or unintended forms of discrimination’ (1989: 6). There were also calls for: more intervention from central government; coherent and coordinated policy over ‘a large field of influence’ involving many ‘government departments and local authorities’ and others; action by existing or future statutory bodies; and action by ‘individuals in positions of responsibility and influence’ (Solomos, 1989: 7).

The Stephen Lawrence Inquiry noted the inherent challenges associated with any definition of racism or institutional racism. It defined racism as consisting of ‘conduct or words or practices which advantage or disadvantage people because of their colour, culture or ethnic origin’ (1999c: 321, para. 46.25). It noted that eradicating racism would require ‘specific and co-ordinated action both within the agencies themselves and by society at large’ (1999c: 33, 6.54). Dr Robin Oakley and Dr Benjamin Bowling argued that the term institutional racism should be ‘understood to refer to the way institutions may systematically treat or tend to treat people differently in respect of race’ (1999c: 27, 6.32).

Reflecting on these, and other submissions, the Inquiry accepted that institutional racism is the process affecting ‘people from ethnic minorities’ through which they are ‘systematically discriminated against by a range of public and private bodies’ (1999c: 27, para. 6.33). The Inquiry defined institutional racism as consisting of a collective failure by an organisation to ‘provide an appropriate and professional service to people because of their colour, culture or ethnic origin’ (1999c: 321, 46.25). The Inquiry said that institutional discrimination could be detected in processes, attitudes and behaviour but such discrimination resulted from ‘unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people’ (1999c: 321, 46.25).

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29 Whilst Sir William MacPherson of Cluny was the chairperson of the Inquiry and the report is sometimes called the MacPherson Inquiry report, the Inquiry’s formal title was ‘The Stephen Lawrence Inquiry’.
The Stephen Lawrence Inquiry’s 1999 definition of institutional racism was accepted by the Government and by a wide range of public and civil society organisations and institutions; but it was not incorporated into the primary or secondary legislation. Moreover, as a concept, institutional racism was the subject of extensive debate and challenge from the outset (Rollock, 2009: 14-15). Some race equality campaigners argued that the definition was too narrow and failed to effectively differentiate between institutional acts of racism and individual acts of racism (Rollock, 2009: 14-15). Others, including some representatives of public bodies, rejected, and resented, the term and argued that it was unfair (Rollock, 2009: 14-15). Nevertheless, instead of a preoccupation with ‘establishing the intent to commit a racist act’, many race equality campaigners accepted that the concept had led to a greater focus on ‘institutional processes and the way they disadvantaged particular ethnic groups’ (Rollock, 2009: 14-15). Many race equality campaigners also accepted that the focus on institutional racism had encouraged a greater concentration on ‘achieving equitable outcomes for ethnic groups’ (Rollock, 2009: 14-15). The CRE supported, adopted and promoted the Lawrence Inquiry’s definition of institutional racism. Explicit links were made, in the CRE’s guidance on the Race Equality Duty (RED), between the RED and the need for action by public bodies to tackle institutional racism (2001: 5-6). The CRE’s non-statutory guidance advised public bodies, and others, that the RED: was a positive duty; gave statutory force to the Lawrence Inquiry’s recommendations; and introduced compulsory measures to replace voluntary measures to advance race equality (2001: 5-6). The CRE’s non-statutory guidance, to public bodies on the RED, advised that complying with the RED would make public authorities ‘more effective, efficient, transparent and accountable’; and would also assist them to ‘win the confidence and cooperation of the public they exist to serve, and on whom they depend for support’ (2001: 6).

It is important to note that the definitions of racism adopted by the Stephen Lawrence Inquiry, and in legislation, recognised that anyone, from any racial group, can face racial discrimination. However the Lawrence Inquiry’s definition of institutional racism, not incorporated in legislation, focused on the disadvantage, and exclusion, experienced by minority ethnic groups. A leading critical race theorist’s definition of racism referred to ‘any program or practice of discrimination, segregation, persecution, or mistreatment
based on membership in a race or ethnic group’ (Delgado and Stefancic, 2001: 154). Fredman argued that race should be regarded as a social construct that reflects ‘ideological attempts to legitimate domination’; and that it is ‘heavily based on social and historical context’ (Fredman, 2001a: 9-10). Fredman (2001a: 13) also argued that racism can be viewed as operating along three or more axes: ‘denigratory stereotyping, hatred, and violence’; ‘the cycle of disadvantage’; and ‘the negation and even obliteration of culture, religion or language.’ Cashmore’s 2004 definition referred to decisions and policies ‘on considerations of race for the purpose of subordinating a racial group and maintaining control over that group’ (Cashmore, 2004: 349). Fredman and others built on this work and argued that racism is not about ‘objective characteristics, but about relationships of domination and subordination’ and hatred (Fredman, 2011a: 51). Race, power and structures of domination are therefore inextricably linked. These intertwined issues of power, domination, structural inequalities, racism and racial discrimination in Britain have been explored extensively by many activists and race and critical race theorists (Gilroy, 1991, Small, 1994, Skellington and Morris, 1996, Blackstone et al., 1998, Runnymede Trust et al., 2000, Parekh, 2000). Common themes, identified by those authors, include the entrenched and systemic nature of racism, racism’s structural and institutional dimensions and the fact that anti-discrimination laws did not address deep rooted institutional racism or structural inequalities related to race.

Since the publication of the Stephen Lawrence Inquiry, academic discourses have continued to develop around the nature and extent of institutional racism and racism (Fredman, 2011a: 51, Delgado and Stefancic, 2010, Fredman, 2001b). However since 1999, the backlash against the concept of institutional racism has also grown. The language, and concept, of institutional racism have been subject to continued challenge and attacks – including by public institutions, the Conservative-led Coalition Government and even the chair of the EHRC (Phillips, 2009). Some supporters of the concept have also argued that there has been limited attention on issues of power, domination and the nature of institutional racism. This lack of focus having arisen partly because the

Lawrence Inquiry’s reference to ‘unintended racism’, in the definition of institutional racism, and partly because of the backlash against institutional racism as a concept (Rollock, 2009: 14-15). It has also been argued that inadequate progress has been made on the development of a shared understanding of what is required to address institutional racism (Rollock, 2009: 14-15). In subsequent chapters, consideration has been given to whether the race equality provisions in the pseds provided legal tools for challenging institutional racism.

The DRC adopted, and referred extensively to, the social model of disability from its formation in April 2000 until it ceased to exist in 2007. Between 2005 and 2007, the DRC also made extensive reference to the social model of disability in its statutory codes of practice and non-statutory guidance on the Disability Equality Duty (DED). However, as with institutional racism, there was no statutory definition of the social model in the legislation. However the assessment of Disability Equality Duty (DED), provided in chapter 5, examines whether the social model impacted on the DED’s construction; it concludes that the social model of disability did inform the shape of the DED and the associated statutory and non-statutory guidance published by the DRC.

The social model of disability drew on work published by the Union of the Physically Impaired Against Segregation (UPIAS) and the Disability Alliance in the 1970s (UPIAS and The Disability Alliance, 1977). The joint statement asserted that ‘disability is a situation, caused by social conditions’; this concept underpins definitions of the social model (UPIAS and The Disability Alliance, 1977: 4). The 1976 statement called for the elimination of the social conditions that cause disability (UPIAS and The Disability Alliance, 1977: 4). It also called for a co-ordinated approach to ‘incomes, mobility or institutions’, for disabled people to take ‘control over their own lives’ and for professionals and others to commit to ‘promoting such control by disabled people’ (UPIAS and The Disability Alliance, 1977: 4). Oliver built on this work to develop a new social theory of disability (1990: 11). Oliver’s theory was self-defined by disabled people and their needs, located in disabled people’s experiences and advocated self-organisation by disabled people (1990: 11). By 2000, Thomas had drawn further on the UPIAS statement, and associated work, and proposed that disability occurred when ‘aspects of contemporary social structure and practice
operate to disadvantage and exclude people with impairments’ by restricting their activity (Thomas, 2002: 43). Hughes argued that a medical approach, and the absence of a social construct, led disabled people to be confined, incarcerated, socially excluded, stripped of their social responsibilities and made dependent (2002: 58-59). The social model should be understood in terms of ‘the ways in which social structure excludes and oppresses people’ (Hughes, 2002: 59).

By 2006, Shakespeare had refined and advocated a more nuanced approach that neither reduced ‘disability to an individual medical problem’, nor neglected ‘the predicament of bodily limitation and difference’ (2006: 2). Shakespeare also argued that whilst disabled people faced discrimination analogous to racism or sexism there were important differences because ‘comparatively few restrictions experienced by people with impairment’ were ‘wholly social in origin’ (Shakespeare, 2006: 40-41). The DRC adopted, and advocated, a version of the social model of disability. In its statutory guidance on the DED (DRC, 2005: 2), the DRC defined the social model of disability in the following terms:

‘At present disabled people do not have the same opportunities or choices as non-disabled people. Nor do they enjoy equal respect or full inclusion in society on an equal basis. The poverty, disadvantage and social exclusion experienced by many disabled people is not the inevitable result of their impairments or medical conditions, but rather stems from attitudinal and environmental barriers.’

The House of Commons Work and Pensions Committee recognised the significance of the social model, as compared to the medical model of disability, when it debated how disability equality should be addressed in what was to become the Equality Act 2010. The Committee recommended that the social model should apply ‘for the purpose of direct and disability-related discrimination’ (House of Commons Work and Pensions Committee, 2009a: 29). The Committee proposed that this should mean ‘for the purpose of direct and disability-related discrimination the social model - protection from discrimination to everyone who has (or has had) an impairment without requiring the effects of that impairment to be substantial or long-term - should apply’ (House of Commons Work and Pensions Committee, 2009a: 29). The Committee argued that it was ‘inequitable to protect some disabled people from discrimination but not others because their
impairment is less significant’ (House of Commons Work and Pensions Committee, 2009a: 29). However with respect to reasonable adjustments the Committee’s assessment was that ‘a medical model approach must be retained’ (House of Commons Work and Pensions Committee, 2009a: 29).

Oliver and Barnes highlighted the importance for disabled people of the uneven distribution of political power, wealth and influence (2012: 154). They also commented that disabled people faced constraints on participation associated with environmental, cultural and social barriers (2012: 155). They also asserted that disabled people organisations (DPOs), namely those organisations controlled and run by disabled people, had represented disabled people, secured positive legislative changes and forced governments to introduce positive social policy initiatives and programmes (Oliver and Barnes, 2012: 155). However, a ‘gradual downgrading of the role of’ such DPOs since the 1990s had resulted in the loss of a strong and powerful disabled people’s movement by 2012 (Oliver and Barnes, 2012: 155). As a consequence – of the downgrading of DPOs and the loss of the DPO movement – Oliver and Barnes argued that the struggle to improve disabled people’s life chances had taken a step backward (2012: 155). In chapter seven, consideration has been given to whether disability or race equality organisations have played significant roles in bringing psed JR claims.

The limitations of anti-discrimination legislation, substantive equality and positive equality duties

O’Cinneide, Fredman and Hepple have written extensively about the limitations of anti-discrimination legislation, formal equality, substantive equality and developments in anti-discrimination and equality legislation. Their work influenced the approaches taken by the Equalities Review (2007), the Discrimination Law Review (DCLG et al., 2007), the EHRC’s Triennial Review (EHRC, 2010a) and the EHRC’s equality measurement frameworks (CASE and OPHI, 2009, Wigfield and Turner, 2010). O’Cinneide, Fredman and Hepple argued that anti-discrimination legislation had been unable to adequately target structural discrimination and associated complex, deeply rooted patterns of exclusion and inequality (O’Cinneide and EDF, 2004: 22). O’Cinneide identified a number of important flaws in the framework of anti-discrimination laws: too much reliance on enforcement by
an individual; the cost and complexity of litigation; and ‘isolated deterrence’ which meant that too often underlying patterns of discrimination were not identified or challenged (O’Cinneide and EDF, 2004: 24-25). Other problems included a culture of ‘passive compliance’, where organisations took the minimum steps necessary to avoid legal action, and a ‘lack of active participation by disadvantaged individuals and groups in decision-making’ (O’Cinneide and EDF, 2004: 19, 24, 25). A focus on artificial classes of discrimination and groups, instead of encouraging an holistic approach that could benefit more people and more groups, and a ‘lack of emphasis on social cohesion’ were also significant flaws (O’Cinneide and EDF, 2004: 22-25). These critiques of anti-discrimination legislation have significant echoes of Scheingold’s theory of the Myth of Rights (Scheingold, 2004).

O’Cinneide’s critique of the individual enforcement model also argued that the UK’s anti-discrimination law’s individual enforcement model set up ‘a two-party winner-takes-all contest, which is confined in effect to the two parties concerned, leaving no room for best practice group settlements or the input of third parties’ (2004: 23). Furthermore, it provided limited remedies for what had gone wrong, failed to seek to remove discriminatory practice across the organisation, was combative and could generate significant hostility to the equality agenda (O’Cinneide and EDF, 2004: 23). The approach was likened to ‘sending a fire engine to fight a fire rather than preventing that fire in the first place’ (O’Cinneide and EDF, 2004: 23). It is significant that, although different academic disciplines have been drawn on, there is little to separate the critiques of the law made by Scheingold in the Theory of the Myth of Rights and O’Cinneide’s various critiques of anti-discrimination laws.

Fredman highlighted key limitations posed by formal equality models, and suggested that under such a model ‘gender, race, ethnicity, or other status are regarded as irrelevant’ (2011a: 30). By contrast, ‘substantive equality recognises that these characteristics can be valued aspects of an individual’s identity’ and that a key problem is ‘the detriment which is attached to difference’ (2011a: 30). Substantive equality should respect and ‘accommodate difference’, remove detriments ‘but not the difference itself’ (Fredman, 2011a: 30). Formal equality prioritises rationality and individual fairness whereas
‘Substantive equality approaches are primarily concerned with preventing disadvantage’ (O’Cinneide, 2008: 95). Substantive equality is regarded as potentially transformative because it requires existing social structures to change to accommodate difference, ‘rather than requiring members of ‘out-groups’ to conform to the dominant norm’ (Fredman, 2011a: 30). However, substantive equality raises significant challenges in relation to the boundaries between the role of the courts, the judiciary and elected governments. In turn, these challenges may also raise profound questions about justiciability, especially where socio-economic rights are involved (Fredman, 2009). O’Cinneide notes the caution of the courts where there is no widespread political agreement about what rights to equality involve (2008: 92). Once again, Scheingold’s Myth of Rights’ critique is consistent with Fredman’s and O’Cinneide’s concerns about the caution of the courts. Bearing this caution in mind, O’Cinneide has suggested that more might be gained by lawyers and judges by building a clear idea of ‘what constitutes unacceptable forms of disadvantage, discrimination and inequality’ (O’Cinneide, 2008: 98).

Fredman argued that positive equality duties go beyond ‘the individualised and backward looking nature of tribunal claims’ and rather ‘than simply penalising individual acts of unlawful discrimination and compensating individual victims, the aim is to promote equality through structural change’ (2011a: 279). Fredman has developed, and further refined, a human rights based approach to the concept of negative and positive duties since 2001 (Fredman, 2001b: 9-43). The essential distinction between negative and positive duties is that negative duties are intended to prevent ‘the State from interfering with individuals, rather than’ as with positive duties ‘requiring the State to take positive action’ (Fredman, 2009: 1). Fredman has also argued that courts have a role to play in ‘reinforcing accountability of government to the people’ and ‘giving a voice to those who are necessarily marginalised in the political process’(Fredman, 2009: 5). In fact, Fredman went further, maintaining that the courts have a role to play in ensuring that ‘the material and social preconditions exist for full and equal participation, and ultimately in functioning as a catalyst for deliberative democracy’ (Fredman, 2009: 5). It is here that perhaps Scheingold’s Myth of Rights’ critique would question what can really be expected
of the courts, even when the courts are willing to hand down favourable legal judgments to claimants.

One of the critical arguments proposed in relation to the nature of positive equality duties was that they move towards promoting substantive rather than just formal equality. Fredman (2001b: 26-27) described positive equality duties as fourth generation equality laws just before the RED came into force. These fourth generation equality duties were supposed to address some of the limitations of anti-discrimination legislation because proof of individual prejudice was not needed nor was evidence of unjustifiable disparate impact (2001b: 26-27). Instead, a positive duty, and positive action, were supposed to be triggered following evidence of ‘structural discrimination’ to achieve ‘change, whether by encouragement, accommodation, or structural change’(2001b: 26-27). Fredman’s assessment was that the local authority race equality duty had proved largely ineffective because of its vagueness, the individual nature of the duty and ‘judicial hostility’ (2001b: 28). A positive equality duty was defined as a ‘prospective duty’ that required ‘a continuing process of diagnosing the problem, working out possible responses, monitoring the effectiveness of strategies, and modifying those strategies as required’ (Fredman, 2001b: 27). Such a duty required organisations to ‘promote equality and diversity in all aspects of their work, in a manner which involves employees, employers and service-users alike’(O’Cinneide and EDF, 2004: 19). Positive equality duties were supposed to be proactive and focused on ‘achieving results backed by enforcement mechanisms and the measurement of outcomes’ (O’Cinneide and EDF, 2004: 19). Key characteristics included proactivity, sustainability, being effective and outcome oriented (O’Cinneide, 2006: 31). They should also be imposed in ways that retained their credibility in the public, private and wider community sectors, steer clear of ‘excessive bureaucratic load’ and avoid an ‘overemphasis on process as distinct from outcomes’ (O’Cinneide, 2006: 31). They should also be supported by an ‘effective enforcement mechanism’ and should not create a ‘hierarchy of inequalities’ (O’Cinneide, 2006: 31). Effective participation rights for, and participation by, the groups affected by discrimination, were defined as central to the success of such a duty:

31 A detailed critique of the local authority duty which came into force in 1977 (the Race Relations Act 1976, section 71) is provided in chapter 4’s narrative assessment.
‘If participation is built in as a central aspect of such duties, not only is it likely that strategies will be more successful, but the very process of achieving equality becomes a democratic one ... any attempt to encapsulate the content of minority rights without active participation of the groups in question will be patronising, erroneous, and unlikely to succeed’ (Fredman, 2001b: 27).

O’Cinneide provided an important framework for assessing the fitness for purpose of existing or planned pseds. The issue of participation, by those affected, is a theme that is consistent with, and echoes, the call for action and participation made in Scheingold’s theory of the Politics of Rights. According to Fredman, effective sanctions in Northern Ireland encouraged organisations to enter into voluntary affirmative-action agreements with the Equality Commission for Northern Ireland (2005: 14). Making the positive duty as specific as possible can help to embed ‘proactive measures into the organisational culture’ (Fredman, 2005: 14). Courts can play an important role in advancing ‘accountability, deliberative democracy, and participative equality’ if they can require decision-makers to justify their decisions and these explanations are exposed to ‘public scrutiny and debate’ (Fredman, 2009: 181). Nevertheless, positive duties are described by Fredman as ‘quintessentially political.’ This assessment also has echoes of Scheingold’s theories of the Myth of Rights and the Politics of Rights. Positive duties are also described as continuous and as requiring ongoing monitoring. However Fredman suggested that such monitoring might be beyond the institutional capabilities of courts (2009: 181). These themes – about the political nature of the process, the courts’ limited remit, role and powers, the importance of democracy, and participative equality – appear to be consistent with, and to some extent to echo, central themes in Scheingold’s theories of the Myth of Rights and the Politics of Rights.

The pseds have been described as representing an ambitious attempt ‘to make equality issues a core concern for public authorities’ and ‘to encourage the transformation of existing practices’ (O’Cinneide: 31). O’Cinneide also advocated ‘a substantive equality analysis’ perhaps based on the South African model’ (2008: 87). O’Cinneide’s and

32 The South African model of equality rights has been interpreted as requiring the elimination of historically-rooted patterns of prejudice, discrimination and disadvantage that contribute to the subordination of particular groups’
Scheingold’s analyses recognise that issues of power and deep rooted inequalities may not easily be remedied by legal judgments or decisions. Like O’Cinneide and Fredman, Hepple described the PSED as potentially promoting ‘transformative equality’ with its main purpose being to ‘bring about a culture change so that promoting equality becomes part of public bodies’ core business’ (Hepple, 2011: 134). The RED, the DED, the GED, the PSED and the Equality Act 2010, have been described by Hepple as fifth generation equality legislation which has continued ‘the move towards comprehensive equality’ and started a ‘period of transformative equality’ (Hepple, 2010b: 3). However, there were a number of significant limitations to this transformative role because positive duties cannot change statutory restrictions on what public authorities can do or ‘resolve debates about core issues of principle’ (O’Cinneide, 2006: 33-34). Nor can positive duties address the fact that there is a shrinking sphere of public authority activity for example due to cuts and privatisation (O’Cinneide, 2006: 33-34). These assessments, of the potential limitations of a legal framework, echo similar themes raised in Scheingold’s theories of the Myth and the Politics of Rights (2004). Consideration has therefore been given, in subsequent chapters, to the extent to which the frameworks provided by the pseds and/or JR psed judgments have promoted accountability and/or advanced equality as defined by O’Cinneide, Hepple and Fredman.

The conceptions of positive equality duties, advanced by Fredman, Hepple and O’Cinneide, recognise the importance of the law as a tool to promote social justice. Nevertheless, they also recognise a range of significant limitations associated with both anti-discrimination legislation and positive equality duties. All emphasised the importance of aspects of participative democracy and the important roles played by social movements (Fredman, 2001c: 157). The conceptions of positive equality duties, advanced equality legislation and Scheingold’s theories of the Myth of Rights and the Politics of Rights are not mutually exclusive. Even though they are drawn from different academic disciplines, these theoretical and conceptual frameworks complement each other to a significant extent. Important areas of intersection include recognition of the importance of, and need for: democratic and political engagement; wider community engagement measures; and empowerment and involvement. There is also a shared recognition of the potential limitations of the law, courts and legal remedies. However, the central
difference revolves around whether the law, and in this case pseds, have the ability to be transformative. Consideration has therefore been given to whether Scheingold’s theory of the Myth of Rights, and its arguments about the limitations of the law, challenge the concept of the pseds as potentially transformative. How these considerations have informed, and helped to shape, the methodology and the research methods is explained in the next chapter.
Chapter 3: Methodology, research methods and ethical, legal and equalities considerations

Introduction
Central interfaces, between public accountability, equality, law and social justice models examined in the literature review, have informed the development of this methodology and the research methods adopted. This study is designed to advance our understanding of the modern public sector equality duties (pseds) as ground-breaking public law provisions, positive legal duties and public accountability tools for holding English public bodies to account. Two interrelated research questions have been developed: 1) Have the race and disability equality duties been effective positive legal duties and legal public accountability tools? 2) Does Scheingold’s theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality?

This chapter explains the rationale for: the development of these interrelated research questions; the adoption of a socio-legal, interdisciplinary, qualitative methodology; and the provision of a socio-political historical narrative that focuses on race and disability equality. It also explains the focus on legal enforcement, community activism, cause lawyers, legal empowerment and the rationale for examining psed JR judgments. The rationale for the selection of the qualitative research methods adopted follows. Brief descriptions of each of the research methods adopted, and deployed, have been provided. This chapter concludes with an explanation of how key ethical, equalities and legal considerations have been addressed.

Methodology

A socio-legal, interdisciplinary and qualitative study
Socio-legal studies is an interdisciplinary approach to analysing law, legal phenomena, and relationships between these matters and wider society (British Library, 2011). This study draws on a number of related, but separate, academic disciplines or subjects of academic interest including public accountability, the law, equal opportunities and social
justice.\textsuperscript{33} The literature review identified important roles played by legal enforcement, cause lawyers, legal empowerment and community activism in redressing the potential power imbalances between individuals, the State and its emanations.

Whilst socio-legal research can be qualitative, quantitative or both, qualitative approaches predominate in accountability studies (Bovens et al., 2014: Kindle Locations, 4359-4360) and are significant in socio-legal studies (Halliday and Schmidt, 2009: 231). Qualitative research is the dominant research approach in public accountability studies because such research helps to clarify ‘ambiguous phenomena’ (Bovens et al., 2014: Kindle locations 4355-4356 & 4397). Leading socio-legal researchers consider interdisciplinary research approaches to be at the heart of socio-legal research (Halliday and Schmidt, 2009).\textsuperscript{34} This examination, of the pseds as legal tools and public accountability tools, is an interdisciplinary, socio-legal and qualitative study that draws on a narrative assessment of key developments over time in the socio-political sphere. Appropriate qualitative research methods have been selected to support this study.

Dobinson and Johns (2007: 19) suggest that legal research can generally be grouped within three categories – problem solving, policy or law reform based research. This study spans all three of these legal research categories. Focusing on legal research, Dobinson and Johns state that good qualitative legal research should meet five requirements – specific research questions; a defined and justified sample; valid data collection; appropriate analytic methods; and interpretation based on the data (2007: 33). Focusing on research into public accountability, these requirements are echoed, and augmented, by Bovens et al (2014: Kindle location 4375). Drawing on the work of previous

\textsuperscript{33} Some of these are sub-disciplines or fall within subcategories of separate academic disciplines. ‘Academic disciplines may be defined as scholarly communities that: ‘specify which phenomena to study, advance certain central concepts and organizing theories, embrace certain methods of investigation, provide forums for sharing research and insights.’ REPKO, A. F. 2012. Interdisciplinary Research: process and theory, 2nd ed. USA, Sage.

\textsuperscript{34} ‘The raison d’être of the Law and Society Movement has been the shared appreciation of interdisciplinarity – the recognition that one has much to learn from scholars of other disciplinary backgrounds who unite around a common interest in “law” ’ HALLIDAY, S. & SCHMIDT, P. D. 2009. Conducting law and society research: reflections on methods and practices, Cambridge, Cambridge University Press.
researchers, they cite a number of ‘commonly agreed-upon’ important elements for qualitative research:

‘An in-depth and interpreted understanding of the social world by learning participants’ circumstances, experiences, perspectives, and histories. Samples are small in size and purposively selected. Data collection usually involves close contact between the researcher and the participants in an interactive, developmental, and emergent process. Data are detailed and rich. A heavy inductive component or orientation in the analytic process. Analysis is open to emergent concepts and ideas, which may produce detailed description and classification, identify patterns, or develop typologies and explanations. Outputs tend to focus on the interpretation of social world through mapping meanings, processes, and contexts’ (Bovens et al., 2014: Kindle locations 4377-4387).

Clear research questions, that have been informed by the literature review, underpin the research approach. The approach is designed to provide an in-depth and interpreted understanding of the purpose, development and real world application of the race and disability pseds. The data gathered, and the research methods adopted, are designed to enable an examination of the views, experiences and perspectives of individuals, organisations and legal experts.

**The socio-political historical narrative**

The law is living, dynamic and has to be appreciated taking account of the socio-political context within which it operates (Barnett, 2011: 1). Laws evolve in accordance with the socio-political and legal domains in which they operate, understanding the law therefore requires an appreciation of relevant historical, legal, philosophical and political factors (Barnett, 2011: 1, 133). An historical socio-political analysis is central to this in-depth, and interpreted, understanding of the purpose, development and real world application of the pseds. This narrative analysis: reflects on, and analyses, important developments in the legislative and socio-political spheres; and tracks how the race and disability pseds evolved against this background. The narrative form allows an assessment of key legislative and socio-political developments over time; and it informs the doctrinal and socio-legal evaluation of the race and disability pseds as positive legal duties and public accountability tools. The assessment of the roles played by cause lawyers and community activism contributes critical evidence in relation to the impact of the duties.
**The focus on race and disability, legal enforcement, JR and community activism**

The RED and DED were promoted – by the CRE, DRC, academics, race and disability equality campaigners and others – as legal tools for addressing institutional discrimination, inequalities, advancing substantive equality and implementing the social model of disability. Of the three original equality commissions, the CRE and the DRC were the best funded, had legal departments and financially supported organisations to enable individuals to secure their rights. The CRE and DRC also advocated the use of the RED and DED by other organisations and provided advice and guidance to facilitate this.

The focus on race and disability, as standalone duties, and as provisions within the PSED, recognises that the first two modern pseds for England addressed race and disability equality. The focus on legal enforcement, JR and community activism also recognises that the CRE, the DRC and race and disability equality advocates had long campaigned for the introduction of legally enforceable pseds (see chapter 4). These campaigners had sought legal duties that would: challenge institutional discrimination and the profound disadvantages associated with race and disability; and advance the social model of disability and substantive equality. As part of their respective campaigns, the CRE, Disability Rights Task Force (DRTF), DRC, academics, equality campaigners and others argued strongly for robust and effective legal measures to address institutional discrimination, inequalities and advance race and disability equality. The focus on race and disability also recognises, given this background, that race and disability JR claims were likely to form a substantial proportion of the overall psed JR claims.

The focus on the DED also recognises that of the three duties, the DED contained the most expansive description of equality aims and practical expressions of equality of opportunity. It also recognises that whilst the CRE, DRC and EHRC had enforcement

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35 Campagners analysed the limitations of the original local race authority duty, referenced in chapter 1, and subsequently assessed the strengths and limitations of the modern pseds. How these limitations were, or were not, addressed in the form, content and implementation of the race and disability pseds is evaluated in subsequent chapters.

36 The DRTF was established by the Labour Government in 1997 to consider ‘how best to secure comprehensive, enforceable civil rights for disabled people within the context of our wider society, and to make recommendations on the role and functions of a Disability Rights Commission.’ DRTF 1999. From exclusion to inclusion: final report of the Disability Rights Task Force, n.p., DWP.
powers in relation to the pseds, JR was the primary means of legal challenge for individuals, VCOs and others.

The importance of cause lawyers and legal empowerment

The focus on cause lawyers and legal empowerment draws on Scheingold’s theories of the Myth of Rights and the Politics of Rights (Scheingold, 2004). These theories questioned the capacity of the law on its own to achieve transformative social change and Scheingold argued that community activism, cause lawyers and political mobilisation were pivotal to advancing social justice. Social justice theories recognise that in a challenge against the State, or emanations of the State, individuals and non-state bodies are generally at a power disadvantage. Legal empowerment has been recognised as both an international and national tool for enabling disenfranchised people to challenge unfair, problematic or excessive exercises of state power.

The research questions

Why two interrelated research questions?

Two interrelated research questions have been developed for this study: 1) Have the race and disability equality duties been effective positive legal duties and legal public accountability tools? 2) Does Scheingold’s theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality?

The first question focuses on whether the duties have actually been effective as positive equality duties and legal public accountability tools. The first and the second questions are linked by Scheingold’s emphasis on the importance of cause lawyers, political mobilisation and legal empowerment in enabling disenfranchised people to challenge exercises of state power. These questions recognise that descriptions of the equality duties as positive legal duties and tools for holding public bodies to account permeate the literature on the pseds; both aspects are equally important and investigating the accuracy of these descriptions is at the heart of this thesis.
Scheingold’s theories of the Myth of Rights and the Politics of Rights (Scheingold, 2004) question the capacity of the law on its own to achieve transformative social change. However, Scheingold contended that cause lawyers, community activism and political mobilisation could play pivotal roles in enabling the law to be used as an effective tool for advancing social justice. So the demands made by cause lawyers and equality campaigners in respect of the pseds and the extent to which these demands were addressed by governments and the legislature is another important focus for this study (see chapters 4 & 5). Scheingold’s theories are critical to probing whether the concept of positive legal duties has inherent limitations in terms of achieving social change. Scheingold’s theories raise substantive questions and provide a framework for understanding how the pseds have actually developed and operated in the real world.

**Q1: Have the race and disability equality duties been effective positive legal duties and legal public accountability tools?**

To address this research question, consideration has been given to: how the duties have been used as legal tools; whether the demands of those who advocated for the duties have been met; the effectiveness of the duties as legal accountability tools; and whether the pseds have enhanced the ability of individuals and organisations to hold public bodies to account. Consideration has also been given to the impact of enforcement and legal action and whether cause lawyers, community activism and legal empowerment have played important roles in addressing and redressing key power imbalances. Finally, the accessibility and effectiveness of JR in public sector equality duty (psed) cases, the decisions made and remedies provided, by judges deciding JR cases have been assessed.

**Q2: Does Scheingold’s theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality?**

How Scheingold’s theory of the Politics of Rights informs the conception of positive equality duties has been considered in order to answer the second research question. Evidence that lawyers acting on behalf of claimants in race and disability psed cases could be classified as cause lawyers has been evaluated. The roles played by cause lawyers, community activism and legal empowerment have been assessed as have whether these roles have been critical to the implementation of the race and disability pseds.
Research methods – rationale and overview

A number of complementary and appropriate qualitative research methods have been deployed including: the development of an analytical and conceptual framework; the creation of a unique data-base and resource bank; the analysis of primary and secondary research materials; doctrinal, socio-legal and socio-political analysis; data and case analysis; case studies; and participant observation. The research approach involved close interactive contact between the researcher and the participants, particularly through the use of participant observation and drawing on organisations’ and individuals’ written submissions.

A small number of case studies have been purposively selected. The data sources and data drawn on for this study are detailed and rich. An inductive component has been a central part of the analytical process as demonstrated by the development of an analytical and conceptual framework which has been open to both existing and emergent concepts and ideas. The comparative analyses provided have led to the production of detailed descriptions, classifications as well as the identification of patterns and explanations. This study provides an interpretation of the social world through examining the purpose(s) of the pseds, the public accountability processes provided by these duties and the impact of key developments in the socio-political sphere on the development and implementation of these duties.

The conceptual and analytical framework

Framework overview

A conceptual and analytical framework, which builds on the literature review, has been developed to facilitate this study’s assessment of the pseds as legal accountability tools and positive legal duties. Key questions have been identified about public accountability, the use of JR, the conception of the duties as positive equality duties and Scheingold’s theory of the Politics of Rights. Three sets of evaluative criteria have been developed to examine: the duties as positive legal duties; the duties as public accountability tools; and the roles played by cause lawyers, legal empowerment and community activism. Relevant
elements of these criteria have been considered in subsequent chapters. In the final
chapter, key elements of the conceptual and analytical framework have been assessed to
answer the research questions.

Examining the duties as positive legal duties
The examination of the pseds as positive legal duties builds on the work of O’Cinneide,
Fredman, Hepple and Scheingold. The framework has ten evaluative criteria which have
been used to examine whether the duties have: i) been proactive; ii) been sustainable; iii)
been effective; iv) been focused on outcomes rather than process; v) been implemented
in a manner credible to public, private and the wider community sectors; vi) avoided
excessive bureaucratic load; vii) supported by an effective enforcement mechanism; viii)
avoided creating an hierarchy of inequalities; ix) provided, or been accompanied by,
effective participation rights; and x) been considered to be transformative.

Examining the duties as public accountability tools
The examination of the pseds as legal public accountability tools principally draws on the
work of Bovens and Scott. The framework has three evaluative criteria which have been
used to examine whether the duties: i) specified ‘who is accountable, to whom, for what,
by which standards, and why; ii) satisfied Bovens’ seven conditions for an accountability
relationship to exist; and iii) served as effective legal accountability mechanisms. This
assessment of the duties as legal accountability mechanisms, evaluates whether the CRE,
DRC and EHRC, as regulatory and enforcement bodies: were given sufficient powers and
effective tools to hold public bodies to account; and whether they used these tools. This
assessment of the duties as legal accountability mechanisms also evaluates whether
individuals, interest groups, third parties and other societal stakeholders were: afforded
effective tools to hold public bodies to account in relation to the pseds; and were able to
use the pseds as legal tools to hold public bodies to account.
Examining the roles played by cause lawyers, legal empowerment and community activism

The framework draws on the work of Scheingold and Shdaimah to examine whether UK lawyers who have been most actively involved in race and disability psed cases could be defined as cause lawyers. Five evaluative criteria have been developed to examine whether lawyers, who have most often represented claimants in psed cases could reasonably be defined as cause lawyers. The criteria are whether they have: i) espoused a commitment to the advancement of equality and/or human rights; ii) used the law to advance social justice; iii) sought to publicise how the duties may be successfully deployed; iv) sought to promote legal empowerment; v) engaged in wider activities to advance social justice and/or contributed to social or political mobilisation. Consideration has also been given to identifying the roles played by legal empowerment and community activism in supporting the deployment of the pseds.

Creation of a unique data bank, primary and secondary resources and document analysis

An extensive database and resource bank has been created consisting of primary and secondary research materials. The electronic databank includes over 2000 references and over 1500 electronic resources. In addition, a resource library has been created which consists of the physical documents gathered for this study. The electronic database and data bank, contain: relevant primary legislation, secondary legislation, statutory codes of practice and related guidance published by the CRE, DRC, EHRC and key government departments and bodies; Hansard debates, and other parliamentary documents, about the equality duties and associated matters; key research commissioned into the equality duties; papers from leading legal academics and public law lawyers on the duties including published and unpublished conference papers; literature on key concepts and theories; major UK reviews on discrimination and equalities published since 2000 (DCLG et al., 2007, Equalities Review Panel, 2007); submissions to government commissioned reviews of the duties; reported JR cases sourced from Westlaw, the British and Irish Legal

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37 EndNote, the bibliographic manager, was used to create this electronic databank. In addition to the database functions, electronic resources can be held in the Endnote database or libraries. This means that electronic PDFs can be searched and that searches across the database can be run. The SMART Group facilities within Endnote have been deployed to facilitate both customised searches and automated additions to SMART Groups already created.
Information Institute (BAILII), the Equality Law Reports; and other resources. EndNote, a powerful database, research and reference manager, has been used to facilitate the classification, analysis, comparative analysis and review of these rich resources.

The pseds have been the subject of extensive consultation with stakeholders. Government consultative activities have generated extensive written resources stating what VCOs, public bodies, including local authorities, and other stakeholders have said about these duties. It is notoriously challenging to undertake primary research, for example through the use of questionnaires or surveys, and obtain the type, quality and number of responses required for high quality research. Key submissions have been identified, downloaded, incorporated into the EndNote database and drawn on as required.

**Doctrinal analysis and a wider socio-legal and socio-political analysis**

Doctrinal research ‘relies extensively on using court judgments and statutes to explain law’ (McConville and Chui, 2007: 3-4). Only focusing on the ‘black letter of the law’, or doctrinal research, to explain the equality duties would be limited. Nevertheless, doctrinal research has made an important contribution to this study’s assessment of the pseds.

The ‘purpose’ of the pseds has been assessed by reference to: what is laid down in statute; views expressed by parliamentarians in key psed debates; key recommendations made by the CRE and DRC; and key demands made by lawyers and equality campaigners. The assessment of psed JR cases draws on relevant primary and secondary legislation, psed legal judgments, relevant legal principles (McConville and Chui, 2007: 3). The socio-legal analysis is informed by guidance issued on behalf of Government, statutory advice issued by the equality commissions and views expressed by cause lawyers, Equality Commissions and voluntary and community organisations (VCOs). This socio-legal analysis, and the thesis as a whole, are supported by a detailed socio-political narrative (see chapter 4).

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38 Relevant documents that have been drawn on include the primary and secondary legislation on the pseds, key Hansard debates and other parliamentary documents.
Comparative analysis of the psed legislation

This study considers how the concept of institutional racism, given the absence of a statutory definition, and the backlash against it, impacted on the form, structure and/or implementation of RED or associated provisions in the PSED. Similarly, consideration has been given to how the social model of disability, given the absence of a statutory definition, impacted on the form, structure and/or implementation of the DED or associated provisions in the PSED. The analytical framework has been designed to facilitate a comparative assessment of the legislative, regulatory and enforcement frameworks for the RED, DED and PSED as set out in primary legislation, secondary legislation and statutory codes of practice or similar documents.

The general equality duties have been reviewed. The general RED has been compared with the old local authority duty and with the race equality provisions in the general PSED. The general DED has been compared with the disability equality provisions in the general PSED. The general RED, DED and PSED have been compared with each other. The SEDs for England, for race and disability, in force between 2000 and 2010 have been compared with each other. The SEDs, since 2010, for England, Scotland and Wales have been examined and compared with each other. The statutory codes of practice or the technical guidance that supported the RED, DED and PSED have also been reviewed and assessed as have the statutory enforcement and regulatory powers of, and enforcement action taken by, the CRE, DRC and the EHRC between 2000 and 2014.

Public sector equality duty judgments – 2001 to 2014

This study focuses on English public bodies and other bodies subject to the pseds. Substantive race and disability psed JR judgments handed down by the courts and Upper Tribunals, between 2001 and the end of July 2014, have been collected. The rationale for including or excluding judgments was whether the case spoke to how the pseds have been used to hold public bodies to account. The 136 judgments selected each gave substantive consideration to the general race or disability pseds and are primarily JR judgments. These judgments primarily were, or resulted from, claims taken by individuals.

39 The original local authority duty was introduced as section 71 of the Race Relations Act 1976, it came into force in 1977.
and organisations that challenged alleged race or disability psed breaches. A small number of psed JR claims taken by one public body against another have also been considered. A small number of planning judgments, that were not JR claims, have also been included; for the purposes of this study such legal judgments are equivalent to JR judgments. Additional information has been provided on the search criteria adopted in appendix 8.

Appendix 8 identifies 136 substantive race or disability psed judgments, whether there was a third party intervener or interested party and the decision made by the High Court, the Upper Tribunal and the appellate courts. The psed judgments, predominantly JR judgments, have been analysed by reference to year, court, nature of public body and other key factors. To contribute to the assessment of the roles played by cause lawyers, the CRE, DRC and EHRC and VCO third party interveners, the information on third party interveners and legal representatives has been analysed and reviewed in chapters six and seven. This analysis, in chapter 6, also explores the remedies that have been offered where claimants were successful and the principles that have emerged with respect to complying with the due regard requirements.

The analysis is intended to identify whether there is evidence of the successful use of JR in relation to tackling institutional racism, institutional disability discrimination and/or promoting the social model of disability, advancing equality and/or leading JR cases having a wider influence.

Case studies
The focus is on the race and disability pseds. A small number JR case studies have been selected to facilitate a qualitative examination of the extent to which the duties’ legal and

40 Such judgments have been included where: a) the court or tribunal had jurisdiction to hear a psed claim; b) compliance with the pseds was given substantive consideration in the published judgment; and c) the court or tribunal could exercise the powers available under JR. These judgments were all planning cases, mostly some form of appeal case, under the Town and Country Planning Act 1990 and all of the cases involved Gypsies and Travellers.
41 JR cases often will include a number of grounds, the focus in this study is on decisions made in relation to the equality duty elements of the case where race or disability were substantive factors.
42 The information provided in appendix 6 identifies key firms of solicitors, chambers, barristers and a range of equality focused third party interveners.
regulatory frameworks have provided sufficient clarity to enable the courts, claimants, third party interveners and others to hold public bodies to account. These case studies have been used to explore whether JR has enabled key stakeholders to: address failures by public bodies to act appropriately to advance equality of opportunity; or address issues of institutional race or disability discrimination. An analysis of JR cases identifies: important psed principles laid down by the courts; the consequences for public bodies associated with breaches; and examples of the sanctions and redress provided by the courts to claimants whose cases have been upheld.

Three legal empowerment case studies have been developed. These case studies facilitate an analysis of the importance of cause lawyers and community activism in supporting legal empowerment and promoting a wider understanding of the pseds. One case study explores the issues from a generic perspective, the second focuses on race and the third focuses on disability. These case studies examine leading examples of how VCOs and cause lawyers have worked together to advance legal empowerment in relation to the pseds by promoting an understanding of public law, the pseds and JR (see chapter 7). Three case studies on campaigns have been developed to support the analysis of the importance of cause lawyers and community activism in supporting psed focused social justice campaigns. One case study explores the issues from a broader perspective, another focuses on race and the other focuses on disability (see chapter 7).

**Participant observation**

Participant observation is a qualitative method of social investigation in which a 'researcher participates in the everyday life or social setting, and records their experiences and observations' (Jupp, 2006: 214-216). The participant observer role adopted for this study has been located at the observation, and gathering information, end of the continuum. A key activity has been to attend public conferences and events specialising in the law, equalities, human rights and JR. This participant observer approach, deployed over five years, facilitated the collection of an important set of papers from lawyers and legal academics playing leading roles in psed cases. Taken together, the analysis of these papers has supported an evaluation of the development of the pseds, and associated JR cases, before and since the first successful psed case decided.
in 2005. These public events have also allowed access to key psed lawyers who have led on key cases and community activists interested in using these duties.

The observation has taken place in public settings where the purpose of the event(s) was to openly share views about, and papers on, the pseds, equality, human rights and associated legal enactments. Documents accessed have been produced for public consumption however without this participant observation approach it would have been difficult to bring the papers together. The general limitations on the reuse of the information in the papers are covered by general copyright matters; no other limitations have been identified. The views expressed by participants in these public settings have informed the identification of key themes and issues but no theme or issue has been attributed to any named individuals unless the views have been expressed in a written paper or document. This research method has provided access to first-hand accounts, from leading public law lawyers, legal academics and community activists, that comment on: key developments in the legal framework; key psed judgments; and the impact of key changes in the socio-legal and political environment. This research method has also provided opportunities to hear the views of experts and to discuss issues and questions with these parties about the pseds and the content of papers.

**Ethical, legal and equalities issues**

Edge Hill’s ethical requirements are couched in terms of values and principles including responsibility, integrity, quality, sensitivity, duty of care and the researcher’s independence. A commitment has been made to high-quality ethical research. Relevant ethical guidance - including that provided by Edge Hill, the British Sociological Association and other general guidance (Kumar, 2010: 244 - 246) – has been considered and relevant issues have been addressed. Relevant legal and equal opportunities issues have also been considered and addressed. As the information collected was already in the public domain no special or separate consent is required to reuse the information.

Key ethical issues identified by Kumar (2010: 246 - 249) are addressed below. With respect to bias, the methodology and research methods have been designed and deployed to ensure that there is no unacceptable bias. The provision or deprivation of
treatment is not an issue for this study. Regarding the need to avoid the use of an inappropriate research methodology, the research methodology for this study has been carefully considered and the rationale for its adoption explained in this chapter. Suitable research methods have been selected and the rationale for their selection explained. The British Sociological Association (2004) identified a number of ethical considerations; these have all been considered and addressed. With respect to professional integrity, the highest standards have been maintained. With respect to responsibilities towards research participants, there are no direct research subjects. Documents gathered, and used, are open source or subject to standard copyright and no individual has been named unless published materials – for example reports, case reviews, legal judgments, conference papers, newspapers, materials published by the person cited – and the name, and the reference materials, are already in the public domain. There has been no covert research but the implications for participant observation were considered. No organisation, apart from Edge Hill University, is supporting or funding this research so no additional issues of anonymity, privacy and confidentiality arise in relation to funding. All reasonable steps have been taken to comply with Edge Hill’s ethical requirements.

Consideration has been given to relevant legal requirements in the Data Protection Act 1998, the Freedom of Information Act 2000 and the Equality Act 2010. Personal data is defined, by the Data Protection Act 1998, as information that allows the identification of a living individual. Sensitive data is a class of personal data that includes information relating to race, disability, certain legal proceedings and other specified matters. The Data Protection Act 1998 sets out the circumstances in which an individual’s consent may be required before personal data or sensitive data are processed. Legal judgments are covered by the DPA’s provisions, so the courts have already assessed any data protection issues prior to the publication of any court judgment. Using published information in the public domain does not require that consent be sought again unless the information is

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43 ‘Sensitive personal data means personal data consisting of information as to— (a) the racial or ethnic origin of the data subject, (b) his political opinions, (c) his religious beliefs or other beliefs of a similar nature, (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992), (e) his physical or mental health or condition, (f) his sexual life, (g) the commission or alleged commission by him of any offence, or (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.’ MULLOCK, J. & LEIGH-POLLITT, P. 2000. Data Protection Act Explained, Norwich, TSO.
being processed, or used, for a purpose for which consent has not already been granted. The assessment made for this study is that judgments already published and/or reported online – for example on Westlaw, BAILII and similar sites - are expected to be drawn on and referenced therefore no new Data Protection Act requirements apply.

Limited sensitive data has been gathered. For example, the names of people who have made race or disability discrimination claims have been gathered and this would be classed as sensitive data. However, no new data protection processing issues have arisen. For example, no one has been named in this thesis whose name is not already in the public domain because their name is listed in a published legal judgment, a conference paper or online materials. No reference is made to any individual, by reference to a protected characteristic, unless this is information is already a matter of public record. Lawyers have been assessed by reference to five criteria to assess whether they could reasonably be defined as cause lawyers. The source material used to make this assessment is all in the public domain. It includes information published: by these lawyers; in online legal directories; on websites of other organisations with which these lawyers have worked. The requirements of the Data Protection Act 1998 have been considered and met. Consideration has been given to Edge Hill University’s requirements in relation to preventing harm. The conclusion is that this research will not result in the possibility of harm to any party. This study has also been designed to comply with good practice in relation to equality and anti-discriminatory practice.
Chapter 4: The call for, and development of, race and disability equality duties in the context of wider legislative and socio-political developments

Introduction

An age old proverb says that we need to study the past if we want to divine the future. The race and disability public sector equality duties (pseds) built directly on the legislative foundations provided by the anti-discrimination and equalities legislation in place at the time. Consequently significant strengths or weaknesses in these legislative foundations had the potential to strengthen or weaken the pseds and how they operated as positive legal duties and public accountability tools. This historical evaluation maps significant developments in the legislative frameworks, calls for race and disability pseds and how the intentions of key parties – governments, the Legislature and non-governmental bodies – developed between 1965 and 2013.44 Central to this evaluation is how successive Labour and Conservative (or Conservative led) governments responded, between the 1960s and 2013, to key demands for legislative change – in relation to race and disability legislation and the pseds. The demands for change made by other parts of the Legislature, the CRE, the DRC and the EHRC, equality campaigners, other civil society organisations and lawyers are of particular interest.45

Key legal theorists recognise that the constitution and therefore the law are living, dynamic and have to be appreciated taking account of the socio-political context within which they operate (Barnett, 2011: 1). Anti-discrimination and equality legislation, and the equality duties, have evolved in accordance with the socio-political and legal domains in which they have operated. Understanding this legislation therefore requires an appreciation of relevant historical, legal, philosophical and political factors (Barnett, 2011: 44). Unless otherwise stated the frameworks referred to in this chapter are the dedicated legislative frameworks for race and disability anti-discrimination and equalities legislation. Wider legislative developments in relation to race relations and disability equality are not the focus of this study. For example, public order matters such as incitement to racial or religious hatred or provisions for disabled people set out in the Chronically Sick and Disabled Persons Act 1970 and 1976, the Disabled Persons Act 1981, community care legislation or social or benefits legislation are generally beyond the scope of this study.

44 Section 1 of the Equality Act 2006, provided for the establishment of the Commission for Equality and Human Rights (CEHR). Shortly after the CEHR was established in 2007, its working name became the Equality and Human Rights Commission (EHRC).
Consequently, this socio-political evaluation reflects on, and analyses, important developments in the legislative and socio-political spheres and tracks how the race and disability pseds evolved against this background. This chapter evaluates the impact of important, but often competing, socio-political agendas related to anti-terrorism, austerity, cohesion and integration, immigration, small government on the one hand and race and disability equality and institutional discrimination on the other hand. In-depth socio-political analyses (Oliver and Barnes, 2012, Hepple, 2011, Stephenson and Morrison, 2011, Monaghan, 2007, Sooben, 1990, Oliver, 1990, Solomos, 1989) and parliamentary and non-parliamentary resources have been brought together, and drawn upon, to facilitate this evaluation. Seven broad time-frames, spread over six decades, have been identified: 1963 to 1968; 1974 to 1976; 1983 to 1994; 1995 to 1996; 1997 to 2000; 2001 to 2010; and 2010 to 2013. Important developments during each period inform our understanding of the legislative regimes, the place of the pseds within these regimes and their purpose as positive legal duties and public accountability tools. The analysis in this chapter informs the doctrinal and socio-legal evaluation, provided in the next chapter, as well as the evaluations of the roles played by cause lawyers, legal empowerment and community activism.


Campaigns for, and against, racial discrimination and race relations legislation led to, and shaped, the first race relations acts enacted in 1965 and 1968. During the 1960s,

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46 The term ‘small government’ refers to the policy objective espoused, particularly by the Conservative Party and right of centre political parties, to reduce the size of the State, state intervention and the level of public spending. Though linked to the austerity agenda, which developed following the world financial crash in 1998, it is also associated with a philosophical commitment to greater individual choice and responsibility, reducing the size of the State and greater involvement by business in delivering services and functions previously delivered by the State at national, regional and local levels.

47 Key parliamentary and non-parliamentary resources drawn together are: parliamentary select committee reports; government White Papers; official parliamentary debates; influential inquiries, reviews and formal government responses; national discrimination and equalities reviews; key assessments of, and research into, the pseds commissioned by government departments, the CRE, DRC and EHRC, national audit and inspection bodies, civil society organisations (CSOs), lawyers and academics.

48 The Bristol bus boycott campaign of 1963, challenged the ‘colour bar’ operated by the Bristol Bus company which meant that black people were denied employment; it was ‘one of the first successful black-led [civil rights] campaigns against racial discrimination’ in the UK. It directly influenced the then Labour Party leader, Harold Wilson, to introduce race relations legislation after he was elected as Prime Minister in 1964. STEPHENSON, P. & MORRISON, L. 2011. *Memoirs of a Black Englishman*, Bristol, Tangent Books, MOTUNE, V. 2013. *Bristol Bus Boycott To Celebrate 50th Anniversary* [Online]. England: The Voice.
equality campaigners also called for a local authority race equality duty. However, alongside these demands for race equality, calls for immigration controls emerged as a competing agenda. The fight for race equality, and race relations legislation, whilst supported by race equality campaigners, generated overt hostility and posed political challenges for parties committed to introducing race relations legislation. During the 1964 election campaign, an infamous anti-Labour racist campaign slogan was ‘If you want a nigger for a neighbour vote Labour’ (Stephenson and Morrison, 2011: 66, 67, 77). Moreover, leading trade-unions and business representatives, including the Trades Union Congress (TUC) and Confederation of British Industry (CBI), opposed demands for tougher measures to tackle race discrimination (Stephenson and Morrison, 2011: 69).

It was against this socio-political background, that the Race Relations Act 1965 emerged as the first race relations act in Britain. The 1965 Act was, in part, the Labour Government’s response to campaigns against the widespread and overt discrimination faced by ‘recent immigrants from the Caribbean and Indian sub-continent’ (Motune, 2013, Hepple, 2011: 7). Whilst the 1965 Act was regarded as ‘a momentous first step’, it failed to meet race equality campaigners’ aspirations because it was deemed to be inadequate and limited in tackling racial discrimination (Stephenson and Morrison, 2011: 68, Monaghan, 2007: 38-39, Blackstone et al., 1998: 24). By 1967, starkly differing demands were being made by advocates for, and against, race relations legislation.


49 Professor Street was a Professor of English Law at leading UK universities. [Sir] Geoffrey Howe, was later to become a leading frontbench Conservative Politician, and served as Chancellor of the Exchequer; he was a front bench Conservative politician from the 1960s to the early 1990s. Geoffrey Bindman, went on to
lawyers in shaping the first race equality legislation in the UK; it recommended the introduction of positive action provisions, new conciliation and enforcement arrangements and the extension of the legislative framework for race relations (Monaghan, 2007: 44, Street et al., 1967b, Hepple, 1968). The Street Report argued emphatically that anti-discrimination legislation should be extended coherently, should apply to both the Crown and government departments and be applied as widely as possible (Street et al., 1967b: 7, 10). It also recommended the adoption of proactive measures, for example, the use of tribunals where conciliation failed and that the Race Relations Board should be given the power to issue various orders to require discriminatory practices to be dropped (Street et al., 1967b: 7, 10).

In stark contrast in 1968, Enoch Powell, a leading Conservative Politician, the then Shadow Defence Secretary and a previous Conservative Cabinet Minister, argued vehemently against race relations legislation. Powell contended that discrimination, deprivation, alarm and resentment, lay ‘not with the immigrant population but with those among whom they have come and are still coming’ (Powell, 1968). He challenged the proposed Race Relations Act 1968, claiming that such legislation risked ‘throwing a match on to gunpowder’ (1968). His ‘Rivers of Blood’ speech, infamous then and now, concluded with dire warnings about the consequences of immigration (Monaghan, 2007: 41, Powell, 1968). The speech led to Powell being sacked from the Conservative shadow-front-bench and had been widely condemned by the Press and others (Stephenson and Morrison, 2011: 87, Manzoor, 2008). Nevertheless, Powell had substantial support and many ‘thought he was right, particularly amongst the police force’ (Stephenson and Morrison, 2011: 87, Manzoor, 2008). The extent of this support was clear when: a thousand dockers went on strike, and marched on Westminster, to protest at Powell’s dismissal, carrying placards saying "Back Britain, not Black Britain"; and when Powell received 100,000 letters, shortly after the speech, of which only 800 disagreed with him (Manzoor, 2008).

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Harold Wilson’s Labour Government did legislate again and the Race Relations Act 1968 was enacted but like the 1965 Act before it, the 1968 Act was seriously flawed as it only provided formal equality measures and did not prohibit indirect discrimination.\(^{50}\) Lord Lester, then Anthony Lester QC, later described the 1968 Act as broad in scope but ‘toothless and unenforceable’ (Lester, 2003: 2).\(^{51}\) Furthermore limitations were placed on race equality legislation by immigration legislation (Monaghan, 2007: 36, Hepple, 1968: 810). The consequences for the public sector equality duties (pseds) are picked up later in this chapter.

1974 to 1976: The Race Relations Act 1976 and the local authority race duty
In 1975, the Sex Discrimination Act was enacted by the recently elected Labour Government. Whilst this dissertation does not examine the development of gender equality legislation, it is important to note that successive governments since the 1970s, have sought to maintain a degree of parity between race and sex discrimination legislation (Monaghan, 2007: 54, Lester, 2003: 7). Anthony Lester QC worked as a special adviser to the newly appointed Labour Home Secretary, ‘developing new anti-discrimination legislation on sex as well as race’ (Lester, 2006, Lester, 2003: 3,4,7, Blackstone et al., 1998: 24).\(^{52}\) A prominent civil rights QC, Lester is regarded by Government Ministers, peers and others as an architect of the 1976 Act who was instrumental in getting it on to the statute book (Fiddick and Hicks, 2000: 18, Parliament. House of Lords, 1999: Column 128, 140). According to Lester, legislation was to be regarded as one part, albeit a crucial part, of what was intended to be a comprehensive strategy to tackle racial disadvantage (Blackstone et al., 1998: 24).

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\(^{51}\) Anthony Lester had been a co-founder of the Campaign Against Racial Discrimination (CARD) following his return in 1964 from Harvard in the USA. He described himself as being ‘inspired by Dr Martin Luther King’ to fight for civil rights. He was later instrumental in forming the Runnymede Trust, a leading race equality body. LESTER, A. 2003. *Nailing the Lie and Promoting Equality: The Jim Rose Lecture* [Online]. London: Runnymede Trust. Available: http://www.runnymedetrust.org/events-conferences/jim-rose-lecture.html [Accessed 1 May 2014].

\(^{52}\) Anthony Lester became Lord Lester in 1993. As a member of the House of Lords, as Lord Lester, he was later to play an equally key role in shaping the Race Relations (Amendment) Act 2000.
The Racial Discrimination White Paper (1975), drew, and built, on the House of Commons Select Committee on Race Relations and Immigration (HoCSCRR&I) report (1975). The Select Committee’s dual remit for race relations and immigration demonstrated the continuing interrelated nature of the race and immigration agendas (Select Committee on Race Relations and Immigration, 1975: ii). The Select Committee warned against a ‘general cycle of deprivation’ where ethnic minorities felt ‘victims of discrimination’ and recommended that a statutory obligation should be placed on local authorities to promote equal rights and facilitate the funding of local race relations activities (Select Committee on Race Relations and Immigration, 1975: vii, xxv). The White Paper acknowledged the ‘important declaratory effect’ of legislation and said that the 1968 Act had supported those who wished to challenge racial discrimination and had reduced some of the most crude forms of racial discrimination (HM Government, 1975: 8). Nevertheless, the White Paper also acknowledged the extent of the challenges faced by both’ immigrants’ from the Commonwealth and their UK born children; it noted that limited progress had been made in addressing these challenges; and that major problems persisted in unemployment and housing (HM Government, 1975: 2-3). Noting the potential dangers associated with a ‘vicious downward spiral of deprivation’, the White Paper stated that it was the Government’s duty to prevent such ‘morally unacceptable and socially divisive inequalities from hardening into entrenched patterns’ and that failing to provide remedies against racial injustice struck at the rule of law (HM Government, 1975: 3, 6). Good race relations required ‘a coherent and co-ordinated policy over a large field involving many Government Departments, local authorities’, other existing and future statutory bodies and influential people (HM Government, 1975: 4-5).

Legislation was not a ‘sufficient condition for effective progress towards equality of opportunity’ but it was regarded as being able to deal with discriminatory acts, patterns of discrimination due to the effects of past discrimination which might not now ‘involve explicit acts of discrimination’ (HM Government, 1975: 6). The White Paper stated that

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Recommendation 17: ‘To facilitate the funding of local race relations activities, a statutory obligation should be placed on local authorities to promote equal rights and, paying attention to the new structure of local government with its division of responsibilities between counties and districts, the funding should be on a county basis either through county precepts or agreed sharing between the districts or indeed through both.’ SELECT COMMITTEE ON RACE RELATIONS AND IMMIGRATION 1975. The Organisation of Race Relations Administration, Volume 1. Session 1974-75. London, HMSO.
the Government needed to ensure that the legislative framework was comprehensive in scope and incorporated an effective enforcement regime (HM Government, 1975: 6). An effective enforcement regime had to provide redress for individual victims of injustice and also had to be ‘capable of detecting and eliminating unfair discriminatory practices’ (HM Government, 1975: 6). With respect to non-legislative measures, the White Paper cited the critical importance of the policies and attitudes of central and local government, and their influence on the country as a whole (HM Government, 1975: 6). It advocated the development of a more comprehensive policy for dealing with ‘the related and at least equally important problem of [racial] disadvantage’ (HM Government, 1975: 6). The implications for major public expenditure programmes were also highlighted as was the need to reassess priorities within existing expenditure programmes (HM Government, 1975: 6). This analysis was to underpin the development of future race relations legislation, the 1976 local authority race equality duty and the public sector race equality duties introduced between 2000 and 2010.

Neither the Government’s White Paper nor the subsequent Bill incorporated the Select Committee’s recommendation that a statutory obligation be placed on the local authorities to promote equal rights (Home Office, 1976: 12, Sooben, 1990: 13). These omissions were raised during the passage of the Bill by Labour MP Fred Willey, a leading member of the Select Committee, a lawyer and a long-time campaigner for race equality (Sooben, 1990: 8-9, Solomos, 1989: 8-9). According to Sooben (1990: 9), Willey argued forcefully during the parliamentary debates for what was to become the local authority race duty but he described the proposed duty in terms of empowering local authorities. According to Willey, the duty was not to be prescriptive or impose solutions on local authorities (1990: 9). Following these interventions, a new clause was added to address the Select Committee’s proposals for a ‘general duty with respect to race relations’ (Home Office, 1976: 12).54 However a Home Office assessment of the local authority duty gave the impression that it would primarily apply to local authority areas in which the largest numbers of ‘racial minorities’ had settled. Furthermore, as community relations

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54 The clause which was to become section 71 of the Race Relations Act 1976 was added in the House of Commons Standing Committee. General duties are set out in primary legislation whereas specific equality duties were set out in secondary legislation (see chapter 5 for further details).
councils were seen as central to the development of community relations policies, the relevance of the duty for local authorities with low numbers of people from BME communities, and/or no community relations council, was not clear (Home Office, 1976: 12).

‘In providing the services for which they are responsible, local authorities in whose areas the racial minorities have settled must be sensitive to their special situation and the needs to which this gives rise. Full co-operation between the local authorities and community relations councils is essential if community relations policies are to be fully developed’ (Home Office, 1976: 12).

The local authority race equality duty, enacted as section 71 of the Race Relations Act 1976, was the first general public sector equality duty (psed) but it only applied to local authorities. The duty placed a legal obligation on local authorities to address racial discrimination and promote equality of opportunity and good relations between people of different racial groups. According to Sooben, section 71 ‘was intended to re-emphasise a clear and demonstrable commitment to improve race relations at both Government and local authority levels, rather than to outline a specific policy’ (1990:10). Importantly, the 1976 Act also included voluntary positive action provisions which public bodies, and others, could decide whether, or not, to use. Section 75, of the 1976 Act, was intended to bring the actions of the Crown and government departments within the scope of the 1976 Act (Blackstone et al., 1998: 25). The 1976 Act was initially regarded as a significant step forward as was the local authority race duty (section 71); however the guidance on section 71 was not issued until June 1977 and what was issued was very limited (Sooben, 1990: 9). The guidance simply stated that the effect of the duty would obviously ‘differ from area to area and as between different local authority functions’ and that local authorities would ‘need to examine their relevant policies and practices to ensure that they meet the requirements of’ section 71 (Sooben, 1990: 9). The impact of this limited and inadequate guidance and an inadequate regulatory and enforcement framework is picked up later in this, and the next, chapter.

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55 The most important positive action provisions were included as sections 5 and 35 of the Race Relations Act 1976. Section 5 allowed employment by reference to someone’s racial group where membership of a racial group was deemed to be an occupational qualification. Section 35 allowed action to be taken to benefit a particular racial group where a racial group had special needs in education, training or welfare.  
56 A joint circular from the Home Office and other government departments.
1983 to 1994: The CRE’s first and second reviews of the Race Relations Act 1976

Perhaps unsurprisingly, given the inadequacies of the guidance and the limited intentions of both the Government and the Legislature, by 1983 serious limitations in the effectiveness of the local authority race duty had been identified by CRE and others (CRE, 1983). The CRE’s 1983 consultation referred to frustration with the local authority duty, its vagueness, the need to expand the duty to all public bodies and the need for a ‘stronger and clearly enforceable’ obligation (CRE, 1983: 7). In 1985, the CRE presented its first review of the Race Relations Act 1976 to the then Conservative Home Secretary (CRE, 1985). Proposal 22 of the 1985 review, endorsed the CRE’s 1983 consultation. Proposal 22 called for a new duty, to be extended to all public bodies, which would require public bodies to ‘work towards the elimination of discrimination and to promote equality of opportunity and good relations between persons of different racial groups generally’ (CRE, 1985: 35-36). Restricting the duty to only local authorities was described as ‘illogical’ given the range of public services provided by other public bodies (CRE, 1985: 35-36). The CRE also called for the duty to be reworded to provide clarity and legal enforceability (1985: 35-36).

The absence of effective accountability measures was noted and the fact that there was no way for the public ‘to check progress and see what plans are offered for the future’ (1985: 36). The CRE called for the annual publication of an account of the local authority’s programme and previous year’s performance ‘to enable the public to evaluate the work of public bodies in the field of race relations policy’ (CRE, 1985: 36). However despite these calls, neither of the Conservative Governments, elected in 1983 and 1987, adopted the CRE’s recommendations for a new, strengthened and extended public sector Race Equality Duty (RED) (CRE, 1992: 83). In fact, neither Government responded to the CRE’s detailed recommendations and very limited progress on race equality legislation was to be made between 1985 and 1992 (CRE, 1992: 7, 81).

In 1992, the CRE’s second review of the Race Relations Act 1976 noted, with evident dismay, that most of the CRE’s 1985 proposals for change remained unfulfilled including

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57 The main progress was the introduction of two statutory codes of practice on housing covering rented and non-rented housing and bringing planning control within the scope of the 1976 Act.
the proposals to strengthen section 71 (1992: 81-83). Moreover, the number of proposals that remained unfulfilled far exceeded the list of legislative actions taken (1992: 81-83). To make matters worse, the local authority race equality duty’s impact on contract compliance had been constrained by local government legislation, introduced in 1998, and the extension of compulsory competitive tendering (1992: 83). The CRE commented that racial discrimination remained widespread and the legislative framework needed to be strengthened because critical weaknesses and limitations had been exposed (1992: 7, 81). Comparing the Northern Ireland Act (NIA) 1998’s Section 75 duty with provisions in the rest of the UK, the review stated that there was no justification for the law in Britain to ‘be any weaker than the law against religious discrimination in Northern Ireland’ (CRE, 1992: 7).

Readers of the second review would have been left with a sense of inertia, of a lack of government interest in augmenting anti-discrimination race provisions and a sense of actual legislative regression with respect to race equality and the local authority race duty. Following the 1992 report, between 1992 and 1996, only two substantive race legislative measures were introduced – the removal of the limit on compensation awards and the provision of interest on compensation awards to be paid (Lourie, 1994: 10). Both race provisions were only introduced because a private members’ bill, the Race Relations (Remedies) Bill, introduced by the Labour Party’s Keith Vaz, was successful. The Race Relations (Remedies) Act 1994 maintained parity between sex and race anti-discrimination legislation following the introduction of the Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (McColgan, 1994: 226, Lourie, 1994: 10). Apart from these measures, progress on the race relations legislative front was to remain stalled until the next Labour Government in 1997.

58 The Local Government Act 1988, had been introduced by the Conservative Government, section 18 – Race Relations matters – provided a statutory limitation on those matters that could be considered by a local authority wishing to enter into contracts. That Local Government 1998 Act also extended the compulsory competitive tendering regime placed on certain public bodies including local authorities.


By contrast, by 1994, disability campaigners were on the cusp of securing the first disability discrimination act; this was to be enacted as the Disability Discrimination Act 1995. Prior to 1995 there had been some limited legislative provisions for disabled people but no equivalent to the Sex Discrimination Act 1975 or the Race Relations Act 1976.\textsuperscript{61} In 1990, Oliver reflected on ‘the rise of a strong vibrant and international disability movement’, recognition from the establishment and others that change was needed and the likelihood that political action would be taken (Oliver, 1990: 132). Oliver was right, the socio-political trade-winds were favourable; nevertheless legislative action was still some years away.

In 1991 and 1992 disability campaigners sought to get a Civil Rights (Disabled Persons) Bill, based on the US Americans with Disabilities Act (ADA) 1990, on to the statute book but each attempt failed ‘due to lack of Government support’ (Roll, 1994: 1, 7, 8).\textsuperscript{62} In 1992, disability groups drew up a manifesto ‘An Agenda for the 1990s’ which included a call for anti-discrimination legislation (Roll, 1994: 12). By 1994, a network of national and regional disability organisations had formed a campaign group - Voluntary Organisations for Anti-Discrimination Legislation (VOADL) (Roll, 1994: 12). VOADL’s campaign resulted in a parliamentary Early Day Motion that had secured 311 signatories by February 1994; a lobby of Parliament followed in March 1994 (Roll, 1994: 8, 12).\textsuperscript{63} The Bill proposed the statutory creation of a Disablement Commission with a broad civil rights remit in relation to disabled people and a similar remit to the CRE and EOC (Roll, 1994: 10). It was against this campaigning background that, in 1994, the Conservative Government consulted on proposals to outlaw discrimination against disabled people in employment and access to

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\textsuperscript{61} Examples of these limited provisions include the Disabled Persons (Employment) Act 1944, the Chronically Sick and Disabled Persons Act 1970, the Chronically Sick and Disabled Persons (Amendment) Act 1976, Disabled Persons (Services, Consultation and Representation) Act 1986 and provisions that covered disabled people parking, transport and associated matters.


\textsuperscript{63} Early Day Motions (EDMs) are formal motions submitted for debate in the House of Commons. However, very few are actually debated. EDMs allow MPs to draw attention to an event or cause. MPs register their support by signing individual motions. http://www.parliament.uk/edm
goods and services. In January 1995, the Conservative Government’s Minister for Disabled People published the ambitiously titled ‘Ending discrimination against disabled people’ (1995). The Government referred to the ‘new rights’ that it had introduced for disabled people in positive terms (1995: 7). It also said that it had ‘trebled the amount’ spent on benefits for the long-term sick and disabled people, introduced new benefits to meet their needs and demonstrated a commitment to providing, and funding, ‘real practical help to disabled people’ (1995: 7). Celebrating the fact that it was working with a range of partners, including ‘most importantly, of all disabled people themselves’; the Government argued that this approach had opened up opportunities and led to advances in the rest of society towards disabled people (1995: 7).

By November 1995, the Disability Discrimination Act (DDA) 1995 had been enacted. The importance of the pressure for legislative change, sustained by disability campaigners over a four year period, should not be underestimated (Oliver and Barnes, 2012: 155). The Conservative Government’s willingness to introduce disability discrimination legislation was evident whilst it remained unwilling to extend race relations legislation. The DDA 1995 also differed from race and sex anti-discrimination legislation because, though it prohibited discrimination against disabled people, it did not place a general prohibition on positive discrimination in favour of disabled people. Nor, as the DDA 1995 was designed to protect disabled people, did it provide general anti-discrimination protections for people not deemed to be disabled. Qualified reasonable adjustment provisions, set out in sections 6 and 21 of the DDA 1995, placed statutory duties on employers and providers of services to make reasonable adjustments; but it was to be for the employer or service provider to determine what was reasonable by having regard to a number of factors. These requirements departed from the formal equality model.

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64 There was a general prohibition on positive discrimination under both the Sex Discrimination Act 1975 and the Race Relations Act 1976.
65 The Sex Discrimination Act 1975 protected men and women equally from discrimination. The Race Relations Act 1976 also applied equally to members of different racial groups. Discrimination in favour of a group was not lawful unless one of the limited positive action provisions, in each act, could be called upon.
66 In employment, the factors to be considered in assessing reasonable adjustments, included: whether a step could be taken to remove a substantial disadvantage faced by a disabled person; how practical it was for the employer to take the step; the financial or other costs of addressing the substantial disadvantage; the extent of the employers’ financial or other resources; and access to financial resources to address the disadvantage. DDA 1995, section 6(4).
Instead of the principle of like treatment, the reasonable adjustment provisions required the consideration of changes, which might need to be made, to accommodate or assist disabled people. As individuals could apply to an employment tribunal or court if they were concerned if reasonable adjustments were not made, the reasonable adjustment provisions were legal obligations that could be enforced by the courts (Lawson, 2008: 64-67). The DDA 1995 therefore included a number of proactive statutory requirements, absent from race and sex anti-discrimination legislation. These DDA specific provisions would subsequently form important building blocks for what would become the Disability Equality Duty (DED).

Despite the strengths of the DDA 1995, in due course disability equality campaigners and lawyers identified important problems with the 1995 Act including flaws in how some rights were framed and important omissions (DRTF, 1999: 2). The definition of disability under section 1 of the 1995 Act was regarded by many as problematic because it represented a medical rather than social model approach; the requirement to prove that one was disabled excluded some disabled people who faced discrimination (House of Commons Work and Pensions Committee, 2009b, DRTF, 1999: 4, 12). The statutory guidance on the definition of disability did little to dispel this notion or to allay fears about having to prove that someone was disabled (House of Commons Work and Pensions Committee, 2009b: 12, 30, 52, 82, 89, Minister for Disabled People, 1996). Furthermore, the recommendation, for the creation of the ‘Disablement Commission’, had been omitted from the 1995 Act. Although the Act made provision for the creation of a National Disability Council, the Council’s remit was limited to advising the Secretary of State and it did not have the statutory powers of the CRE or EOC (DDA 1995, section 50). The failure to legislate to create a disability rights commission in 1995 meant that there was no equivalent body to the CRE or EOC to oversee the Act or formulate a strategic direction from 1995 onwards. Furthermore, in the absence of such an equality commission, there was no clear focus for providing leadership on progressing the agenda

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67 The provisions were phased in over a number of years starting with the employment requirements. Next, employers were required to make reasonable adjustments where arrangements or physical features of an employer’s premises placed a disabled employee, or would be employee, at a substantial disadvantage.
on service-delivery. Furthermore, the DDA 1995 did not incorporate the equivalent to the local authority race duty.

Nevertheless, given that legislative progress in relation to race and anti-discrimination and equalities had been largely stalled since 1985, the enactment of the Disability Discrimination Act 1995 was regarded as a significant legislative step forward even if not an unqualified success (DRTF, 1999: 2). As with the Race Relations Act 1976, the need to address the limitations of the legal framework was recognised, as was the importance of legislation in defining rights, providing a framework and encouraging cultural change.

‘The Disability Discrimination Act 1995 (DDA) marked an important step forward in disabled people’s rights. But there are gaps and weaknesses in the Act which mean that disabled people continue to be denied comprehensive and enforceable civil rights. Whilst legislation in itself cannot force a change in attitudes, it can provide certain rights and lay down a framework that will encourage and hasten a change in culture’ (DRTF, 1999: 2).

1997 to 2000: Exclusion to inclusion, establishing the DRC, the RED and the EU anti-discrimination and equalities agenda

A Labour Government was elected in May 1997 after winning a landslide victory.68 This Government quickly responded to longstanding demands from equality and human rights campaigners and embarked on an ambitious equalities and civil rights based legislative programme. In July 1997, the Home Secretary, Jack Straw, wrote to Sir William MacPherson of Cluny, a retired high court judge, to ask him to chair a public inquiry into the racist murder of Stephen Lawrence.69 The inquiry was to investigate the matters arising from Stephen Lawrence’s death in 1993, in order to ‘identify the lessons to be learned for the investigation and prosecution of racially motivated crimes’ (Macpherson of Cluny, 1999b).70 In October 1997, this ambitious equality and civil rights programme was expanded when the Government published proposals for what were to become the

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68 The Labour Party had been out of power for some 18 years and followed four successive Conservative Governments elected in May 1979, June 1983, June 1987 and April 1992.
69 Such an inquiry had been rejected by the previous Conservative Government.
70 The purpose of the inquiry was set out in the cover letter, from Sir William McPherson to the Home Secretary, published with the Inquiry Report. MACPHERSON OF CLUNY, W. 15 February 1999b. Re: The Inquiry into Matters arising from the death of Stephen Lawrence.
Human Rights Act 1998 and the Data Protection Act 1998. In December 1997, the Government established the Disability Rights Task Force (DRTF) with three linked responsibilities (DRTF, 1999: 2). First, the DRFT was to report on how best to ‘secure comprehensive, enforceable civil rights for disabled people within the context of our wider society’ (1999: 2). Second, it was to ‘make recommendations on the role and functions of a Disability Rights Commission’ (1999: 2). Third, it was to ‘provide a full report of its recommendations on wider issues no later than July 1999’ (1999: 2).

Returning to the race equality agenda, by 1998, Lord Lester’s assessment was that the aims and ambitions for the Race Relations Act 1976 had ‘never been fully realised’ (Blackstone et al., 1998: 25). Key factors in this failure were legislative, legal and CRE related. On the legislative side, Lord Lester noted problems caused by limitations and exceptions in the 1976 Act and that the language of the Act was too technical and inaccessible (Blackstone et al., 1998: 25). These legislative limitations had been compounded by legal decisions taken by the courts. Notably a 1982 House of Lords’ decision ‘effectively neutered’ section 75 of the RRA 1976 by defining that only acts ‘resembling acts which might be done by a private person’ would be covered by section 75 (Blackstone et al., 1998: 25). This was to largely leave the governmental arena ‘unregulated’, ‘precisely where the individual is most vulnerable’ by excluding key areas such as the administration of justice, ‘police action in the course of their operational duties’, the operation of much of the criminal justice system and immigration procedures (Blackstone et al., 1998: 25). With respect to the CRE, Lord Lester’s said that the CRE was under-resourced and had sometimes been unwilling to use its ‘considerable investigative and enforcement powers’ (Blackstone et al., 1998: 25). Furthermore these failings had been compounded by limited progress on non-legislative measures to address racial disadvantage (Blackstone et al., 1998: 25-27). Part of the package of non-legislative measures, originally envisaged by Lord Lester and others, had been a form of contract compliance which would have meant that actual and potential contractors for central and

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71 The Human Rights Act 1998 was enacted on 9th November 1998 however to allow training to be rolled out the Act was not to come into force until 2000. Until the subsequent creation, 9 years later, of the Equality and Human Rights Commission, there was no UK wide Human Rights Commission to drive the human rights agenda forward.

72 R v Entry Clearance Officer, ex-parte Amin [1982] 2 AC 818 at 835 (HL)
local government contracts would have been asked to provide ‘reasonable information about their employment practices and policies’ (Blackstone et al., 1998: 27). Lord Lester noted that in Northern Ireland, a Conservative Government had introduced contract compliance monitoring on the basis of religion, under the Fair Employment Act 1989, sections 38 to 43. However, the same Government had severely limited the contract compliance questions that could be asked in England. Following its election in 1997, the Labour Government had also failed to introduce contract compliance monitoring (Blackstone et al., 1998: 27, CRE, 1992: 83).

In April 1998, the CRE presented its third review of the Race Relations Act 1976 to the Labour Home Secretary, Jack Straw (CRE, 1998a). The review (CRE, 1998a) made extensive recommendations for legislative change building on its first and second reviews; it also echoed some of the concerns raised by Lord Lester and others (CRE, 1992, CRE, 1985). The CRE noted that the previous Conservative Governments had not responded to its first review and had made a limited response to its second (CRE, 1998b: 6). The CRE’s third review proposed wide ranging legislative changes to the Race Relations Act 1976 including the introduction of a new public sector race equality duty (CRE, 1998a: 3, 13-14). Other recommendations included making race equality a permanent priority for public bodies and making changes to RRA’s scope, definitions, the areas covered, exceptions, positive action, ethnic monitoring, the CRE’s powers, enforcement and adjudicating complaints (CRE, 1998a: 3, 11-36). Explicit reference was also made to the need for a positive right not to be discriminated against as well as the need to address institutional complacency, persistent discrimination and limitations on the ability of individuals to secure justice (CRE, 1998a: 7). The review referred to the power of public bodies and government to change attitudes and mainstream equality; it also noted with concern that there were ‘no incentives to encourage institutions’ whether public or private ‘to end discrimination and implement good practice’ (CRE, 1998a: 7-9). Explicit reference was also made to creating ‘new frameworks for accountability’ for achieving race equality and to placing responsibility for initiating action for racial equality where it should be, namely with organisations and leaders of leading institutions (CRE, 1998a: 7-9). The CRE also commented, in positive terms, on its joint work - with the CBI, the Local Government Association, the TUC and trade unions - and the importance of such
partnership working in eliminating discrimination and promoting racial equality (CRE, 1998b: 2). The CRE had not forgotten that in the 1960s, the TUC and CBI had proved to be powerful opponents to race equality legislation so securing their support was important. However, the CRE also stated that the success of such partnership initiatives depended on its ability to use its powers under the 1976 Act (1998b: 2). The responses of Labour Governments, elected between 1997, 2001 and 2005, to these proposals are explored later in this chapter.

With respect to a public sector race equality duty, the CRE’s third review repeated, but also gave real substance to, its 1985 and 1992 recommendations for an extended public sector race equality duty. The new duty would effectively extend the CRE’s own duty to public bodies carrying out their functions; requiring these public bodies to work for ‘the elimination of racial discrimination’ and the promotion of ‘equality of opportunity and good relations between people from different racial groups’ (CRE, 1998a: 9, 13). The CRE recommended that the new race equality duty should cover all of the functions of a public body and address institutional racism. The CRE also recommended the introduction of specific duties to ensure that public bodies would be able to demonstrate compliance with the new general duty (CRE, 1998a: 13-15). These specific duties would support proposed new powers for the CRE. The new powers would enable the CRE ‘to verify compliance’ by public bodies with the racial equality duties and take action in respect of non-compliance’ (CRE, 1998a: 13-15). The CRE also called for other new obligations to be placed on public bodies including requirements to assess impact, use contract compliance and implement ethnic monitoring (CRE, 1998a: 13-15). In addition, annual reports on race equality measures would have to be published by public bodies subject to the duty and there would have to be external audits of the performance of the duties by a range of audit and inspection bodies (CRE, 1998a: 13-15). If a public body failed to ‘carry out its racial equality duties’, the CRE proposed that this act or omission should be challengeable by way of judicial review (JR) (CRE, 1998a: 13-15).

At the end of April 1998, when the CRE submitted its proposals for reforming the Race Relations Act to Parliament, the Stephen Lawrence Inquiry was in the midst of gathering
submissions and interviewing witnesses (CRE, 1998a). Part 2 of the Inquiry received 146 written submissions from a wide cross section of civil society, public sector organisations, lawyers and others (Macpherson of Cluny, 1999a). Importantly, lawyers – representing BME people in leading cases involving deaths in custody and other suspicious deaths – made representations to the Inquiry (Macpherson of Cluny, 1999a). The senselessness and brutality of Stephen Lawrence’s racist murder, the bungled police investigation, the campaign led by Stephen Lawrence’s parents and the Inquiry itself had acted as a focus for calls for legislative, and other, action to address racism, institutional racism and flaws in the civil and criminal justice frameworks. The Stephen Lawrence Inquiry report, a landmark public inquiry report, was presented to Parliament in February 1999 (Macpherson of Cluny, 1999c). The report recognised the existence of, and the need to address, institutional racism (Macpherson of Cluny, 1999c: 20, 23, 24, 28, 321).

The Inquiry defined institutional racism as ‘the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin’ which can be ‘detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people’ (1999c: 321). The Inquiry’s conclusions stated that every institution should be required ‘to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities’ (1999c: 321). The Inquiry also recognised the need for the Police and other public bodies to rebuild trust with BME communities and the importance of accountability; these were central themes in the report, the findings and the recommendations (Macpherson of Cluny, 1999c: 11, 13, 34, 256, 315, 323, 324, 327, 330).

Following the Inquiry Report’s publication, on 15th February 1999, the Home Secretary, Labour’s Jack Straw, responded promptly on 24th February 1999. His statement to Parliament announced the Government’s intention to extend the Race Relations Act 1976 to all public services; however, as he also announced that legislative and non-legislative

73 The Inquiry sat in public session for seventy days during 1998.
74 In terms of civil society organisations, written submissions were provided by race equality, anti-racist and anti-harassment voluntary and community organisations (VCOs), public bodies, academics and relevant legal associations.
measures would be considered, it was unclear what precisely was intended (Fiddick and Hicks, 2000:14-15). The Labour Government expressed some concern about the effectiveness of statutory regulation; a theme to be picked up with vigour, some ten years later, by the Conservative-led Coalition in the Red Tape Challenge.

The Labour Government asked the Better Regulation Task Force (BRTF) to review ‘the regulations and administrative procedures surrounding anti-discrimination legislation’ (BRTF, 1999: 3, 6). The BRTF’s approach incorporated both, what it called, a ‘citizen’s and business perspective’ (BRTF, 1999: 3, 6). The report noted, with regret, the fact that anti-discrimination laws were needed (BRTF, 1999: 3). Moreover, perhaps unsurprisingly given its joint focus on citizens and business, contrary to the CRE’s recommendations for extensive legislative change (CRE, 1998a), the BRTF’s report cautioned against major legislative changes arguing instead that much could be achieved by non-regulatory means (BRTF, 1999: 3). Confusingly, whilst supporting the recommendations of the Stephen Lawrence Inquiry and the CRE’s call for a public sector race equality duty, the BRTF’s report also suggested that new legislation was not required. However the BRTF’s report stated that it would support a public sector race equality duty if the need for new legislation were proven (BRTF, 1999: 3). Many of the recommendations, from the CRE’s third review (1998b), if implemented, could have supported the proposed Race Equality Duty (RED). Unfortunately, only a few of the CRE’s key recommendations were initially adopted as part of the Race Relations (Amendment) Bill, in November 1999, or were later introduced as amendments to the Race Relations (Amendment) Bill; whilst others were never adopted.

75 ‘It was agreed that the public sector should promote race equality: “Officials have been asked to work up options, both legislative and non-legislative, for taking this forward in the fields of public sector employment, the provision of goods, facilities and services and the functions to be newly caught by the extension of the Act described above”.’ FIDDICK, J. & HICKS, J. 2000. The Race Relations Amendment Bill [HL] Bill 60 of 1999-2000, Research Paper 00/27. London, House of Commons Library.

76 ‘The BRTF had been established in 1997. It was an independent body that advised Government on action to ensure that regulation and its enforcement accord with the 5 principles of good regulation: transparency, accountability, proportionality, consistency, and targeting.

77 ‘We are not persuaded of the need for major legislative overhaul at this stage – either in relation to the individual regimes or in bringing them together. Much can be achieved through non-regulatory means.’ BRTF 1999. Better Regulation Task Force Anti-discrimination legislation, London, Cabinet Office; BRTF.
A House of Commons’ briefing note, published in 2000, identified that whilst the Government intended to legislate ‘to make it unlawful for a public authority to discriminate directly in carrying out any of its functions’, it did not intend that this prohibition should extend to indirect discrimination (Fiddick and Hicks, 2000: 17). Furthermore, in opposition to the CRE’s proposals, the published Bill did not include the anticipated public sector RED (Fiddick and Hicks, 2000: 17-18). The Government initially argued that it would be better to introduce an equality duty covering race and other equality strands at some point in the future (Fiddick and Hicks, 2000: 17-18). Both omissions were challenged by peers and Lord Lester was pivotal during these debates (Parliament. House of Lords, 1999, Fiddick and Hicks, 2000: 18-23). Lord Lester argued that the Bill was seriously flawed because it did not address indirect discrimination properly nor did it include ‘a clear and legally enforceable positive duty upon public authorities to secure that their functions are carried out without racial discrimination’ (Parliament. House of Lords, 1999: 14.12.99 - Column 142).

Lord Dholakia, who had previously served as a CRE Commissioner, also argued for radical thinking, root and branch action and for an ‘enforceable legal duty on all public bodies to combat racial discrimination and promote racial equality’ (Parliament. House of Lords, 1999: 14.12.99 - Column 170). Lord Lester insisted that the question of enforceability was central and, echoing the CRE, that the duty should be made enforceable by regulations ‘requiring compliance statements’ (Fiddick and Hicks, 2000: 27). He also maintained that private bodies exercising public functions should be caught by the duty (Fiddick and Hicks, 2000: 27-30). With respect to the Government’s approach to indirect discrimination, Lord Lester referred to concerns raised by the CRE, the Society of Black Lawyers and representatives of other ethnic minority organisations and produced legal guidance for peers (Fiddick and Hicks, 2000: 17-26). Lord Lester’s legal guidance challenged the Government’s proposed legislative approach to indirect discrimination (Fiddick and Hicks, 2000: 17-26). His arguments carried added weight because the Government, and other peers, acknowledged that he had been a key architect of the original 1976 Act (Parliament. House of Lords, 1999: 14.12.99 - columns 128, 140).
In January 2000, the Home Secretary announced that the Government would amend the Race Relations Bill to extend the planned prohibition on discrimination in carrying out the functions of public bodies to indirect discrimination (Fiddick and Hicks, 2000: 23-24). That same month, Lord Lester QC successfully moved the amendment to introduce what was to become the public sector RED (Fiddick and Hicks, 2000: 27). By contrast, peers’ concerns about the treatment of immigration and nationality in the Bill and the potential for discrimination had limited impact on the exemptions included in the eventual public sector RED and the Race Relations (Amendment) Act 2000 (Fiddick and Hicks, 2000: 34-40).

The 2000 Act significantly extended the Race Relations Act 1976 and brought public bodies, their activities and public functions fully within the scope of the 1976 Act; it also introduced the new public sector RED and augmented the regulatory and enforcement powers of the CRE (CRE, 1998a: 13, 14, 35). However, a significant number of the CRE’s legislative recommendations – including the positive enforceable right to be free from discrimination on racial grounds and the requirement on public bodies to use contract compliance – were not incorporated in the 2000 Act and have not been adopted since (CRE, 1998a: 11, 12, 13, 16, 21, 22, 30, 31, 32, 39).

The new Act received Royal Assent in November 2000 and the new RED was introduced as section 71 of the Race Relations Act 1976 as amended. The RED was supported by the CRE’s new regulatory and enforcement powers, including the ability to issue codes of practice, compliance notices and apply to the court to support enforcement action (sections 71C, 71D and 71E). The Race Relations (Amendment) Act 2000 also gave the Secretary of State the power to introduce statutory regulations for the better performance of the general RED. The approach taken to the general and specific equality duties is investigated in the next chapter. The Home Secretary said that the Government’s

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78 The approach adopted is explored in the next chapter.
79 The fact that judicial review would be available to address a failure by a public body to carry out its racial equality duties was addressed by the case of Elias first decided in 2005.
80 Key CRE recommendations, that were not adopted in 1998 and have not been adopted subsequently, that could have supported an effective Race Equality Duty included the recommendations that: using the Human Rights Act 1998 as a model, that legislation should have to be declared compatible with race equality legislation; there should be a positive right to be free of discrimination; there should be a requirement on public bodies to use ‘contract compliance’; procurement should explicitly be brought within the Act’s scope; the time limit for race discrimination claims should be extended to 6 months instead of 3 months; and class actions by groups of litigants should be allowed.
intention was to: achieve ‘a step change in race equality in this country’; ensure that the public sector set ‘the pace in this drive towards equality’; and send ‘the clearest possible message that discrimination is not acceptable and will not be tolerated’ (Fiddick and Hicks, 2000: 23-24). Importantly the Labour Government accepted that institutional racism existed and needed to be challenged by introducing, what would become, the Race Equality Duty and other legislative measures in the 2000 Act.

In 2000, the Runnymede Trust published ‘the Future of Multi-Ethnic Britain’; also known as the Parekh Report (Runnymede Trust et al., 2000). An independent Commission had been established by the Runnymede Trust in 1998. This Commission’s three part remit was to: ‘analyse the current state of multi-ethnic Britain’; propose ways of countering racial discrimination and disadvantage; and to assess ways to make ‘Britain a confident and vibrant multicultural society at ease with its rich diversity’ (Runnymede Trust et al., 2000: viii). The Parekh Report noted that the Labour Government, elected in 1997, had initially adopted a ‘colour blind approach’ but had subsequently, adopted a more positive approach, by engaging with race equality, social policy and modernisation (Runnymede Trust et al., 2000: 251). The Report referred in positive terms to the forthcoming RED, the Government’s acceptance of most of the recommendations made by the Stephen Lawrence Inquiry and other positive policy steps taken to advance race equality (Runnymede Trust et al., 2000: 251). In retrospect, this was to prove a high point in relation to the RED and race equality legislation.

Returning to the disability agenda, between 1997 and 1999, the DRTF worked hard to fulfil its challenging briefs. In 1998, it published an interim report containing recommendations for the establishment of what was to become the DRC (DRTF, 1999: 3). The Labour Government acted almost immediately on these recommendations and the Disability Rights Commission Act was enacted in 1999. Sections 2(b) & 2(c) specifically

81 The Runnymede Trust, a leading race equality think tank for over thirty years, had been created in 1968 partly in response to Powell’s Rivers of Blood speech. Its first chair was Anthony Lester QC.
82 These other positive steps included preliminary work on a race equality performance management framework, race equality targets for the Police, other uniformed services and civil service recruitment, including CRE standards in the best value regime, a strong emphasis on equality issues, setting up a Race Relations Forum on new government structures and machinery and a new grants programme for BME organisations. RUNNYMEDE TRUST, COMMISSION ON THE FUTURE OF MULTI-ETHNIC BRITAIN & PAREKH, B. 2000. The future of multi-ethnic Britain: The Parekh Report, London, Profile Books Ltd.
stated that the DRC had the duty to ‘promote the equalisation of opportunities for disabled persons’ and ‘take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons’. With its equalisation duty and responsibility to encourage good practice in relation to the treatment of disabled people, the DRC’s duties show its civil rights roots. The formulation of the DRC’s Duty would have implications for the form and content of the future DED; this is explored in the next chapter. Towards the end of 1999, the DRTF published its final report ‘From Exclusion to Inclusion’ (1999). This 134 page report reflected on the CRE’s third review, the Stephen Lawrence Inquiry Report, the report from the Better Regulation Task Force, other reports and other relevant matters; it contained over 150 recommendations (1999). Recommendation 6.13 proposed the introduction of a public sector disability equality duty but this was not to be progressed by the Government in 1999; it would have to wait until 2005.

Despite the advances in relation to individual equality strands, by 2000, the Labour Government and others had started to focus on the EU agenda and the consequences for the UK’s legislative framework. In 2000, ‘Equality: A new framework’ was published; this was an independent review of the enforcement of the UK’s anti-discrimination legislative framework (Hepple et al., 2000). The purpose was to ‘review and evaluate proposals for the reform of the UK’s anti-discrimination legislation’; ensuring full compliance with obligations under EU law and international human rights law was a subsidiary objective (Hepple et al., 2000: xiii). The report’s authors were Professor Sir Bob Hepple QC, Mary Coussey and Tufyal Choudhury and the chair of the advisory panel was Lord Lester QC. The report reflected on the existing EU framework and in particular on EU Treaties and Directives that prohibited discrimination (Hepple et al., 2000: 7). The Review also sought to assess the likely impact of two proposed EU directives published in draft form in 2000 (Hepple et al., 2000: 7). The Race Equality Directive would outlaw ‘race discrimination in employment and related fields and in the provision of education, goods, and services, access to goods, services and premises; travel; the environment and housing; participation in public life; Local Government, Health and Social Services. Draft directives had been published in 1999 and the report commented on these draft directives because the report had been written before the final directives were published in June and November 2000.
housing, and in relation to ‘social protections’ and ‘social advantages’ (Hepple et al.,
‘Member States to outlaw discrimination connected to religion and belief, disability,
sexual orientation and age in’ employment and related fields (Hepple et al., 2000: 7, 
Monaghan, 2007: 114).\(^{86}\)

In sharp contrast to the Better Regulation Task Force’s report (BRTF, 1999), published just
a year before, this Review recommended a major reorganisation of the framework for
anti-discrimination legislation (Hepple et al., 2000: 5-10). The persuasive rationale for a
fundamental overall for the UK’s anti-discrimination legislation included dissatisfaction
with the existing outdated legislative framework, pressures to extend the separate
legislative frameworks and the need to introduce positive equality duties (Hepple et al.,
2000: xiii). This independent Review also commented on the need to learn from the
relative success of Northern Ireland’s fair employment legislation and keep in line with EU
law (Hepple et al., 2000: xiii). The rationale for fundamental change also cited ‘the new
political and legal culture based on the Human Rights Act 1998’, changes to the face of
discrimination, disadvantage and social and employment practices and the danger of the
fragmentation of equalities policies because of devolution (Hepple et al., 2000: 5-14). This
influential report made over fifty recommendations, some of which were to be addressed
by the Government via the enactment of the Equality Act 2006 (Hepple et al., 2000: xvii -
xxiv). However the most fundamental proposals were not to be addressed until 2006 and
2010 with the enactment of the Equality Act 2006 and the long-awaited Equality Act
2010.\(^{87}\)

2001 to 2010: Race, SEDs, community cohesion, integration, terrorism, the DDA
2005, the DED and the EU agenda

Between 2001 and 2010, there were sometimes divergent developments in relation to
the race, disability and broader equalities agendas. These developments are considered
next. In 2001, following consultation, a statutory order – the Race Relations Act 1976

\(^{87}\) Key provisions included: the creation of a single Equality Act in Britain; the creation of a Human Rights
Commission; the development of an integrated and extended public sector equality duty; and the
development of a more effective regulatory and enforcement framework.
(Statutory Duties) Order 2001 – was laid before Parliament on 23 October 2001. This order set out regulations to ensure the better performance of the general RED; it came into force on 3 December 2001. The legislative form and content of these specific equality duties (SEDs) largely drew on the recommendations made in the CRE’s third review (CRE, 1998a).\footnote{The RED framework is assessed in the next chapter.} However, before the ink had dried on these SEDs, what were to become known as the cohesion and integration agendas had started to gain traction. In the summer of 2001, the UK was hit by a series of serious race related disturbances (Rollock, 2009: 10).\footnote{Oldham (May 2001), Burnley (June 2001), Leeds (June 2001), Bradford (July 2001), Stoke-on-Trent (July 2001).} Whilst not the first of their kind, these were the first major disturbances since the Brixton riots of 1995 and the first for New Labour. In response during 2001, the Labour Government set up a Ministerial Group on Public Order and Community Cohesion, established an Independent Review Team (IRT) and commissioned three separate reports (Rollock, 2009: 10).

The Ministerial Group was tasked with reporting to the Home Secretary on ‘what Government could do to minimise the risk of further disorder, and to help build stronger, more cohesive communities’ (Ministerial Group on Public Order and Community Cohesion, 2001: 2). The IRT was chaired by Ted Cantle, its remit was to obtain views, identify areas of weakness and good practice and report to the Ministerial Group (Community Cohesion Review Team et al., 2001: 5). When published, three reports – on Bradford, Burnley and Oldham – all raised ‘concerns about communities divided along racial, faith and cultural lines and the need for better community cohesion’ (Rollock, 2009: 10).

The reports of the Ministerial Group and the IRT were published in December 2001; the same month that the race SEDs came into force (Ministerial Group on Public Order and Community Cohesion, 2001, Community Cohesion Review Team et al., 2001). The IRT’s report asserted that separate ‘educational arrangements, community and voluntary bodies, employment, places of worship, language, social and cultural networks’ meant that many communities operated on ‘the basis of a series of parallel lives’ and that this
amended to segregation (Community Cohesion Review Team et al., 2001: 9). The IRT’s report made sixty seven recommendations; the recommendations were spread across fourteen thematic areas (Community Cohesion Review Team et al., 2001: 18-52). The Ministerial Group referred to a lack of a ‘strong civic identity or shared social values to unite diverse communities’ and ‘fragmentation and polarisation of communities’ along economic, geographical, racial and cultural lines on a scale that amounted to segregation, ‘albeit to an extent by choice’ (Ministerial Group on Public Order and Community Cohesion, 2001: 11). The terrorist attacks in the USA, on 11 September 2001 and the wars in Iraq and Afghanistan, from 2001 and 2003, reinforced the UK Government’s concerns as well as fears about an enemy within, immigration, terrorism, cohesion and integration.

Labour’s Home Secretary, Mr Blunkett, was also concerned about the political implications and linked the issues of immigration and asylum with wider policing issues. In April 2002, the day after the far right made significant gains in France, and before the May local elections in Britain, aides to the then Labour Home Secretary ‘insisted that his tough policies on street crime, immigration and asylum were vital if jaundiced voters were not to abandon the mainstream parties’ (Beynon and Kushnick, 2003: 241, Wintour, 2002). In 2003, the Race Relations Regulations 2003 were introduced. These regulations incorporated new requirements on discrimination, harassment, victimisation, reasonable adjustments, policing and new definitions. However, the regulations did not mark a new focus on race equality. Instead, by January 2005, the Home Secretary had launched a joint government strategy to increase race equality and improve community cohesion (Home Office, 2005). Whilst the Government reaffirmed the importance of addressing racial disadvantage, it also argued that ‘a cohesive society relies on more than equal opportunities for individuals’ (Home Office, 2005: 11). The Home Office’s new strategy advocated the development of ‘social conditions’ to help people from all backgrounds ‘come together and develop a sense of inclusion and shared British identity defined by common opportunities and mutual expectations on all citizens to contribute to society’ (Home Office, 2005: 11). The coordinated terrorist suicide bomb attacks in central London on 7 July 2005 added a new imperative to the anti-terrorism, cohesion and integration

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debates. By 2005, some argued that community cohesion had become widely regarded as ‘the new framework governing race relations policy in the UK’ or even ‘the defining policy’ between 2001 and 2005 (Rollock, 2009: 11, Worley, 2005: 1, 6).

Between 2006 and 2008, the rise of the community cohesion agenda, and its dominance over the race agenda continued. This dominance was reinforced by the work of the Commission on Integration and Cohesion (COIC), the introduction of a statutory duty to promote community cohesion in 2006 and the publication of a range of guidance on community cohesion by various government departments (2007: 63). The focus on race equality was further undermined by the demise of the CRE and the creation of, what became, the EHRC during 2007.\(^9^1\) Unfortunately, the EHRC’s early years were beset with leadership, and other problems, which undermined its effectiveness (JCHR, 2010: 15-19, 30, 31).\(^9^2\) In 2009, the EHRC issued guidance to local authorities noting that there was evidence that local authorities were ‘implementing the drive to promote community cohesion and integration in breach of their positive legal obligations concerning equality and diversity’; however the guidance was non-statutory (EHRC, 2009: 2).

By 2009, community cohesion had ‘largely replaced the earlier agenda that came out of the Macpherson Report’ (Rollock, 2009: 11, Worley, 2005: 6). The interrelated anti-terrorism, community cohesion, immigration and integration agendas each presented ever louder, competing narratives to race equality, race relations and the RED obligations. These competing narratives ‘paid little attention to issues of inequality, the role of economic factors, institutional racism and political disenfranchisement’; instead they often concentrated on BME communities as the ‘problem’(Rollock, 2009: 10). Furthermore, spending on race equality was, to some extent, crowded out by these agendas. For example, the community cohesion and integration agendas made policy and financial demands on public bodies and local authorities; they also played ‘a central role

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\(^9^1\) Section 1 of the Equality Act 2006, provided for the establishment of the Commission for Equality and Human Rights (CEHR). Shortly after the CEHR was established in 2007, it made its working name the Equality and Human Rights Commission (EHRC).

\(^9^2\) There were financial problems and irregularities, conflicts between commissioners, resignations by some commissioners and leadership problems. JCHR 2010. *Equality and Human Rights Commission: Thirteenth Report of Session 2009-10: Report together with formal minutes and oral and written evidence*, London, TSO.
in government policy and spending commitments during this period’ (Rollock, 2009: 11, Worley, 2005:6).

By contrast on the disability front in 2000 progress was still being made; the DRC, newly formed in 2000, helped to drive the disability agenda. The DRC had embraced, and promoted the social model of disability, from its inception. The Commission argued that disabled people’s experiences of ‘poverty, disadvantage and social exclusion’ were not the inevitable result of their impairments or medical conditions’ but ‘stemmed from attitudinal and environmental barriers’ (DRC, 2005: 184). The DRC’s commitment to the social model of disability informed its statutory and non-statutory guidance. In 2002, the DRC worked with the Department for Work and Pensions and parliamentarians to secure amendments to the DDA 1995; importantly this included a commitment to introduce a public sector disability equality duty. Between 2000 and 2003, the DRC worked with government departments to develop new regulations to comply with the EU Employment Framework Directive. The resulting Disability Discrimination Act 1995 (Amendment) Regulations 2003 incorporated new definitions and requirements in respect of discrimination, harassment, victimisation, reasonable adjustments and policing. By December 2003, following a failed private members Bill in 2002, a draft government Disability Discrimination Bill had been published (2003).

In July 2004, a detailed consultation – on extending the DDA to cover public functions and developing a public sector disability equality duty – was published (DWP, 2004). The Government’s initial proposals for the DED were modelled somewhat slavishly on the RED. However, in 2004 and 2005, following intervention by peers, the proposed shape of the DED was amended. The DED’s final framework drew on the DRC’s own statutory remit, the social model of disability and legislative provisions unique to the DDA 1995 (see chapter five). The DED’s framework went beyond the provisions in the general RED by introducing six rather than three equality aims. The social model informed the DRC’s approach to the Disability Equality Duty (DED), the form of the DED’s equality aims, the DRC’s statutory and non-statutory guidance as well as how the DRC worked with government departments, civil society and others. In April 2005, the Disability Discrimination Act 2005 was enacted with the long awaited, and fought for, DED. The DED
was designed to be proactive, three of its six equality aims addressed: the ability to treat disabled people more favourably; promoting positive attitudes towards disabled people; and encouraging participation by disabled people in public life. The social model of disability and enabling disabled people to use the DED also influenced the DRC’s approach to the roll-out of the DED. Between 2006 and October 2007, when the DRC was incorporated within the EHRC, the DRC embarked on a major programme called ‘Doing the Duty’. This innovative programme was designed to support public sector bodies and enable disability campaigners to use the new DED; the programme is briefly reviewed in chapter seven. The DRC ceased to exist in 2007 when the EHRC was created.

Though there were important developments on the race and disability agendas, successive Labour Governments, between 2001 and 2010, were also concerned about the broader equalities legislative agenda. In 2002, the Labour Government published two reports on the way ahead for equality and diversity (DTI et al., 2002a, DTI et al., 2002b). In 2003, the Joint Committee on Human Rights had announced that its ‘preferred option was a single commission integrating protection for equality and human rights’; the Government announced its support of that position in October 2003 (Klug and O’Brien, 2004: 712). In May 2004, a Government White Paper set out proposals for the establishment of a Single Equality Commission to be called the Commission for Equality and Human Rights (CEHR) (DTI et al., 2004). The White Paper identified extended enforcement powers for the CEHR but stated that it would be expected to ‘take a strategic approach to the use of its enforcement tools’ (DTI et al., 2004: 41). Where possible the CEHR would be expected ‘to secure change without formal enforcement action’ (DTI et al., 2004: 46). It would also be important for the EHRC to ‘combat perceptions’ that the CEHR’s role ‘in relation to business was only to enforce legislation’ (DTI et al., 2004: 64). The White Paper also said that the CEHR would be expected to work ‘in partnership with business wherever possible’ (DTI et al., 2004: 64). The CEHR would also be expected to work closely with relevant inspectorates and standard setting agencies to ‘promote, encourage and develop performance measures and standards in equality and human rights’ (DTI et al., 2004: 70-71). With respect to third party interventions in legal cases, whilst the CRE, DRC and EOC had intervened occasionally ‘to provide expert knowledge and understanding’ to assist the courts in making a decision,
the Government intended that the CEHR should be enabled to make strategic third party interventions (DTI et al., 2004: 40).

In August 2004, the CRE responded to the proposals for the creation of the CEHR, and its own demise, arguing that the proposals were wrong in principle, would not work and were not better than the arrangements then in place (CRE, 2004: 3). The CRE challenged the analysis in the White Paper, raised concerns about the effectiveness of the proposed ‘super-quango’ and asserted that the fundamental roles of statutory equality bodies were to ‘enforce the law, to set standards and to regulate policy and practice’ (CRE, 2004: 3). The CRE argued that the White Paper’s focus on ‘generalities and warm aspirations’ simply would not do (CRE, 2004: 3). The CRE also argued that the White Paper’s proposals would weaken key elements of the CRE’s armoury and be less effective than the arrangements it was proposed that they would replace (CRE, 2004: 3). Furthermore, the CRE argued that proposals would actually be regressive, representing a reduction in the legal enforcement powers then exercised by the CRE (CRE, 2004: 6, 20). The CRE stated unequivocally that its Commissioners rejected the White Paper (CRE, 2004: 3). The DRC took a more conciliatory approach, stopping short of outright opposition but highlighting a number of serious concerns (DRC, 2004). In 2005, these concerns were rejected by the Government and a bill to create a single Equality Commission was published. The Government also launched the Discrimination Law Review (DLR) to consider how to create a clearer, streamlined legislative framework to produce ‘better outcomes’ for those who experienced disadvantage (DCLG et al., 2007: 2). The DLR drew on the Equalities Review, also established in 2005, which was examining the ‘causes of persistent discrimination and inequality in British society’ (Equalities Review Panel, 2007: 12). The Equality Act 2006, enacted in February 2006, provided for the establishment of the Commission for Equality and Human Rights – which was to become known as the Equality and Human Rights Commission (EHRC) – and for the incorporation of the CRE, DRC and EOC within this new Commission.

In 2007, the final report of the Equalities Review (Equalities Review Panel, 2007) and the DLR consultation paper were published (DCLG et al., 2007). The DLR’s final report came in the form of a consultation paper that set out proposals for a Single Equality Bill, and what
was to eventually become the Equality Act 2010 (DCLG et al., 2007). Chapter five of the DLR consultation paper (DCLG et al., 2007: 79-109) was devoted to exploring the potential shape and form of a new expanded public sector equality duty which would enable ‘public authorities to address their equality responsibilities more efficiently through a single mechanism’ (DCLG et al., 2007: 85). A single equality duty was supposed to make it easier to address the needs of groups facing multiple discrimination’ (DCLG et al., 2007: 85). The proposed duty was defined as a positive duty because it would: help ‘public authorities to embed equality considerations throughout their activities’; ‘support the design and delivery of personalised and responsive public services’; and ‘help bring about a culture change so that promoting equality becomes part and parcel of public authorities core business’ (DCLG et al., 2007: 79). Interestingly, like the local authority race duty before it, and contrary to the views of both the CRE and DRC, the language used in the 2004 White Paper was not primarily, or definitively, about obligations, requirements, legal consequences, enforcement or regulation but, instead, it was about enablement and support (DTI et al., 2004). Although new enforcement powers for the EHRC were proposed, the expectation was that formal enforcement action would ‘only be used where necessary when informal routes’ had been unsuccessful (DCLG et al., 2007: 102).

Four key principles, that would underpin the new duty, were identified – consultation and involvement, use of evidence, transparency and the ability of staff to understand and discharge the duty (DCLG et al., 2007: 92). The duty was not intended to lead any public authority to ‘take any action which might be disproportionate to the benefits the action would deliver’ (DCLG et al., 2007: 89). Proportionality was to be an overriding principle, ‘action taken by a public authority would need to be proportionate to the size, nature and impact of the inequality identified and to take into account other competing considerations’ (DCLG et al., 2007: 89). Key considerations included ‘the nature of the functions performed, the size and resources of the public body, national and local priorities and the composition and needs of the local community, service users and the workforce’ (DCLG et al., 2007: 89).

The Government’s consultation document appeared to propose an intentionally non-prescriptive policy framework in which legal enforcement by the EHRC should only come
at the end of a process; and only then if legal enforcement was to be used strategically. JR was referenced but with respect to the powers of the EHRC not wider usage. The word accountability is absent from the Discrimination Law Review (DLR) consultation document although it appears many times in the final report of the Equalities Review (Equalities Review Panel, 2007: 10, 11, 91, 97, 98, 106, 108, 116, 117). The Equalities Review’s strongest, although somewhat bland and non-prescriptive, statement on accountability is that accountability should rest at the top of all organisations and ‘leaders should report on and be given a chance to explain their record on delivering equalities’ (Equalities Review Panel, 2007: 117). The Equalities Review advocated a ‘strong, integrated public sector duty, covering all equality groups, with a focus on outcomes and not process’ that would ‘enable better policy design as well as better service delivery’ (Equalities Review Panel, 2007: 116).

The DLR referred to positive duties as an important innovative approach to ‘dealing with disadvantage, ensuring that public bodies proactively consider equality issues’ that can ‘help to deliver personalised public services which cater better for individual needs’ (DCLG et al., 2007: 14). These government commissioned reviews did not appear to envisage the strong legally enforceable duty advocated by the CRE, DRC or equality campaigners for decades. In June 2008, a framework for a new Equality Bill, based on the DLR proposals, was published (GEO, 2008). According to this framework document, an extended public sector equality duty would require public bodies to consider ‘how their policies, programmes and services affect different disadvantaged groups in the community’ (GEO, 2008: 13). In 2009, the Government introduced the Equality Bill and eventually in April 2010, after significant scrutiny, and amendments by Parliament, the Equality Act 2010 was enacted. According to the Explanatory notes to the 2010 Act, the Act was designed to ‘harmonise discrimination law, and to strengthen the law to support progress on equality’ (GEO et al., 2010: 4).

Like the previous equality duties, the PSED would consist of a general equality duty and SEDs (see chapter 5). The Act provided for the introduction of SEDs, for the better performance of the PSED; these SEDs were to be set out in secondary legislation. The EHRC retained the regulatory and enforcement powers that it had had with respect to the
previous equality duties; including the power to issue statutory codes of practice and non-statutory guidance (see chapter 5). As with the RED and DED, the PSED was supported by separate statutory provisions which made it unlawful for public authorities to ‘do any act which constituted discrimination.’  

However, because the 2010 Act was enacted in April 2010, there was insufficient time to develop the SEDs, and lay them before Parliament, ahead of the general election in May 2010.

2010 to 2013: Austerity, equality, the PSED and the SEDs and other competing agendas

When the Conservative-led Coalition Government came into power in 2010, the UK and much of the rest of the world was still in the grip of one of the deepest and longest lasting recessions. The Coalition adopted a programme of ‘austerity measures’ and a commitment to: ‘small government’; reducing the size of the State; reducing state intervention; radically curtailing public spending and welfare benefits; and increasing involvement by the business sector. As a consequence, issues of procurement and what is contracted out of the state sector have become ever more important. However, whilst the SEDs for Scotland and Wales address the issue of public procurement, the SEDs for England do not. Since 2010, the private sector has played an ever increasing role in delivering services and activities for public bodies subject to the PSED. However, whilst the SEDs for Scotland and Wales specifically comment on how public procurement should be managed, to comply with the PSED’s equality aims, the SEDs for England are silent on this issue.

Since 2010, the Coalition Government’s austerity programme has hit disabled people particularly hard. Austerity has been described as a ‘war’ on disabled people that has led to their ‘impoverishment’ and is undermining, and reversing advances, made since the 1940s (Edwards, 2012: 4, Wood and Grant, 2010: 14). Disabled people and their
households have faced cumulative financial losses because the cuts have targeted the long-term sick and disabled. Moreover, the disabled tend to claim a variety of benefits, many of which have been cut (Wood and Grant, 2010: 14). The combined and cumulative impact of these cuts have ‘created significant losses in income’ (Wood and Grant, 2010: 14). Since 2010, the language of the austerity era has placed an unrelenting, and negative, focus on disabled people; this contrasts sharply with the language of compassionate Conservatism which accompanied the introduction of the DDA 1995. In the 1990s, the then Conservative Government publicised its work with disabled people and disability organisations and groups. By contrast, between 2010 and 2013, the Conservative-led Coalition Government has characterised disabled people and the long-term sick as placing unreasonable burdens on the State and as problems to be dealt with (DPAC, 2013: 15).

The austerity programme, and financial downturn, have also hit BME people disproportionately hard. For example, the unemployment rates for BME young people, and BME young men in particular, have remained stubbornly high. The unemployment rate for black youth rose substantially from 2010 whereas the unemployment rate for white youth fell (Taylor, 2015). Furthermore, the organisations to whom individuals might be expected to turn for help, including VCOs, advice agencies and law centres, were also hard hit by the cuts and financial downturn. According to the TUC, cuts to civil society organisations have been on an unprecedented scale. For example, research indicated that charities faced net funding reductions of more than £110 million in 2011/12 (TUC, 2012: 17). Given this context, it is perhaps not surprising that some disability organisations, disabled people, race organisations and BME individuals have turned to the RED, DED and PSED to challenge: unrelenting national, regional and local cuts; and other changes to services that were considered to be damaging.

97 ‘There are now 41,000 16- to 24-year-olds from black, asian and minority ethnic [BAME] communities who are long-term unemployed – a 49% rise from 2010, according to an analysis of official figures by the House of Commons Library. At the same time, there was a fall of 1% in overall long-term youth unemployment and a 2% fall among young white people.’ TAYLOR, M. 2015. 50% rise in long-term unemployment for young ethnic minority people in UK [Online]. England: The Guardian. 10 March. Available: http://www.theguardian.com/society/2015/mar/10/50-rise-in-long-term-unemployed-youngsters-from-uk-ethnic-minorities [Accessed 1 May 2015].
In 2010, the newly elected Coalition Government had announced that the PSED would come into force in 2011 but the PSED’s regulatory regime had not been agreed. There was a delay in finalising the SEDs for England, which were supposed to support the better performance of the PSED; this meant that the SEDs for England came into force six months after the PSED, in September 2011. The SEDs for England, announced in March 2011 came into force in September of that same year; the provisions echoed the minimalistic and deficient approach taken by the old local authority race duty. By contrast, the SEDs, introduced in 2010 and 2012 for Wales and Scotland, built directly on the secondary legislation that had supported the RED, DED and GED. Campaigners have argued that: the SEDs for Wales and Scotland have provided a much more robust regulatory and enforcement framework for the PSED than the SEDs for England; and that the SEDs for Scotland and Wales also addressed many of the concerns of equality campaigners (2013: 13, 14, Moon and EDF, 2013: 14). The nature of the SEDs for England, introduced in 2011, and the impact on the PSED as a public accountability tool and positive legal duty are considered in the final chapter.

During 2010, the Coalition Government announced that it would not bring into force two provisions, in the Equality Act 2010, that might have supported the PSED. Then in April 2011, the Government launched the Red Tape Challenge (RTC) to assess whether some legislation: was ‘too bureaucratic and burdensome’ for the benefits brought; and could be...

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98 Prior to the introduction of the Equality Act 2010, the RED and DED had each been supported by SEDs and statutory codes of practice.
99 In January 2011, the GEO published stripped back draft SEDs for England. In February 2011, the Government lost a high profile psed JR challenge to its decision to cut a major education building programme brought by a number of local authorities (see appendix 8, case 62). The Government’s decision to curtail previous Labour Government’s the Building Schools for the Future programme was the subject of a legal challenge. Luton Borough Council & Nottingham City Council & Ors, R (on the application of) v Secretary of State for Education [2011] EWHC 217 (Admin) (see appendix 8, case 62). In March 2011, the GEO reopened the consultation around these SEDs.
100 The Equality Act 2010 (Specific Duties) Regulations 2011.
101 The Scottish and Welsh Administrations were responsible for the SEDs for Scotland and Wales.
102 The two provisions were the public sector duty to give due regard to reducing socio-economic inequalities, section 1 of the Equality Act 2010, and the provisions on combined or dual discrimination, section 14 of the Equality Act 2010. If it had been brought into force, the socio-economic duty would have required ‘specified public bodies, when making strategic decisions such as deciding priorities and setting objectives, to consider how their decisions might help to reduce the inequalities associated with socio-economic disadvantage. Such inequalities could include inequalities in education, health, housing, crime rates, or other matters associated with socio-economic disadvantage. Section 1 made it the responsibility of public bodies, subject to the duty, to determine which socio-economic inequalities they were in a position to influence.’ GEO, DWP, BIS & DCSF 2010. Equality Act 2010: Explanatory Notes, London, TSO.
simplified or better implemented (HM Government, 2015). The entire Equality Act 2010, and specifically the PSED, came within the RTC’s scope. Under the RTC banner, the Government consulted on plans to repeal provisions in the Equality Act 2010: employer third party harassment; the questionnaire procedure; and the power of an Employment Tribunal to make wider recommendations (GEO, 2012a, GEO, 2012b, TUC, 2012).\(^{103}\) The questionnaire procedure had been in place since the 1970s.\(^{104}\) On 15 May 2012, the Home Secretary announced a review of the PSED, as one of the outcomes of the RTC, to establish whether the PSED ‘was operating as intended’ (GEO, 2013: 9).

The RTC also impacted on the planned statutory code to support the PSED.\(^{105}\) In 2011, as part of the Red Tape Challenge, despite the EHRC being well advanced on the development of a statutory code to support the PSED, the Coalition Government decided that the EHRC should not issue any further statutory codes of practice. Submissions to the review of the PSED later cited the absence of robust SEDs for England, a statutory code of practice for the PSED and the announcement of the PSED review as factors that undermined the implementation of the PSED; the TUC echoed these assessments (Moon and Equality and Diversity Forum, 2013, Race Equality Coalition, 2013: 12-14, TUC, 2012. Campaigners have also argued that these changes formed part of the dismantling of the equalities infra-structure (Moon and EDF, 2013, Race Equality Coalition, 2013: 12-14, TUC, 2012).

The RTC also impacted on the employment tribunal (ET) regime and the remit and powers of the EHRC. In 2012, the Government overhauled the ET system and introduced fees of £1,200 for claimants who wished to pursue a discrimination case; further fees were payable if a claimant appealed; and other restrictions on exemptions were introduced.

\(^{103}\) Respectively section 40(2), section 138 and section 124 (3) of the Equality Act 2010. Third party harassment and the questionnaire procedure were repealed in 2013 by sections 65 and 66 of the Enterprise and Regulatory Reform Act 2013. The power of employment tribunals to make wider recommendations was repealed by section 2 of the Deregulation Act 2015.


\(^{105}\) The RED and the DED had been supported by statutory codes of practice issued by the CRE and DRC.
Unsurprisingly, following the introduction of these fees, overall ET claims fell by 80% and race and disability ET claims fell by 60% and 46% respectively (TUC, 2013). Between 2010 and 2013, changes were also made to limit access to both legal aid and JR. The TUC has argued that the combined impact of the cuts to the EHRC, repealing provisions in the Equality Act 2010 and the reduced capacity of civil society organisations to support the most disadvantaged have directly reduced access to justice for individuals undermining both the Equality Act 2010 and the PSED framework (TUC, 2012).

Also under the RTC banner, between 2011 and 2013, the Government proposed, and subsequently introduced changes which: limited the EHRC’s statutory powers; introduced tighter controls on the decisions that the EHRC could make; and cut the EHRC’s budget by more than 50% (HM Government, 2012: 4-7, HM Government, 2011: 6, 7). The level and proportionality of the cuts to the EHRC’s budget, the proposed zero-based review of EHRC’s funding and these legislative changes to the EHRC’s remit raised profound concerns in the UK and internationally (Burayzat, 2012).

In 2013, the Independent Review of the PSED reported (GEO, 2013). Even though the report acknowledged that it was really too early to make a proper evaluation, surprisingly the report went onto to draw a number of conclusions. In a largely negative assessment of the RED, DED and the PSED, the Chairperson of the Review came to a number of conclusions and made a number of recommendations. A central conclusion, of relevance to this study was that:

‘The nature of a ‘due regard’ Duty is that it is open to interpretation by public bodies. What amounts to ‘due regard’ depends on particular circumstances and

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106 Race and disability claims plummeted during the first three months of 2014. ‘The number of race discrimination and sexual orientation claims both fell by 60 per cent compared to the same period in 2013. Disability claims have experienced a 46 per cent year-on-year reduction.’ TUC 2013. At what price justice? The impact of employment tribunal fees, London, TUC.

107 In 2010, the cuts amounted to £7m from the EHRC’s £60m budget for the year. By 2014/15, the EHRC reported that its total core steady-state funding for 2014/15 was £17.1m although in theory it also had access to up to an additional discretionary programme funding of £8.1m for wider equality and human rights priorities, subject to the agreement of proposals by the Minister for Women and Equalities. By 2014/15, the EHRC had lost 62% of its funding and 72% of its staffing compared to when it was established in 2007. By this time, the EHRC was almost the size of the former DRC – just one of the equality commissions it replaced – despite having much wider responsibilities. TUC 2012. Two steps forward one step back: How the Coalition is dismantling our equality infrastructure, London, TUC.
only a court can confirm that a public body has had due regard in a particular case. This uncertainty has on many occasions led to public bodies adopting an overly risk averse approach to managing legal risk in order to rule out every conceivable possibility. This has been a recurring theme throughout the review’ (GEO, 2013: 11).

With respect to JR, the report said that though the number of JRs brought under the PSED was low, it was ‘still a significant proportion of the overall number of JRs and there have been several high profile cases’ (GEO, 2013: 11). The report also stated that in all the cases that it had seen ‘the PSED is just one of a number of grounds, which suggests that these JRs would have arisen even in the absence of a PSED’ and:

‘that, even where decisions are overturned due to non-compliance with the PSED, it is not uncommon for the initial decision in question to remain unchanged following further work by the authority to demonstrate they had discharged the duty effectively. It is not clear how this benefits anyone’ (GEO, 2013: 11).

Even though it was acknowledged that it was really too early to make any clear judgements, the report said that there were ‘burdens associated with the implementation of the PSED’, which had required new processes which were ‘not limited to the public sector but may be passed on to private and VCS contractors and to members of the public’ (GEO, 2013: 13). The Chair also expressed the view that ‘these duties do not apparently serve their intended purpose to drive better performance of the equality duty without burdening public authorities and, where used, add instead a layer of unnecessary bureaucracy’ (GEO, 2013: 15). This Independent Review is considered in the final chapter because it may influence the Government’s approach to another review of the PSED, likely to be undertaken in 2016.

The final reflection on 2010 to 2013 is that wars, and other brutal conflicts, across the world have displaced increasing numbers of people, created more refugees and increased legal and illegal immigration. Terrorist attacks, often associated with these conflicts, in the UK, Europe and across the world have reinforced fears about Islamic radicalisation as well as illegal and legal immigration. In turn, these concerns reinforced the cohesion, integration and anti-terrorism agendas which have continued to overwhelm the race agenda. In 2013, the Coalition Government launched another major immigration bill with
the stated intention of creating a ‘hostile environment’ for illegal migrants in order to reduce demands for access to public services, housing, banks and driving licences (Travis, 2013). The Coalition Government, in power between May 2010 and May 2015, committed itself to: significant reductions in immigration; reducing annual net migration to the UK; and to limiting the access of some migrants to public services and other facilities in the UK.

Conclusions
A number of key themes have been identified: austerity, small government and the Red Tape Challenge; piecemeal and drawn-out implementation of race equality legislative recommendations; competing agendas which have undermined the race agenda and the RED; divergent race and disability agendas; the importance of the roles played by lawyers and campaigners; differences of view about whether the RED, DED and PSED should be legally enforceable duties; and challenges posed to the RED and DED by the dismantling of the equalities infrastructure. These key themes are addressed below and where relevant they have informed other chapters. Chapter eight reflects on how these themes and adverse developments have impacted on the race and disability equality pseds as positive equality duties and public accountability tools.

The pseds, austerity and other competing agendas
Since 2010, the austerity, small Government and the Red Tape Challenge agendas have reduced the space for race and disability equality, the RED, the DED and the PSED. Alongside the cuts, the Government introduced fees for using employment tribunals, reduced access to legal aid and introduced measures designed to restrict access to JR. The Red Tape Challenge (RTC) undermined the Equality Act 2010, the PSED, the SEDs and worsened access to justice. Key provisions in the Equality Act 2010 were not implemented and some provisions were repealed. The approach adopted for the SEDs for England, under the RTC’s banner was minimalist; this minimalist approach has undermined the SEDs’ effectiveness as tools to promote the better performance of the PSED.

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108 The Immigration Act 2014 received Royal Assent in May 2014 and is being implemented in phases.
109 The Immigration Act 2014, enacted on 14th May 2014, was subject to a phased implementation timetable that commenced in 2014 into 2015.
Progress largely stagnated on race relations legislation between 1977 and 1997. The implementation of recommendations to improve race relations legislation has been piecemeal and drawn out. For example, it took twelve years for key recommendations, made by the CRE in its third review (CRE, 1998a), to be adopted by successive Labour Governments and then implementation period ran from 2000 to 2010 (CRE, 1998a). The phased implementation of the RED regime undermined its impact and effectiveness. By contrast, the DRC was able to ensure that the component parts of the DED regime came into force at the same time, and the implementation and impact of the DED was more effective for this. Between 1990 and 1997, significant progress was made with respect to disability legislation under both Conservative and Labour Governments. Between 1998 and 2010, significant progress was made both on the race and disability legislative fronts culminating in the enactment of the Equality Act 2010 and the PSED. However, since the enactment of the Equality Act 2010, legislative progress on both the race and disability agendas has either stood still or been reversed.

Competing agendas have undermined, and drowned out, the race agenda and the RED. The 1963 Bristol Bus Boycott, the Street Report (1967a) and Enoch Powell’s Rivers of Blood speech (Powell, 1968) demonstrated the gulf between those between those who advocated for race equality legislation and those who have demanded ever stricter immigration legislation and controls; that gulf remains to the current day. Immigration and calls for tighter immigration controls have provided a competing narrative, and competing policy demands, to the race equality agenda since the 1960s. Since 2001, the anti-terrorism, cohesion and integration agendas have also proved to be increasingly important competing narratives to the race agenda and the RED. From 2001, when there should have been an increasing focus on implementing the RED, instead the immigration, cohesion and integration agendas have often combined dominating the race equality agenda; this continued to undermine the implementation of the RED.

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110 Provisions were implemented as part of the Race Relations (Amendment) Act 2000, Race Relations Act 1976 (Statutory Duties) Order 2001/3458, Race Relations (Amendment) Regulations 2003, the Equality Act 2006 and the Equality Act 2010. Some key recommendations were not adopted and so the impact of the CRE’s well-considered programme was fragmented and undermined.

111 The RED was implemented in phases – the general RED was enacted, then the SEDs followed and then the statutory code.

112 The general DED, the associated SEDs and the statutory code all came into force on the same day.
Divergent race and disability agendas

Between 1993 and 2010, divergent, but not inconsistent agendas, developed in relation to race and disability equality legislation. Race equality and disability campaigners won a number of important battles: for the DDA 1995, the RR(A)A 2000 and the RED, the DDA 2005 and the DED and the Equality Act 2010 and the PSED; for the race and disability SEDs; and for strengthened race and disability equality provisions to comply with the new EU Directives. However, the CRE, DRC and race and disability equality campaigners were destined to lose a key battle in relation to the Equality Act 2006; their battle to retain the CRE and DRC. The sustained legislative progress, made by the DRC and disability campaigners, secured legislative changes consistent with the social model of disability (e.g. the reasonable adjustment provisions and the formulation of the DDA). However, the picture for the CRE and race equality campaigners was less successful. Nevertheless, with the added impetus of the Stephen Lawrence Inquiry’s recommendations, the RED and associated race SEDs were secured. However, race equality and RED policy agendas have tended to be undermined or even drowned out by: the almost immediate backlash against the concept of institutional racism; and a number of competing agendas previously referenced.

Since 2010, both the race and disability equalities legislative agendas have been diminished or crowded out by competing agendas associated with austerity, red tape and small government. Given the commitment of the previous Conservative-led Coalition Government, and the Conservative Government elected in May 2015, to ongoing austerity measures and small government, it is anticipated that these agendas will continue to dominate. The likelihood is that they will continue to have the potential to continue to crowd out the race and disability equality agendas, especially where substantive equality demands are being made. It is to be seen what role the PSED will be able to play in challenging discrimination and advancing equality especially as the previous Conservative-led Coalition Government had announced a full scale review of the PSED in 2016.

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114 The RED was enacted in 2000 and associated SEDs came into force subsequently (see chapter 5).
The importance of a strong equalities infrastructure

The TUC has argued cogently that an effective and strong equalities infra-structure requires comprehensive equality legislation, good access to justice for victims of discrimination and dissuasive sanctions for violations of the law. It also requires an independent and effective statutory equality body responsible for enforcing the law, raising awareness of individuals’ rights and promoting a culture of compliance. The final component is ‘a strong civil society, capable of advocating on behalf of those most likely to suffer disadvantage or experience unequal treatment and which is given a voice in decision-making that affects those groups’ (TUC, 2012: 12). The TUC’s assessment was that the Coalition Government had unpicked significant elements of this infrastructure between 2010 and 2012. The impact of austerity and the cuts has further undermined the capacity of VCOs and other civil society organisations to represent the most vulnerable in society. It is against this background that that the PSED came into force.
Chapter 5: A comparative assessment of the RED, DED and PSED as positive legal duties and public accountability tools

Introduction

One of the principal findings drawn from chapter 4, was that, since the 1970’s, there had been a long-running difference of opinion between, on the one hand, the equality commissions, equality campaigners, leading lawyers and on the other hand, successive governments, government departments and public bodies about the need for the public sector equality duties (pseds) to be legally enforceable and at what point action should be taken to ‘enforce’ them. The focus, in this chapter, is on how the pseds, and their associated regulatory and enforcement provisions, were set out in the law and the extent to which each duty was constructed in law as a positive equality duty and legal public accountability tool. The doctrinal and socio-legal assessments in this chapter, build on chapter 4’s extended socio-political narrative assessment and support the analyses provided in chapters 6 and 7. Together the analyses set out in chapters 4, 5, 6 and 7 provide critical evidence to answer the central research questions set out in chapter 3.115

The extent to which the RED, DED and PSED were intended to be positive legal duties and legal accountability tools and their effectiveness as such is examined in this chapter. The powers of the CRE, the DRC and the EHRC have also been considered. The nature and effectiveness of CRE’s, DRC’s and EHRC’s powers to support, regulate and enforce the RED, DED and relevant provisions within the PSED are analysed. Looking at the UK as a whole, there were minor and substantive differences in the legislative regimes for the RED, DED, Gender Equality Duty (GED) and PSED as they applied to England, Scotland and Wales. The equality duty regime for Northern Ireland’s was provided by Section 75 of the Northern Ireland Act 1998. The arrangements in other parts of the UK have been reviewed where the substantive differences can inform our understanding of the RED, DED and PSED as positive duties and legal accountability tools for England.

115 The two research questions: 1) Have the race and disability equality duties been effective positive legal duties and legal public accountability tools? 2) Does Scheingold’s theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality?
This chapter provides a series of comparative doctrinal and socio-legal assessments of the legislative provisions provided by the RED, DED and the PSED for England. The terrain explored is complex not least because the RED’s, DED’s and PSED’s legal provisions were provided in primary legislation, secondary legislation and statutory codes of practice; and these provisions had different levels of legal enforceability. Further complexity was introduced by amendments to anti-discrimination legislation between 2001 and 2011 that had implications for these duties. Yet more complexity arose because the RED, DED and PSED used different legislative formulations to define the bodies subject to the general public sector equality duties (pseds). Lastly, some important changes were made to the statutory powers of the CRE, DRC and EHRC before the CRE and DRC ceased to exist in 2007 and the EHRC was established. Where necessary, for this study, this chapter seeks to explain the implications for the RED, DED and PSED which resulted from these rather complex changes. The form, structure, content and overall purpose of the RED, DED and PSED and their purpose as positive legal duties and legal public accountability tools are investigated. Six linked doctrinal and socio-legal comparative assessments have been provided in this chapter; where relevant these assessments take account of the actual words used in the legislation. As the EHRC, took over statutory responsibility for the RED and DED in 2007, the assessments also consider the statutory duties of the EHRC.

The comparative assessments of the pseds compare the form, content and structure of the RED, DED, PSED and other relevant legislative provisions. The first examines the proposals made by the Home Office in 2001 for a new framework to support the RED. The second explains the powers of the CRE, DRC and EHRC in relation to the RED, DED and PSED and the structure of these duties.\textsuperscript{116} It also explains the legal status of the component parts of the equality duties and why it has mattered in JR proceedings whether legal provisions were incorporated in primary or secondary legislation, statutory codes of practice or technical guidance. The other assessments focus in turn on the RED,

\textsuperscript{116} The component parts of the actual duties were the general equality duties, the SEDs, statutory instruments, statutory codes and technical guidance. The legal status of each is different and the significance of these differences for enforcing the duties in court is examined in this chapter.
the DED and the PSED and their associated legislative, regulatory and enforcement regime.\textsuperscript{117}

The proposals for a new legislative regime made in 2001

The preceding chapter provided an assessment of the reasons for the limited impact of the original local authority race equality duty. It is important to understand the limitations of that regime and how changes, introduced between 2001 and 2003, were designed to address those limitations. Enacted as section 71 of the Race Relations Act 1976, the old local authority duty was in force between 1977 and 2001. A number of important weaknesses were identified following the implementation of the local authority race duty (see chapter 4). That duty existed in isolation, it was vague, weak, not supported by an effective regulatory or enforcement regime and it provided no effective sanctions for non-compliance (CRE, 1998a: 8). As a result, the duty could not be successfully litigated and proved to be unenforceable (CRE, 1998a: 8). The CRE argued that a new duty was needed that placed ‘the responsibility for initiating action for … equality where it should be’ not with the CRE but with the ‘leaders of institutions’ (CRE, 1998a: 9). This argument was addressed in part between 1999 and 2002 with the enactment of the Race Relations (Amendment) Act 2000. This 2000 Act amended the Race Relations Act (RRA) 1976, repealing the old local authority duty and replacing it with a new general RED. The RED is explored in detailed later in this chapter.

In 2001, the Home Office set out proposals for, and consulted on, what it described as ‘the legislative and administrative framework’ to tackle race discrimination and promote race equality (Home Office, 2001: 4, 7-10, 19-27). Problematically, this would mean that the general RED – namely the provisions set out as section 71 of the RRA 1976, as amended by the 2000 Act – would come into force before the other components of the RED’s legislative regime had been designed or introduced by government. The then Labour Home Secretary identified the component parts of the proposed ‘legislative and

\textsuperscript{117} These comparative assessments draw on other relevant equality duty provisions for Northern Ireland, Scotland and Wales. The RED, DED and PSED have also been compared with each other and the powers that the CRE, DRC or EHRC could exercise to support these duties have been assessed. Where substantive changes were made to relevant legislative provisions between 2001 and 2014, the impact of these changes on the RED, DED and PSED have been referenced and assessed.
administrative framework’ (Home Office, 2001: 1). This framework was intended to deliver a new regime for tackling racial discrimination, promoting racial equality in the exercise of public functions and to ‘avoid race discrimination before’ it arose (Home Office, 2001: 1). The proposed framework, consisted of what the Home Office called ‘civil legislative action’ and ‘administrative action’ (2001: 10). It subsequently formed the basis of the legislative and administrative frameworks adopted by successive governments, between 2001 and 2010, for the RED, the DED and the PSED (2001: 10). However, as the extended narrative assessment described, after 2010 the Conservative led Coalition Government made major changes that undermined the legislative and administrative framework for the PSED. The nature of the legislative action and civil action framework proposed by the Home Office in 2001 is explored next.

Civil legislative action was described, by the Home Office, as consisting of three elements – provisions that outlawed race discrimination in ‘all public functions’, the general race equality duty and the SEDs placed on public bodies to ensure the ‘better performance’ by them of the general duty (Home Office, 2001: 10). The Home Office also suggested how each element of the framework, for civil legislative action, could be enforced. Breaches of the general prohibition on race discrimination in public functions could be enforced by claims to relevant courts, informal action by the CRE or formal investigations by the CRE (Race Relations Act 1976, section 19B). In relation to the general RED, the amended section 71, the Home Office suggested that the CRE would either take informal action ‘in light of complaints received from individuals’ or use its own general powers (Home Office, 2001: 10). However, the Home Office consultation document made it clear that the regime was not intended to result in financial remedies (Home Office, 2001: 10). Furthermore, the option of formal enforcement action by the CRE referenced ‘the specific duties’, not the general RED (Home Office, 2001: 10). In relation to the specific equality duties (SEDs), the Home Office suggested that the CRE could use a new legal tool ‘compliance notices’ and that these compliance notices, if necessary, could be backed up by court orders (Home Office, 2001: 10). However no direct reference was made to

118 Apart from court and legal costs, normally there is no financial award if a claimant wins a judicial review case unless human rights, or other provisions, subject to financial remedies are engaged (see chapters 2 and 6).
individuals using JR to enforce compliance by public bodies with the general RED; in fact only one direct reference was made in the entire Home Office document to JR (Home Office, 2001: 21). This sole reference placed no emphasis on the use of JR by individuals instead arguing for ‘all complaints’ to be channelled through the CRE:

‘The duty to promote race equality is different from the provisions outlawing race discrimination in so far as it is not meant to result in a particular outcome for an individual. Its aim is to drive up standards from which individuals will generally benefit. No provision has, therefore, been made for individuals to bring a challenge in a County or Sheriff Court in respect of the duty to promote (though Judicial Review will remain available). The intention is that all complaints should be channelled through the CRE’ (Home Office, 2001: 21).

The Home Office’s 2001 consultation document placed no real emphasis on the CRE enforcing the compliance with the general RED by using JR. Instead, the Home Office focused on the CRE’s powers to issue compliance notices and enforce via the courts. By 2005, the DED statutory code of practice referred directly to claims for JR being made by ‘a person or group of people with an interest in the matter’ (DRC, 2005: 126). However it reconfirmed that only a breach of a general equality duty could be the subject of a JR claim and that a general equality duty did not create ‘individual rights’. However more positively, from the perspective of would-be claimants, the DED statutory code also confirmed that a failure to comply with the specific duties ‘could be used as evidence of a failure to comply with the general duty’ (DRC, 2005: 8, 76). The EHRC’s technical guidance, first published in 2013, echoed that provided by the DRC’s 2005 DED Statutory Code (EHRC, 2013b: 73, 75, 76). However apart from the possibility of action by the EHRC or JR, no other specific sanctions or consequences for non-compliance were identified (EHRC, 2015c, EHRC, 2014: 58, 77, 78, 96). The following assessments of the RED, DED and PSED evaluate how the civil legislative action framework developed between 2001 and 2014.

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119 Examination of the RED, and the DED and PSED, follow later in this chapter. These assessments, and the analyses in chapters 6 and 7, will show that in the regimes adopted by successive Labour Governments, that JR was the primary legal route available to individuals or organisations to challenge breaches of the general equality duties.
In 2001, the Home Office defined ‘Administrative Action’ as having four elements: guidance, performance indicators, audit and reporting and measuring progress (Home Office, 2001: 10). Of these four elements only the first, ‘guidance’, partially falls within the broader legislative framework that is the subject of this part of the study (Home Office, 2001: 10). Three forms of ‘guidance’ from the CRE were identified – statutory codes of practice on the equality duty, other statutory codes of practice and non-statutory guidance (Home Office, 2001: 10). Of these, only the statutory code of practice, and equivalent documents, on the RED, and other general duties, are directly relevant to this part of the study. According to the Home Office, statutory codes on the RED would explain how public bodies should ‘fulfil their obligations under the general and specific duties’ covering a range of issues including ‘policy development and implementation, service delivery, employment and performance management’ (Home Office, 2001: 10). The assessments of the RED, DED and PSED evaluate how the administrative action framework developed between 2001 and 2014.

The powers of the CRE, DRC and EHRC and the structure and status of the pseds
The CRE, DRC and EHRC had a number of dedicated and general powers to support the implementation of the pseds. Before 2006, the CRE and DRC were able to issue statutory codes of practices (subject to parliamentary approval) as well as powers to issue compliance notices and apply to the courts to enforce compliance notices. The CRE and DRC could also act as a third party intervener in JR cases; from 2007, the EHRC inherited these powers. Additionally, the EHRC’s power to intervene as a third party in JR cases was defined in, and strengthened by, section 30 of the Equality Act 2006. Section 31 of the Equality Act 2006 gave the EHRC a new power – ‘public sector duties: assessment’ – to enable it to assess compliance with the pseds. How the CRE, DRC and EHRC used their powers to issue statutory codes in relation to the RED, DED and PSED are explored in this chapter as are the Commissions’ strategies in relation to using their other enforcement powers.

The general equality duties included provisions enabling the introduction of SEDs and statutory codes of practice through secondary legislation. As provisions in Acts of Parliament, the general equality duties were at the top of the equality duties’ legislative
hierarchy. As secondary legislation, the SEDs were subordinate to their primary legislation. Statutory codes of practice (CoPs) supported the RED and DED and technical guidance supported the PSED; both were subordinate to the general pseds and SEDs. The CRE and the DRC described their statutory codes on the RED and DED as documents approved by Parliament that offered ‘practical guidance on the law ... admissible in evidence in a court of law’ (CRE, 2002: 6, DRC, 2005: 173). When the EHRC first published its technical guidance on the PSED, in January 2013, it advised that this technical guidance could also be ‘used as evidence in legal proceedings’ (EHRC, 2013b: 7). However, unlike statutory codes, the EHRC’s technical guidance has not been approved by Parliament (EHRC, 2013b: 7). Though described by the EHRC as similar to a statutory code of practice, no specific reference is made to ‘technical guidance’ in the Equality Act 2010. It has been for the courts to determine what status this technical guidance is given. The EHRC used its general powers to issue technical guidance after the Government prevented it from issuing any further statutory codes (EHRC, 2014: 6, EHRC, 2013b: 7)\(^\text{121}\).

A failure to comply with the general RED, DED or PSED could be challenged in the courts by way of JR. By contrast, no JR claim could be made in respect of alleged breaches of the SEDs (EHRC, 2014: 77, EHRC, 2013b: 76). The equality commissions could enforce alleged breaches of the SEDs by issuing a compliance notice and subsequent applications to the court if necessary (EHRC, 2014: 77, EHRC, 2013b: 76, Home Office, 2001: 10). A failure to comply with the SEDs could also be ‘used as evidence of a failure to comply with the general duty’ (EHRC, 2014: 78, EHRC, 2013b: 76). Likewise, a failure to comply with a code of practice or technical guidance could be admitted in evidence in a JR proceedings but would not constitute an automatic breach of the general equality duties (EHRC, 2014: 6, 77-78, EHRC, 2013b: 76, DRC, 2005: 173, CRE, 2002: 6). Only the CRE, DRC and EHRC respectively had the power to challenge potential breaches of the specific race, disability or general PSED.\(^\text{122}\) The statutory codes of practice published by the CRE and DRC and the

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\(^{120}\) Under the devolution agreement, from 2002, Scottish Ministers had had the power to issue statutory regulations and orders in relation to the RED and DED and exercised these powers (see appendix 3). Welsh Ministers gained similar powers under section 153 of the Equality Act 2010 and exercised these powers in relation to the PSED in 2011 (see appendix 1).

\(^{121}\) Non statutory guidance that has informed key JR cases is examined in chapter 6. Non-statutory guidance designed to facilitate public accountability or legal empowerment is explored in chapter 7.

\(^{122}\) The EHRC as the single equality commission from 2007 was the only equality commission for England.

The words used in legislation are important because the courts hearing JR cases must interpret these words and comply with relevant rules on statutory interpretation. Explanatory Notes to UK Acts of Parliament were introduced from 1999 to make Acts of Parliament ‘accessible to readers who are not legally qualified and who have no specialised knowledge of the matters dealt with’ and ‘to allow the reader to grasp what the Act sets out to achieve and place its effect in context’ (Office of Public Sector Information, 2006). Though these notes have not been endorsed by Parliament and do not form part of an Act, they may be an important source for courts. Other important sources of guidance on statutory interpretation include the Interpretation Act 1978, interpretation sections in acts and case law judgments. Where human rights issues are in play, section 3 of the Human Rights Act 1998 requires the courts to read, and give effect to, legislation in accordance with Convention Rights so far as it is possible. Whether courts take a literal or purposive approach to statutory interpretation, the actual words used in the legislation are of real importance in determining whether anything other than a literal interpretation will be applied. Clearly given that only the general RED, DED or PSED can be enforced by individuals using JR, the clearer that the primary legislation is about what is required the better for potential claimants. The more obscure or uncertain the requirements in the general equality duty, the harder it will be for a claimant to win a JR case. The analysis in the next chapter sets out the key principles that have developed in relation to psed JR claims.

The examinations of the RED, DED and PSED, take the following format: first relevant statutory provisions are documented; an analysis of the significance of the words is then provided; and the key elements of the assessment are drawn together at the end of the

123 In chapter 6, a small number of appeal cases considered under the Town and Country Planning Act 1990 by the courts have considered psed arguments and claims.

124 A purposive approach focuses on identifying and giving effect to the purpose of the legislation intended by Parliament.
review of each psed. To assist readers with this somewhat complex legislative analysis subheadings have been employed.

The Race Equality Duty: 2000 to 2011

This examination of the RED first compares the general RED with other relevant equality duties. The RED was introduced as section 71 of the Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000. The RED came into force in 2001; it was repealed in April 2011 when the PSED came into force. Consideration has been given to both the duties and powers of the CRE and EHRC because the CRE had oversight of the RED from 2000 to 2007 and the EHRC had oversight of the RED from 2007 until 2011 when the RED was repealed and replaced by the PSED. The special exemptions that applied to exercises of immigration functions are explained. The SEDs and the statutory code have then been considered. The assessment of the RED concludes with a comparative assessment of schedule 9 of the Northern Ireland Act 1998 because this examination highlights some of the deficiencies of the RED regime. The CRE’s own general duty, the EHRC’s general duty and the general equality duty in the Northern Ireland Act 1998 have been drawn on to review the RED.

Relevant general equality duties including the RED

The general RED, set out as section 71(1) of the Race Relations Act 1976 was in force between 2001 and 2011, it stated that:

‘Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, 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.’

The other relevant general duties considered in order to assess the RED are: the CRE’s general duties (section 43 of the Race Relations Act 1976); the EHRC’s general duty

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125 Relevant statutory provisions include the statutory remit of the CRE, DRC and EHRC.
126 The CRE and the EHRC had statutory oversight of the RED. The Northern Ireland Act provides an important comparator to the RED, DED and the PSED.
127 The primary legislation setting out what constituted unlawful racial discrimination was amended by the Race Relations Act 1976 (Amendment) Regulations 2003. The changes were designed to strengthen key definitions of unlawful racial discrimination required to comply with the EU Race Directive referred to in the preceding chapters. The majority of the regulations came into force on 19th July 2003.
(section 3 of the Equality Act 2006) and the Northern Ireland equality duty (section 75 of the Northern Ireland Act 1998). Each general equality duty has been set out below, in a box. The analysis of the strengths and weaknesses of the general RED is then provided.

**The original local authority race equality duty [1977 until 2001]**

**Section 71, RRA 1976**

‘Without prejudice to their obligation to comply with any other provision of this Act, it shall be the duty of every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need—(a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity, and good relations, between persons of different racial groups.’

**The CRE’s general duty [1976 until 2007]**

**Section 43, RRA 1976**

To: ‘a) to work towards the elimination of discrimination; b) to promote equality of opportunity, and good relations, between persons of different racial groups generally; and c) to keep under review the working of this Act and, when they are so required by the Secretary of State or otherwise think it necessary, draw up and submit to the Secretary of State proposals for amending it.’

**The EHRC’s general duty [2007 onwards]**

**Section 3, the Equality Act 2006**

To exercise its functions: ‘with a view to encouraging and supporting the development of a society in which— a) people’s ability to achieve their potential is not limited by prejudice or discrimination, b) there is respect for and protection of each individual’s human rights, c) there is respect for the dignity and worth of each individual, d) each individual has an equal opportunity to participate in society, and e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.’

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128 Section 75 of the Northern Ireland Act 1998, as original enacted, came into force on 1st January 2000.
**The Northern Ireland public sector equality duty [2000 onwards]**

**Section 75, the Northern Ireland Act 1998**

‘(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity— (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) between men and women generally; (c) between persons with a disability and persons without; and (d) between persons with dependents and persons without. (2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.’

**An analysis of the RED’s strengths and weaknesses**

The CRE argued that making public bodies and others responsible for advancing equality by extending its own general duty would promote racial equality (CRE, 1998a: 9). It also argued that the wider the range, and number, of public bodies that shared its extended duty, the greater the possible impact (CRE, 1998a: 9). In relation to strengths, the RED covered a significant number of public bodies. Furthermore the equality aims, in the RED, explicitly referred to promoting equality of opportunity and good relations between different racial groups. The RED’s duty of ‘due regard’ was also perhaps less ambiguous than the words ‘with a view to securing’ used in the local authority duty.

However, there were some important potential weaknesses in the formulation, and implementation, of the RED and the associated regulatory and enforcement framework. The RED was not extended unambiguously to all public bodies; it was only extended to the public bodies listed in the Act or associated statutory regulations. This approach meant that any public body not so listed would not be subject to the RED; consequently it was possible that some important bodies could be omitted by mistake. There were also inherent time-lags in listing new public bodies created as a result of public sector reorganisations. The language of ‘due regard’ also mirrored the old local authority duty but nothing in the 2000 Act clarified precisely what ‘due regard’ meant or required. Although guidance was eventually provided in a statutory code of practice, there were time-lags between the general RED and the SEDs coming into force and this guidance
being issued. The general RED came into force in April 2001, the statutory regulations came into force in December 2001 but the statutory code did not come into force until the end of May 2002.

The CRE’s own duty to ‘work towards the elimination of discrimination’ appeared to be more proactive than the RED as ‘working towards’ suggested that progress should continue to be made. Furthermore, the language was potentially more accessible, less complex and not as ambiguous as the RED’s language of ‘due regard’; this was important because the meaning of due regard was not defined in the primary or secondary legislation. Another problem was that the general RED’s equality aims did not provide any clarity about what outcomes could be expected or what difference the RED was intended to make. The fact that the RED’s equality aims mirrored those set out in the original local authority race duty was also potentially problematic as that local authority duty had previously proven to be too vague and legally unenforceable.

The general statutory duty: special cases

The RED’s requirement to promote equality of opportunity in relation to immigration and nationality functions was removed by section 71A. Section 71A originally stated that:

‘(1) In relation to the carrying out of immigration and nationality functions (within the special cases. meaning of section 19D(1)), section 71(1)(b) has effect with the omission of the words “equality of opportunity and”, (2) Where an entry in Schedule 1A is limited to a person in a particular capacity, section 71(1) does not apply to that person in any other capacity. (3) Where an entry in Schedule 1A is limited to particular functions of a person, section 71(1) does not apply to that person in relation to any other functions.’

Amendments to section 71A, from 2001 onwards, reinforced the fact that there would be no duty to give due regard to the promotion of equality of opportunity in relation to many immigration and nationality functions. These amendments identified a wide range, and increasing number of, immigration related enactments and associated ‘immigration and nationality functions’ that were exempted from the RED’s duty to promote equality

129 Equality aims means the words that follow ‘the need’ in the original local authority duty and the RED.
of opportunity.\textsuperscript{130} This reinforced the longstanding approach that ensured that if there was a potential conflict between race equality and immigration legislation, the latter would take precedence.

**The specific race equality duties**

Section 71(2) of the RRA 1976 set out enabling provision which allowed Ministers to issue SEDs. Section 71(2) stated that:

‘The Ministers may by order impose, on such persons falling within Schedule 1A as he considers appropriate, such duties as he considers appropriate for the purpose of ensuring the better performance by those persons of their duties under subsection (1).’

Section 71(3) allowed different ‘provisions for different purposes’ to be introduced in relation to the classes of public bodies or individuals subject to the RED. Section 71(4) required the Secretary of State or Ministers to consult the CRE before making such an order. The Secretary of State or Ministers had the power to issue statutory orders that contained ‘incidental, supplementary or consequential provisions’ as they deemed appropriate; this included provisions to amend or repeal provisions made by, or under, the RRA 1976 or any other enactment. This power to issue SEDs for England and Wales in relation to the RED was exercised in 2001. The Race Relations Act 1976 (Statutory Duties) Order 2001, published on 23rd October 2001 came into force on 3 December 2001, eight months after the RED had come into force.\textsuperscript{131}

\textsuperscript{130} By 2005, the specified provisions set out in section 71A (1A) were: a) the Immigration Acts (within the meaning of section 158 of the Nationality, Immigration and Asylum Act 2002) excluding sections 28A to 28K of the Immigration Act 1971 so far as they relate to offences under Part III of that Act; b) the British Nationality Act 1981; c) the British Nationality (Falkland Islands) Act 1983 (c. 6); d) the British Nationality (Hong Kong) Act 1990 (c. 34); e) the Hong Kong (War Wives and Widows) Act 1996 (c. 41); f) the British Nationality (Hong Kong) Act 1997 (c. 20); g) the Special Immigration Appeals Commission Act 1997 (c. 68); h) provision made under section 2(2) of the European Communities Act 1972 (c. 68) which relates to the subject matter of an enactment within any of paragraphs (a) to (g); or i) any provision of Community law which relates to the subject matter of an enactment within any of those paragraphs.

\textsuperscript{131} The RED had been brought into force on 2 April 2001 in England and Wales by the Race Relations (Amendment) Act 2000 (Commencement) Order 2001. The timetable for Scotland was slower and a separate, although largely equivalent, statutory order was issued setting out SEDs for Scotland.
The explanatory memorandum referenced section 71(C.) explaining that the SEDs had been imposed for the purpose of ensuring the ‘better performance’ of the general RED. There were 5 regulations: i) citation, commencement and interpretation; ii) Race Equality Schemes (RESS); iii) & iv) educational bodies; and v) monitoring by employers (which applied to public sector employers of 150 people or more). The two schedules were attached. The education regulation was a cut down version of regulations 2 and 5 and the employment regulation was largely functional and process focused. Schedule 1 listed the public bodies that would be subject to the duty to produce a RES.

Of the five regulations, the requirements in relation to RESs are of most relevance to this study; regulation 2 applied to all listed public bodies subject to these SEDs, apart from educational bodies. The problems posed by the listing approach, already identified, included the possibility of a body mistakenly not being listed or not listed because it was newly created. However the decision to list the bodies, that would be subject to these SEDs, also meant that it was unclear what a public body would be expected to do to comply with the general RED if it was not subject to the SEDs. Regulation 2 stated that those listed in the Order had to publish an RES by May 2002. Regulation 2(1) defined an RES as ‘a scheme showing how it [the body or person listed] intends to fulfil its duties under section 71(1) of the Race Relations Act and this Order.’ Regulation 2(2) also specified that the RES:

‘shall state, in particular— (a) those of its functions and policies, or proposed policies, which that person has assessed as relevant to its performance of the duty imposed by section 71(1) of the Race Relations Act; and (b) that person’s arrangements for—(i) assessing and consulting on the likely impact of its proposed policies on the promotion of race equality; (ii) monitoring its policies for any adverse impact on the promotion of race equality; (iii) publishing the results of such assessments and consultation as are mentioned in sub-paragraph (i) and of such monitoring as is mentioned in sub-paragraph (ii); (iv) ensuring public access to information and services which it provides; and (v) training staff in connection with the duties imposed by section 71(1) of the Race Relations Act and this Order.’

133 This was reminiscent of the position under the old local authority race duty. Some bodies were subject to the general RED but not to the SEDs; in these cases, it was unclear how compliance with the general RED would be assessed.
134 A delayed compliance timetable was afforded to those bodies and persons listed after 2001.
In terms of accountability, apart from the requirement to set out the arrangements in relation to consultation, there was a very limited focus on public accountability in the general RED and the associated SEDs. Regulation 2 specified that those subject to these SEDs had to produce a RES by 31st May 2002; the assessment had to be reviewed every three years after the production of the first (RES). Those subject to regulation 2 had to produce a RES that set out their arrangements in relation to the promotion of racial equality for: assessing impact and adverse impact; producing and publishing assessments; and monitoring and consultation in relation to policies and proposed policies. Essentially public bodies, and a few named individuals, were required to develop a three year plan which would identify functions, policies and proposed policies that were relevant to achieving section 71(1). However, as previously stated, only the CRE or the EHRC could challenge a breach of these SEDs by using their powers to issue compliance notices or to conduct public sector duties assessments.

The statutory Code of Practice on the Duty to Promote Race Equality

The RED Code for England and Wales came into force on 31st May 2002 (CRE, 2002). This 76 page document defined key terms, explained the Code’s purpose and that of the new regime. It was divided into 5 parts: i) promoting race equality in all listed public authorities; ii) promoting race equality in listed public authorities other than educational institutions; iii) promoting race equality in educational institutions; iv) the role of the CRE; and v) appendices. This RED Code provided guidance on the meaning of key terms in both the general RED and SEDs. The Code described the purpose of the RED as aiming to ‘make the promotion of race equality central to the way public authorities work’ (CRE, 2002: 9). Under the heading ‘benefits’, the Code expanded on the purpose of the RED in relation to policy development and service-delivery. (2002: 9-10). It stated that the RED would:

‘a. encourage policy makers to be more aware of possible problems; b. contribute to more informed decision making; c. make sure that policies are properly targeted; d. improve the authority’s ability to deliver suitable and accessible

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135 The regulations referred to the person’s arrangements but the majority of those subject to the specific duties were public bodies. The only named individuals, listed in the first order, were the Commissioners for a number of police forces and the Sub-Treasurer of the Inner Temple and the Under Treasurer of the Middle Temple in their capacity as a local authority.

services that meet varied needs; e. encourage greater openness about policy
making; f. increase confidence in public services, especially among ethnic minority
communities; g. help to develop good practice; and h. help to avoid claims of
unlawful racial discrimination’(2002: 9-10).

These descriptions support the concept of the RED as a positive and proactive duty but say almost nothing about the RED as a tool of public accountability. In fact the word accountability only appeared once in the entire Code, in its foreword (CRE, 2002: 1). Likewise the term ‘institutional racism’ only appeared in the foreword but was not defined in the glossary or Code (CRE, 2002:1, 2-6). The Code set out four guiding principles – obligatory, relevant, proportionate and the complementary – that should govern public authorities’ efforts to meet the RED (CRE, 2002: 15). Although ‘promoting race equality’ was ‘obligatory’, the CRE stated that the duty would be more relevant to some functions than others (CRE, 2002: 15-16). It also stated that due regard meant that all three complementary equality aims should be considered and ‘the weight given to race equality should be proportionate to its relevance to a particular function’(CRE, 2002: 16). The Code stated that it would be important to ask ‘whether particular policies could affect different racial groups in different ways, and whether the policies will promote good race relations’ (CRE, 2002: 16). The Code stated that whilst the general RED’s equality aims supported each other, they were different and ‘public authorities should consider and deal with all three equality aims’ (CRE, 2002: 16-17). In relation to identifying impact and deciding on how to deal with adverse impact, a series of questions were posed (CRE, 2002: 18). In terms of action to be taken as a consequence of an impact assessment, the Code stated that if an assessment suggested that the policy, or the way the function was carried out ‘should be modified, the authority should do this to meet the general duty’ (CRE, 2002: 16-17). In relation to complying with the SEDs, the word ‘shall’ used in the statutory order was initially echoed by use of the word ‘must’ in explaining the core requirements in relation to RESs. However, the Code generally then reverted back to ‘should’ and ‘could’ (CRE, 2002: 23-29). In terms of interpretation by the courts, the use of the word ‘must’ is unambiguous and leaves little room for movement; by contrast, word ‘should’ or ‘may’ are more ambiguous.
The RED Code could be admitted into evidence. The language used in the Code is only definitive where provisions in primary or secondary legislation are repeated. It is therefore difficult to see how the courts would have used the guidance successfully except where there was evidence of serious non-compliance and/or that the Code had been seriously flouted.

*Section 75, section 75(4) and schedule 9 of the Northern Ireland Act 1998 and the RED*

One of section 75’s strengths was that its scope included a broad range of equality strands in addition to race. However, the most significant advantage, compared to section 71 of the RRA 1976, was that section 75(4) and schedule 9 of the 1998 Act set out in detail what those subject to section 75 were expected to do and the enforcement arrangements. Schedule 9 of the Northern Ireland Act 1998 also set out the detailed requirements in relation to developing Equality Schemes and related enforcement arrangements. This approach had a number of advantages compared to the RED’s approach. First, what was expected of public bodies, how their performance would be assessed and what would be done to ensure that they complied were all specified in the 1998 Act. The component parts of the section 75’s equality duty regime appeared designed to provide a coherent legislative, regulatory and enforcement regime. Unlike the RED, the component parts were not developed, enacted and implemented in a piecemeal manner over many months. Although section 75 and schedule 9 were enacted in November 1998, section 75 did not come into force until 1st January 2000. The Equality Commission for Northern Ireland (ECNI) therefore had time to issue guidance before section 75 came into force. Those subject to section 75 had been informed, a year in advance, what they would be required to do.

Schedule 9 required public authorities to submit their Equality Scheme to the ECNI; the ECNI had the power to approve the scheme or refer schemes to the Secretary of State. In the case of schemes from government departments, the ECNI had the power to approve the scheme or request that the government department revise the scheme. This exact arrangement could not have worked in England because the CRE would have been

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137 Equality Schemes published by a government department could not be referred to the Secretary of State.
the recipient of many thousands of schemes. It would however have been helpful to have
developed a framework for England that incorporated stronger, and clearer, public
accountability arrangements. The EHRC’s powers, in relation to psed assessments,
probably came the closest to the ECNI’s powers. However the EHRC’s powers in relation
to psed assessments were not introduced until 2007, more than six years after the RED
came into force. Other provisions in schedule 9, of the Northern Ireland Act (NIA) 1998,
could have been adapted for England and could have addressed a number of the
deficiencies identified in relation to the RED. Schedule 9 stated that schemes shall:

‘a) conform to any guidelines as to form or content which are issued by the
Commission with the approval of the Secretary of State; b) specify a timetable for
measures proposed in the scheme; and c) include details of how it will be
published.’

Schedule 9’s language appears unambiguous. The ECNI’s ability to issue guidelines with
which public bodies had to ‘conform’ within a stated timetable appeared to provide a
much stronger accountability framework than that provided by the RED, its SEDs and its
Code. Schedule 9 also set out a number of important proactive requirements under the
heading ‘duties arising out of equality schemes.’ An important requirement, under
paragraph 9(1), was for an authority publishing the results of its assessments to detail any
consideration given to:

‘a) measures which might mitigate any adverse impact of that policy on the
promotion of equality of opportunity; and b) alternative policies which might
better achieve the promotion of equality of opportunity.’

Once again schedule 9’s language appeared clear, unambiguous and it was backed up by
the provisions on complaints set out in paragraph 10 of schedule 9. These ‘complaints’
provisions allowed individuals to raise concerns directly with the ECNI; after first having
raised the issue with the public authority concerned and giving that authority a
‘reasonable opportunity to respond.’ These provisions created a direct link between
section 75 and a mechanism for those with complaints about compliance to raise
concerns. Paragraph 10(1) placed an obligation on the ECNI to investigate unresolved
complaints or explain the reasons for not investigating to the complainant; again there
was a clear attempt to facilitate accountability to members of the public and to provide a
framework for resolving concerns where a public authority was not responsive. This is not to suggest that the enforcement framework provided, under schedule 9 of the Northern Ireland Act 1998, was without problems but one could have hoped for a greater read across to the accountability approach taken in section 75 and that taken to section 71.

**The Disability Equality Duty: 2005 to 2011**

This examination of the DED first compares the general DED with other relevant equality duties; it also draws on the assessment of the RED. The DED was introduced as section 49A of the Disability Discrimination Act (DDA) 1995 by the DDA 2005. The DED came into force in December 2005; it was repealed in April 2011 when the PSED came into force. Consideration has been given to both the duties and powers of the DRC and EHRC because the DRC had oversight of the DED from 2005 to 2007 and the EHRC had oversight of the DED from 2007 until 2011 when the DED was replaced by the PSED. The approach taken follows that adopted for the RED; the rationale remains unchanged.

**Comparing relevant general equality duties**

The general DED, set out as section 49(A) of the DDA 1995, stated that:

‘1) Every public authority shall in carrying out its functions have due regard to— a) the need to eliminate discrimination that is unlawful under this Act; b) the need to eliminate harassment of disabled persons that is related to their disabilities; c) the need to promote equality of opportunity between disabled persons and other persons; d) the need to take steps to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons; e) the need to promote positive attitudes towards disabled persons; and f) the need to encourage participation by disabled persons in public life.’

Section 49B(1) of the DDA 1995 stated that a public authority included ‘any person certain of whose functions are functions of a public nature’ unless they were exempted. Section 49B(1b) set out a number of exemptions; section 49B(3) made provision for additional ‘persons’ to be exempted. Section 49B(2) stated the private acts of a person

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138 An amended cut down version of the DED continues to apply to Northern Ireland under section 149 of the Equality Act 2010.
deemed to be a public authority because they exercised public functions would not be covered by the DED.

**The DRC’s general duties [2005 and 2007]**

**Section 2 of the Disability Rights Commission Act 1999**

The DRC had a duty ‘a) to work towards the elimination of discrimination against disabled persons; b) to promote the equalisation of opportunities for disabled persons; c) to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons; and (d) to keep under review the working of the Disability Discrimination Act 1995 (referred to in this Act as “the 1995 Act”) and this Act.’

**The EHRC’s general duty [2007 onwards]**

**Section 3 of the Equality Act 2006**

To exercise its functions: ‘with a view to encouraging and supporting the development of a society in which— a) people’s ability to achieve their potential is not limited by prejudice or discrimination, b) there is respect for and protection of each individual’s human rights, c) there is respect for the dignity and worth of each individual, d) each individual has an equal opportunity to participate in society, and e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.’

**Analysis of the DED**

The general DED has been assessed against the RED regime, previously described, and EHRC’s general duty, set out above. For the purposes of the DED, a public authority included ‘any person certain of whose functions’ were ‘functions of a public nature’ unless they were exempted. This approach was intended to address the limitations of listing public bodies identified in relation to the RED. The fact that the DED was extended to functions that were of a public nature potentially brought a wider range of organisations, in addition to full or true public bodies, into the DED’s ambit. Whilst the language was not the same, there was a better fit between the language of the DRC’s general duty, the DED and the EHRC’s general duty. This improved fit in part reflected the
fact that discussions were ongoing in 2005 around the planned DDA 2005, the Equality Act 2006, the Discrimination Law Review and the Equalities Review.

The DED had six equality aims, compared to the RED’s three; the DED’s first and third equality aims mirrored the RED’s equality aims. The DED’s second equality aim explicitly included harassment and took account of legislative changes introduced in 2003 to comply with the EU Equality Directive; the changes – introduced by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 – had come into force on 1st October 2004. The DED’s final three equality aims, sections 49A(1)(d), (e) and (f), set out positive and proactive requirements on the face of the DDA 1995; and the language used had echoes of the social model of disability. These proactive and positive equality aims gave a real sense of what the DED might be expected to achieve. Section 49A(1)(d) required due regard to be given to ‘the need to take steps to take account of disabled persons’ disabilities’ even where this involved more favourable treatment for disabled people. This equality aim reflected the fact that positive discrimination in relation to disabled people was not generally unlawful under the DDA 1995 whereas, unless a positive action provision applied, this provision would have been prohibited in relation to race. With respect to the DED, the language used to describe the last three equality aims was clearer, and what was intended also seems clearer, than the RED. The Explanatory Notes to the DDA 2005, explain the purpose of the DED in the following terms, the new duty was ‘intended to ensure that bodies which exercise public functions “mainstream” disability rights issues when exercising those functions’ (2005: 12). The Act’s Explanatory Notes also stated that this meant:

‘that public bodies, when making decisions, or when developing or implementing a new policy, must make consideration of the needs of disabled people an integral part of the policy-making or decision-making process with a view to eliminating discrimination and harassment and to improving opportunities for, and promoting positive attitudes towards, disabled people’. and ‘when exercising functions, bodies must take account of the need to encourage disabled people to take part in public life.’

What type of change the DED was intended to bring about was again more clearly stated and what is expected was clearer than with the RED. As with the CRE, the DRC had
powers to issue compliance notices and provision was made for SEDs to be issued for ‘the better performance’ of the DED.

**The specific disability equality duties**

The DRC had learnt from the experiences of implementing the RED and section 75 of the Northern Ireland Act 1998. The DRC had consulted widely about its proposals between January and April 2005; it had then published the results of this consultation and its plans around the same time that the key regulations to bring the provisions into force were laid before Parliament.\(^\text{139}\) Instead of the disjointed approach adopted in relation to the RED, the general DED, the associated specific SEDs and the DED statutory code of practice all came into force on 5\(^\text{th}\) December 2005.\(^\text{140}\) Bodies subject to the DED were given a year, or in some cases, two years to publish a Disability Equality Scheme (DES) – although they could publish in advance of this timetable if they wished to. These SEDs had some similarities with the RED’s SEDs; both required that an equality scheme be published. However, the DED regulations were much more extensive and, like the general DED, these regulations were also much clearer about what was expected and they specified that disabled people had to be involved, not just consulted. These SEDs were also much clearer about their role in supporting the DED as a positive equality and public accountability tool than the race SEDs. The approach taken retained the strengths of the framework established by the requirements in relation to RESs but also did much to address key deficiencies.

Regulation 2(2) stated unambiguously that an authority subject to the duty ‘shall involve’ disabled people ‘in the development of the Scheme who appear to that authority to have an interest in the way it carries out its functions.’ For the avoidance of doubt, regulation 2(3)(a) also required the DES to include a statement of ‘the ways in which such disabled people’ had ‘been involved in’ the development of the DES. Regulation 2(3)(b) also required that the DES include a statement of ‘the authority’s methods for assessing the

\(^{139}\) The Duty to Promote Disability Equality: Statutory Code of Practice: A report on the consultation by the Disability Rights Commission [DRC: October 2005]

\(^{140}\) The DED came into force on 5\(^\text{th}\) December 2005. The DED’s specific equality duties – the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 – also came into force on 5\(^\text{th}\) December 2005.
impact of its policies and practices, or the likely impact of its proposed policies and practices, on equality for disabled persons’. These requirements were in part accountability requirements, requiring those subject to the DED to do more than just consult with disabled people but involve disabled people in developing the DES. The DED statutory Code explained what involvement should mean in practice. The involvement provisions were intended to place disabled people ‘at the heart of the Disability Equality Duty’ echoing the Social Model of Disability’s principle, ‘Nothing About Us without Us’ (DRC, 2006e: 10).

An authority was also required, under regulation 2(3)(c) to set out, in the DES, the steps that it proposed to ‘take towards the fulfilment of its section 49A(1) duty’. Regulation 2(3)(d) required authorities, in relation to employment and education, to set out their arrangements for gathering information in the DES. However, unlike the RES, regulation 2(3)(d) also required public bodies to set out what effect gathering this information had had on disabled people: as employees in terms of recruitment, development and retention; and in relation to the ‘educational opportunities available to, and on the achievements’ of disabled pupils and students. Regulation 2 (3)(e) also required a public authority, subject to the regulation, to set out its arrangements for using the information gathered to support compliance with section 49A(1). Regulation 2(4), in relation to reviewing the DES, retained the three year review provisions, established in relation to an RES, but made it clear that an updated DES had to be published every three years.

The SEDs included three other important provisions under the headings of Implementation of the DESs (regulation 3), Annual Reporting (regulation 4) as well as an entirely new duty requiring reports on policy sectors (regulation 5). Regulation 3 required public bodies to actually take the steps that they said that they would in the DES. This included gathering and using the information that they said that they would gather and taking the actions that they said that they would unless this would be ‘unreasonable or impractical’. Regulation 4 required the publication of an annual report, within one year of the publication of the DES, and every year thereafter. The annual report was to focus on steps taken to achieve section 49A(1), what information had been gathered and how the information had been used to comply with the SEDs’ requirements. New policy sector
reporting requirements, for Secretaries of State and the National Assembly for Wales, required the publication of a progress report on disability equality in the policy spheres for which these parties were responsible. The report was to contain:

‘an overview of progress made towards equality of opportunity for disabled persons in these policy spheres ... their strategies for coordinating action by public authorities operating in these spheres so as to bring about further progress towards equality of opportunity for disabled persons.’

The statutory code of practice – The Duty to Promote Disability Equality, England and Wales

Like the general DED and the associated SEDs, the DRC’s 196 page statutory code of practice for England and Wales published in December 2005 provided detailed guidance on every aspect of the general and specific duties and what was expected of those subject to the general and specific duties. The Code was divided into five parts and five appendices: the first part summarised the Code, its purpose and key terms. Part two explained that the overarching purpose of the DED was equality of opportunity for disabled people, the meaning of key terms in the general and specific duties and what outcomes were sought. The explanation of due regard was much more extensive than that provided in the Statutory Code on the RED. The DRC sought to facilitate a greater understanding of due regard and other key principles by linking the requirements in the general and specific duties to practical examples.

The subsection on the SEDs ran to nearly 30 pages and defined: why disabled people had to be involved; what involvement meant; and how involvement differed from consultation. Referencing a report of the National Audit Office, the DRC advised that budgets should be made available for involvement and engagement activities and that engagement should be long term and supported. The DRC explained that involvement and engagement were ‘required’ to help public bodies to: ‘identify differing service delivery needs that may exist across diverse customer groups’; and ‘develop the most appropriate ways of delivering these services.’ The Code advocated early engagement with stakeholders after ‘sufficient preparation’, a focus on achieving positive outcomes and establishing sustained links ‘with stakeholders during the design and development of
services throughout their implementation and review.’ Part three focused on policies and practices and educational attainment. Part four set out requirements in relation to the duties of the Secretary of State and the new policy sector reporting requirement. Part five of the Code set out which public authorities were covered by the DED and which were covered by the SEDs and how the general DED and the SEDs would be enforced. The Code stated that the DED ‘should end the discrimination which currently can occur when institutions fail to take into account the impact upon disabled people when developing services or policies’ (DRC, 2005: 5).

Although the word ‘accountability’ appeared only once in the Code, the centrality of disabled people to the process of developing a DES was clear. The fact that the DED was an accountability tool was emphasised by the fact that the term ‘account’ appears numerous times in the Code. Many of the DED Code’s requirements linked back to regulations 2(2) and 2(3) on involving disabled people in the development of the DES.  

The Public Sector Equality Duty: 2011 onwards

This examination of the PSED draws on the assessments of the RED and DED. The general equality duty was introduced by section 149(1) of the Equality Act 2010. The Act was enacted on 8th April 2010, section 149(1) came into force in April 2011. The PSED drew on the RED and DED, with sections 149(2) setting out which bodies and persons, other than core public bodies would be subject to the general PSED. Sections 149(3), (4), (5) and (6) replicated or found appropriate ways to give effect to important provisions in the RED or DED. The approach to defining which public bodies, and other bodies, would be subject to the PSED combined approaches adopted in relation to the RED and DED. Some bodies would be listed in statutory regulations however section 149(2) built on the DED model stating that anyone ‘who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).’ The importance of this approach is explored shortly.

Section 149(1), the general equality duty, stated that:

141 The Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005
‘(1) A public authority must, in the exercise of its functions, have due regard to the need to—a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.’

**The EHRC’s general duty [2007 onwards]**

**Section 3 of the Equality Act 2006**

To exercise its functions: ‘with a view to encouraging and supporting the development of a society in which— a) people’s ability to achieve their potential is not limited by prejudice or discrimination, b) there is respect for and protection of each individual’s human rights, c) there is respect for the dignity and worth of each individual, d) each individual has an equal opportunity to participate in society, and e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.’

**Analysis of the PSED**

This formulation of the general PSED drew on the RED and PSED. The RED’s good relations equality aim was amended and the good relations became an equality aim in relation to all protected characteristics except for marriage and civil partnership. Whilst the general PSED did not echo the EHRC’s own general duty, there was no conflict between the duties and there was a degree of synergy. However, section 149(1) was significantly strengthened by the provisions that explained the meaning of ‘due regard’ on the face of the 2010 Act. Section 149(1) was also strengthened by what might be regarded as positive action provisions being built into the general PSED under sections 149(4) and 149(6). Due regard in relation to both equality opportunities and good relations were defined by sections 149(3) and 149(5). Due regard to advancing with equality of opportunity required consideration of:

‘the need to— (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; c) encourage persons who share a relevant protected characteristic to participate in
public life or in any other activity in which participation by such persons is disproportionately low.’

Likewise, in relation to due regard to fostering good relations, this meant ‘having due regard, in particular, to the need to – a) tackle prejudice, and b) promote understanding. Although using ‘due regard’ in a definition of ‘due regard’ was possibly tautological, the wording of the provisions gave some clear sense of what was expected. In terms of positive action provisions built into section 149, section 149(4) stated that meeting the needs of disabled people could involve ‘steps to take account of disabled persons’ disabilities’. Whilst making it clear that the provisions did not legitimise unlawful acts, section 149(6) stated that compliance with section 149 ‘may involve treating some persons more favourably than others’. The PSED incorporated race and disability and the other protected characteristics covered by the Equality Act 2010. The provisions were stronger than the RED’s and the DED’s general duties, not least because of the formulation of sections 149(2) to 149(6).

Section 149(2) and section 150

Section 149(2) broadened the range of bodies and organisations that could be caught by the PSED by stating that a person ‘who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).’ This section had to be read in conjunction with section 150 which defined which public bodies would be subject to the general PSED. Although the listing approach was adopted to define which public bodies, and other persons, would be directly subject to section 149(1), an additional class of ‘persons who exercised public functions’ was also brought within the scope of the PSED. For the purposes of section 149(2), by virtue of section 150(5), a public function was identified as ‘a function that is of a public nature for the purposes of the Human Rights Act 1998.’ This approach means that where legal judgments or other legislative enactments identify an activity as a function of a public nature for the purposes of the Human Rights Act 1998, this activity will also be subject to the general duty of the PSED.

142 Marriage and civil partnership was only incorporated in the PSED in relation to unlawful discrimination and acts under the Equality Act 2010.
The SEDs – The Equality Act 2010 (Specific Duties) Regulations 2011

The SEDs for England came into force on 9th September 2011. These SEDS did not build on the previous race and disability SEDs. Although there were four regulations, all four had been stripped back to the bare bones. Regulation 1 just said when the regulations would come into force. Regulation 2 required the publication of information annually, stating that this ‘must’ include ‘information relating to persons who share a relevant protected characteristic who – a) are its employees or b) other persons affected by its policies and practices.’ As with the previous SEDs for England, the employment provisions did not apply if an authority employed less than 150 employees. Regulation 3 required the publication of ‘specific and measurable’ equality objectives but only every four years. Regulation 4 just said that the information published must be ‘in a manner accessible to the public.’ The first tranche of public bodies subject to these SEDs were expected to publish relevant information by 31st January 2012 and equality objectives by April 2012.

By contrast, the SEDs for Scotland and Wales were more comprehensive and replicated the key provisions previously covered by the specific race, disability and gender equality duties which had been repealed in April 2011. The SEDs for Wales came into force in April 2011 just before the PSED. There were twenty SEDs for Wales which included requirements in relation to: the preparation and review of equality objectives; engagement provisions; collecting information; impact assessments; training; pay and action plans; reviews; Strategic Equality Plans; reports; public procurement; and compliance reports by Welsh Ministers. The SEDs for Scotland came into force in May 2012, just over a year after the PSED had come into force. Although there were 12 SEDs for Scotland, fewer SEDs than for Wales, the Scottish SEDs covered similar territory and included duties to: report on progress on mainstreaming equality; publish equality outcomes; assess and review policies and practices; publish and use a range of information; and consider award criteria in public procurement. The SED frameworks adopted for both Wales and Scotland were designed to facilitate transparency, a crucial friend of accountability, and encourage proactive approaches by those subject to the PSED. These SEDs incorporated clear requirements on: what was to be done by those

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143 The SEDs for Scotland were delayed because Scottish Ministers had responded positively to demands for stronger SEDs for Scotland than had initially been proposed.
subject to the duties; what information had to be published; how interested parties could be engaged in the process; working towards outcomes; and assessment and review arrangements; no similar provisions were incorporated in the SEDs for England.

**The technical guidance**

In 2013, the EHRC used its general powers, under section 13 of the Equality Act 2006, to issue advice and guidance to support the PSED, and published technical guidance on the PSED after the Government prevented it from issuing any further statutory codes (EHRC, 2013b). The EHRC updated the Technical Guidance in August 2014 although, for the purposes of this study, the guidance first published in January 2013 is most relevant (EHRC, 2014: 6, EHRC, 2013: 7).\(^{144}\) The EHRC described its technical guidance as an ‘authoritative, comprehensive and technical guide to the detail of the law’ which will be ‘invaluable to lawyers, advocates, human resources personnel, courts and tribunals’ and others (EHRC, 2013b: 5). The guidance was divided into 7 chapters.\(^{145}\) The main problems with the guidance are that: it was issued more than 18 months after the general PSED came into force; limited time was available to see how lawyers and the courts have viewed this non-statutory guidance; and the guidance fails to explicitly address the issues of public accountability. Although reference was made to the importance of engagement, the concept of public accountability is absent from this definition:

‘Engagement is a broad term intended to cover the whole range of ways in which bodies subject to the duty interact with their service users and employees, over and above what they do in providing services or within a formal employment relationship. What is suitable for a particular body or appropriate for a particular function will depend on the circumstances’(EHRC, 2013b: 50).

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\(^{144}\) The first set of technical guidance is most relevant because it applied in the primary research period – 2000 – July 2014.

\(^{145}\) The Technical guidance published in 2013: Chapter 1, the introduction. Chapter 2 explains what the duty is and introduces the meaning of due regard. Chapter 3 explains what each of the three aims of the public sector equality duty mean. Chapter 4 describes the tools available to advance equality. Chapter 5 outlines practical approaches to complying with the public sector equality duty. Chapter 6 outlines the requirements of the Equality Act 2010 (Specific Duties) Regulations 2011 (the Regulations. Chapter 7 explains how the duty can be enforced by the Commission and others who have an interest.
Conclusions
This comparative assessment has identified three key themes: the pseds as positive equality duties; and the psed as public accountability tools; and government actions which undermined the PSED regime.

The RED, the DED and the PSED as positive equality duties
The regime established by the Home Office for the RED in 2001 incorporated key components of what would be needed to create a positive equality duty. Important elements included provisions in primary legislation, supporting statutory regulations, a statutory code and regulatory and enforcement powers for the equality commissions. However, the evaluations of the regimes for the Northern Ireland section 75 duty and the DED, suggest that the RED’s framework suffered from a number of important deficiencies. The key deficiencies, at the level of the general RED, were: a lack of clarity about what type of change or difference the RED was supposed to make; an undue focus on process rather than outcomes; a lack of focus on institutional racism; and the need for more proactive measures to be incorporated in the general RED. At the level of the specific equality duties, the SEDs for Scotland and Wales, and to some extent the SEDs that supported the DED, demonstrated that more comprehensive SEDs could better support a proactive general duty. At the level of statutory Code, the DED Code provided an example of a Code that combined outcomes, process, engagement, involvement and accountability measures. Furthermore, the general DED, the associated SEDs and the DED Code all drew on the social model of disability implicitly or explicitly.

The transition from the general RED and DED to the general PSED held much promise; and the general PSED was an improvement over the general RED and DED. The PSED is more outcome focused, designed to promote change and incorporates requirements about the need to address the needs of different groups and address disadvantage. It had the potential to draw on the augmented positive action provisions set out at section 158 of the Equality Act 2010. However, the promise of the general PSED was constrained by

146 Section 158 of the Equality Act 2010 allows action to be taken which is to reduce disadvantages, underrepresentation or to address particular needs where this is 'a proportionate means of achieving the aim of: '(a) enabling or encouraging persons who share the protected characteristic to overcome or
limited SEDs and the absence of a PSED statutory Code. The confusion around whether
the PSED would survive a series of government reviews further undermined its potential
for promoting proactive change. Of the three duties, looking at each duty in the round,
the DED came the closest to providing a comprehensive positive equality duty.147
However the leadership and vision, demonstrated by the DRC, that supported the DED,
the associated SEDs and the DED Code, and ensured that the DED regime came into force
on the same day, was not demonstrated by the EHRC.

**The RED, the DED and the PSED as public accountability tools**

The public accountability regime provided by the RED was limited at all levels. There were
no specific requirements in relation to public accountability in the general RED, the
associated SEDs or the RED Code. By contrast, the DED’s commitments to the ‘social
model of disability’ and to the principle of ‘nothing about us without us’ informed the
form and content of the general DED, the associated SEDs and the DED Code; all
contained implicit or explicit accountability and public accountability requirements. With
respect to the PSED, whilst the general PSED did not incorporate explicit accountability or
public accountability provisions, the due regard provisions set out in section 149(1), (2),
(3), (4) and (5) could have been supported by SEDs that incorporated explicit public
accountability measures; as was the case for the SEDs developed for Wales and Scotland.
However despite the significant strengths represented by the construction of the general
PSED, the overall PSED regime was undermined by the regressive approach adopted in
relation to the PSED regulatory and enforcement regime for England. The two critical
factors being the restricted SEDs for England and the absence of a PSED Statutory
Code.148

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147 In the round means taking account of the general duty, the SEDs, the Code and the enforcement and regulatory regime.
148 This omission was only partially addressed by the publication of Technical Guidance in January 2013
because the PSED had come into force in April 2011, almost two years before and the model of Technical Guidance was new.
Government actions which undermined the PSED regime

Like the RED ten years before, the PSED came into force without any SEDs to support it and with no statutory code of practice. When the SEDs for England came into force, nearly six months after the general PSED, the limited provisions were exceptionally weak and very limited. In 2012, the Government took the decision that the EHRC would not issue any further statutory codes of practice. Until the end of 2012, although the general PSED was much stronger than the previous general RED or DED, key elements of the supporting legislative and civil framework, deemed so crucial by the Home Office, CRE and others, had been dismantled. Although the EHRC published technical guidance to support the PSED in January 2013, it was issued more than eighteen months after the PSED had come into force.¹⁴⁹ Whilst the content of the technical guidance covered important territory only time will tell whether or not the delay in this guidance being published, its status and the absence of effective SEDs have undermined the PSED.

Chapter 6: Justiciability, enforcement and the equality duties

Introduction
This chapter examines the justiciability of the equality duties and their legal enforceability. It assesses the use of judicial review (JR) as the means for claimants to secure legal redress for breaches of the general race and disability public sector equality duties (pseds).\(^{150}\) The focus is therefore on the Race Equality Duty (RED), the Disability Equality Duty (DED), the race and disability provisions contained in the Public Sector Equality Duty (PSED) and the use of JR, by individuals and others, to hold public bodies and others subject to pseds to account. Whilst the focus is on JR claims, a small number of planning cases have also been considered which gave substantive consideration to the race or disability pseds.\(^{151}\) The enforcement approaches, in relation to the specific equality duties (SEDs) and the general race and disability pseds, adopted by the CRE, the DRC and the EHRC are also reviewed.\(^{152}\)

The narrative assessment, provided in chapter 4, demonstrated that a range of parties had campaigned over many decades for legally enforceable race and disability pseds. However, the first general public sector equality duty (psed), the local authority race duty, had proven to be legally unenforceable despite having been enshrined in primary legislation.\(^{153}\) Given this context, there were serious questions about whether the post-Lawrence Race Equality Duty (RED) would prove to be a strong, effective and legally enforceable duty (see chapter 5). These concerns were exacerbated by the fact that the general RED was not successfully judicially reviewed by a claimant until 2005, four years after the general duty had come into force (see appendix 8).

\(^{150}\) These general equality duties are set out primary legislation (see chapter 5 and appendix 1). JR, the common acronym for judicial review is used in the rest of this chapter except in headings or quotes. JR, or an equivalent legal proceeding, was the primary legal recourse available to challenge a perceived breach of the general (pseds).
\(^{151}\) These were appeals made under the Town and Country Planning Act 1990 usually against an injunction, other enforcement action or a refusal to allow planning permission; in each case the court had jurisdiction to hear the psed claim and issue relief.
\(^{152}\) Only the Equality Commissions had powers that enabled them to enforce non-compliance in relation to the specific equality duties.
\(^{153}\) Enacted as section 71 of the Race Relations Act 1976; the duty was in force between 1977 and 2001 but was not successfully litigated by the CRE, or any other party, against a local authority.
This chapter examines whether claimants’ substantive race and disability psed JR cases, or equivalent legal cases, succeeded or failed in court, what the ‘due regard’ requirement has amounted to in the eyes of the courts and whether these psed JR claims have been used successfully by claimants to challenge institutional race and disability discrimination and/or advance the equality aims set out in the general duties.\textsuperscript{154} However a legal judgment is unlikely to provide the answers to a number of key questions. What difference did a successful, or an unsuccessful, legal judgment make? Did a JR judgment resolve the claimant’s concerns? Can a JR judgment ‘lost’ by a claimant still have a positive impact or conversely can a JR judgment ‘won’ by a claimant bring mixed blessings or no blessings at all? Scheingold’s theory of the Politics of Rights asserts that such matters depend largely on how these legal judgments are used in social justice and wider political, with a small ‘p’, campaigns. Questions about access to JR turn on the cost of JR, its affordability, access to legal advice and access to public funding for JR. These questions and issues are explored in the next chapter.

The assessments provided in this, and the following, chapter require some understanding of the purpose of, limitations on, and possible legal remedies offered by, JR. Information on JR has therefore been provided together with comments on matters of relevance to this study. This is followed by an assessment of the enforcement strategies, in relation to the specific and general pseds, adopted by the CRE, DRC and the EHRC. Consideration has then been given to the development of key principles, themes and psed judgments between 2001 and 2014. This evaluation draws on reviews of the pseds written by leading legal commentators and lawyers and references key judgments. It draws on an analysis, undertaken as part of this study, of the success and failure rates, for claimants who brought the 136 substantive race and disability cases (see appendices 5, 6 and 8). It also provides evidence that claimants have successfully used psed JR claims to challenge institutional race and disability discrimination and advance the equality aims set out in the general duties.

\textsuperscript{154} Separate questions have not been asked about whether the DED and the PSED have been used to advance the social model of disability because the DED and the PSED - DDA 1995, s. 49A (d) – (e) and the Equality Act 2010, s. 149 (3), (4) & (6) - incorporated equality aims consistent with the social model of disability (see chapter 5, conclusions).
An assessment of key changes made, and being made, to the JR regime is then provided before the chapter’s conclusions. A number of analyses have also been undertaken for this study of legal representation, third party interventions and other forms of involvement by voluntary and community organisations (VCOs), the CRE, DRC, EHRC and other civil society organisations in these psed; these analyses are assessed in the next chapter (see appendices 6, 7 & 8).

**Understanding JR, key limitations, benefits and appendix 8**

JR is a complex subject which is governed by an extensive legislative regime. Important changes to this regime, introduced by the Criminal Justice and Courts Act 2015, are explored in the penultimate section of this chapter. Unless otherwise stated, the regime described below applied between April 2001 and 31st July 2014. Other than planning appeals or challenges that could hear psed claims, JR was the central legal route available to individuals and organisations, other than the Equality Commissions, that wished to legally challenge alleged breaches of the pseds. As argued in the previous chapter, no private law remedy is available for breaches of the pseds. The following overview is intended to present sufficient information about JR to facilitate an understanding of the analyses that follow.

HM Courts and Tribunals Service’s guidance describes JR as ‘the procedure’ which can be used ‘to challenge the decision, action or failure to act of a public body such as a government department or a local authority or other body exercising a public law function’ (MoJ, 2014a: 3). The Civil Procedure Rules (CPR), issued in accordance with relevant legislation, govern a range of important matters in relation to JR. Key legislative provisions with respect to JR are set out in the Senior Courts Act 1981, the Tribunals, Courts and Enforcement Act 2007 and the Criminal Justice and Courts Act 2015. ‘The civil procedure rules make up a procedural code whose overriding aim is to enable the courts to deal with cases justly.’ MOJ. 2015b. Procedure rules [Online]. Available: https://www.justice.gov.uk/courts/procedure-rules [Accessed 27 April 2015].

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155 With respect to changes being made, these are the changes contained in part four of the Courts and Criminal Justice Act 2015.
156 The judge in Bath & North East Somerset Council v Connors & Ors [2006] EWHC 1595 (QB), confirmed that a separate JR claim was not required because psed arguments could be advanced in challenging planning injunctions and relief could be offered [The judgment, paragraphs 78-79].
Review Practice Direction 54A (MoJ, 2015a). CPR Part 54 and the associated JR Practice Direction 54A set out which courts and tribunals may hear a JR permission application and possible outcomes for such permission applications. CPR Part 54 and the associated Practice Direction also set out the rules and requirements in relation to managing and hearing JR claims. These rules and requirements include provisions on time-limits, interested parties, third party interveners as well as JR remedies. Key requirements are summarised next and the relevance for this study is noted where helpful.

JR has been described as a two stage process which first requires the permission of the court to be sought, and obtained, in relation to whether the claim will be heard (Southey et al., 2012: 160). If permission is not given by the court then the substantive JR claim will not be heard (Southey et al., 2012: 160). The court may decide whether to give permission for a JR claim to be heard on the basis of the papers submitted (CPR, r 54.12) or a hearing (CPR, r 54.11A). Sometimes the court will decide to have a ‘rolled up hearing’ which is a single hearing at which the court determines whether permission for JR should be granted and then, if permission is granted, hears the substantive JR claim. If permission is not granted, the claim will fall, if permission is granted a JR permission application will proceed. If a substantive JR claim progresses, there are four main outcomes for the purposes of this study. Leave to appeal may be sought by the claimant or defendant but the permission of the court or Upper Tribunal that issued the

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159 Unless otherwise stated, the term court is used to refer to courts and Upper Tier Tribunal that have the ability to hear JR claims.
160 Unless otherwise stated, references to court also incorporate relevant tribunals.
161 CPR, r 54.4 ‘The court’s permission to proceed is required in a claim for judicial review whether started under this Section or transferred to the Administrative Court.’
162 Permission outcome 1, permission is granted in full and the JR claim will subsequently be heard in full. Permission outcome 2, permission is granted in relation to some of the grounds and subsequently a JR claim will be heard on those grounds. Permission outcome 3, permission is refused and the case falls. Permission outcome 4, a successful appeal is made against the partial or full refusal of permission and as a result the case is subsequently heard in full or on some grounds. Permission outcome 5, an unsuccessful appeal is made against the partial or full refusal of permission and as a result the case falls.
163 Outcome 1, the claim fails on all grounds. Outcome 2, the claim succeeds on some grounds but not others. Outcome 3, the claim succeeds on all grounds. Outcome 4, the court does not make a determination on one or more grounds. It would be possible to have an outcome in which outcome 1, 2 or 3 occurred plus the no determination of one or more grounds.
judgment must be sought. If leave to appeal is declined, then an appeal, on this point, may be made to the superior court.\textsuperscript{164}

The 136 cases listed in appendix 8 include a mixture of classes of cases that involved English public bodies or bodies exercising public functions subject to the pseds for England. Some were permission cases, some were rolled up hearings and some were full hearings of JR claims; there are 104 first instance cases. Appendix 8 also includes appeal cases (28) to the Court of Appeal and a small number of appeals (four) heard by the House of Lords or Supreme Court. In all of the judgments, listed in appendix 8, substantive consideration was given to the race or disability pseds and the court issued a judgment. In a few of the cases, heard by the High Court and Court of Appeal, the court declined to make a determination on the psed claim. Generally this happened where claims had been brought on a number of grounds and the view of the judge(s) was that such a determination would not add anything to the overall decision in relation to the case. However, in a small number of cases, the judge(s) indicated that the pseds had little or no relevance to the matter in hand and because of this declined to issue an adjudication in relation to the psed ground(s). In terms of outcomes, all of the possible outcomes, for permission applications and substantive claims, are reflected in the actual determinations made in the 136 judgments listed in appendix 8. Claimant success and failure rates, in these psed judgments, are considered later in this chapter.

An interested party is defined as ‘any person (other than the claimant and defendant) who is directly affected by the claim (CPR r 54.1(f)). What is commonly called a third party intervener is not defined in those precise terms in the Civil Procedure Rules (CPR).\textsuperscript{165} However the CPR makes provision for any person to apply for permission by the court to ‘(a) to file evidence; or (b) make representations at the hearing of the judicial review’ (CPR r 54.17). Any person given such permission by the court is commonly called a third party intervener and listed as an ‘intervener’ or ‘intervenor’ on the front of the judgment.

In the psed cases listed in appendix 8, 24 voluntary and community organisations (VCOs)---
or civil society organisations instructed claimants’ QCs in 23 (17%) of the 136 cases (see appendix 6). These organisations were involved in 37, or 27%, of the 136 cases. In addition, the CRE, EHRC or the Children’s Commissioner for England intervened in 23, or 17%, of the 136 cases. The importance of these third party interventions is explored in the next chapter.

During the review period, April 2001 to 31st July 2014, some of the time-limits on lodging a JR claim or an appeal, which were already tight, were restricted further from 1st July 2013. The general rule, for initial JR applications, was that a claim had to be filed ‘(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose’ (CPR, r 54.5). However stricter time-limits applied, or were introduced, in relation to certain classes of case. For JR appeals against planning decisions, a shorter 6 week time-limit was introduced in July 2013 (CPR, r 54.5(5)). For procurement decisions, governed by the Public Contracts Regulations 2006, a 30 day time-limit was introduced as of 1st July 2013 (Burges Salmon, 2013: 1–2). Appeals to the Court of Appeal against a High Court JR ruling had to be lodged within 21 days. If an Upper Tribunal refused to judicially review a decision of a First Tier Tribunal, a claimant wishing to appeal such a decision had 16 days to submit an appeal (CPR, r 54.7A).

The Civil Procedure Rules precluded the parties from simply agreeing to extend the time-limits without the sanction of the court. Applications had to be made to, and secured from, the courts to extend any time-limit. 102 (75%) of the cases listed in appendix 8 were heard at first instance.

166 Two VCOs were involved in the same case (case 130, appendix 8).
167 Involved means as the body that instructed the legal adviser on the claimant’s behalf, as a third party intervener or as an interested party (see appendix 6).
168 The EHRC was the most prolific individual intervener in psed cases assessed (see appendix 6). It was involved in 21 cases including one that it brought in its own name.
170 Appeals against a refusal to hear a judicial review application must be lodged within 7 days (CPR, r 52.15(2)).
171 The Tribunals Courts and Enforcement Act 2007, section 15 gave Upper Tribunals the power to hear certain judicial review claims. ‘Since 1 November 2013 Immigration Judicial Reviews (IJRs) that were previously dealt with in the Administrative Court have been dealt with by the Upper Tribunal Immigration and Asylum Chamber (UTIAC). This is by virtue of the Lord Chief Justice’s Direction of 21 August 2013 which provides full details of the categories of IJRs that are transferred.’ HM COURTS AND TRIBUNALS SERVICE. 2014a. Judicial review and costs [Online]. Available: https://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review [Accessed 11 May 2015].

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instance in the Administrative Court and therefore the 3 month time limit applied, the
other 2 cases were heard by Upper Tribunals. However for planning or procurement
cases, the relevant shorter time limits would generally have applied. Clearly the shorter
the time limit, the more important it is to secure prompt access to high quality legal
advice early enough to assess the viability of a JR case and take all required steps before
making a permission application to the court. This raises access to justice issues; key
issues are discussed in the next chapter.

Important questions for potential claimants would probably include ‘How can JR help us?’
‘How much will taking a JR claim cost?’ In part, the answers depend on the remedies
available to the court and how JR cases can be funded. The twin issues of costs and
funding are explored in the next chapter but the issue of relief is considered next. Under
the JR regime in force during this period, if a case was upheld, the courts, had the ability
to issue a number of forms of relief by way of orders.\(^\text{172}\) The main orders were a
mandatory order, a prohibiting order, a quashing order, a declaration, an injunction or
Human Rights Act damages (MoJ, 2014a: 3-4).\(^\text{173}\) A court could also decline to offer any
relief or remedy even if the case was upheld in part or whole. The CPR specifies when
damages may, and may not, be considered, a JR claim ‘may include a claim for damages,
restitution or the recovery of a sum due but may not seek such a remedy alone’ (CPR, r
54.3 (2)). The Senior Courts Act 1981, section 31(4) ‘sets out the circumstances in which a
court may award damages, restitution or the recovery of a sum due on a claim for judicial
review’ (CPR Part 54.3 (2)). A Practical Guide to Judicial Review (Southey et al., 2012: 214)
identifies three main circumstances in which damages could be claimed:

\[ \text{‘(i) where the remedy of damages would have been available if the claim had been brought as a private law action (for negligence or false imprisonment); ii) where} \]

\(^{172}\) Key JR provisions re relief are set out in section 31 of the Senior Courts Act 1981 and section 15 of the
Tribunals, Courts and Enforcement Act 2007. Important amendments in relation to relief have been
introduced, by the section 84 of the Criminal Justice and Courts Act 2015. These are identified in the
penultimate part of this chapter.

\(^{173}\) A mandatory order requires a public body to do something. A prohibiting order prevents the public body
from doing something. A quashing order quashes or nullifies the public body’s decision that was the subject
of the complaint. A declaration states that the judgment has been made in favour of the complainant and
will incorporate the level of detail deemed appropriate by the court or tribunal. Although this description
was provided in 2014, it is generally applicable to the period in question. Any circumstances in which key
provisions, relevant to this study, were not applicable between 2005 and 2014 have been noted.
'just satisfaction is sought for a breach of the HRA 1998; and (iii) where it is successfully claimed that a public body has infringed an individual right in European Union Law’ (Southey et al., 2012: 214).

Claimants may pursue JR claims on a range of grounds so whilst some of the claims listed in appendix 8 were solely or predominantly psed claims, many were more complex and covered a range of grounds in addition to one or more of the pseds. In terms of remedies, no damages were awarded as the result of the findings in respect of the psed element of any of 136 JR claims listed in appendix 8 however damages were awarded on other grounds in a small number of cases. The most common remedies in the 45 judgments, in which claimants succeeded, were declarations and decisions being quashed (see appendix 8). The interrelated issue of remedies and redress are explored further later in this chapter.

The enforcement strategies adopted by the CRE, DRC and EHRC and the pseds
The Public Interest Research Unit (PIRU) undertook a comprehensive analysis of the use by the CRE, DRC and Equal Opportunities Commission (EOC) of their enforcement powers between 2001 and 2006 (Harwood, 2006). PIRU argued that evidence suggested that using these enforcement powers could encourage compliance. By contrast, its research concluded that ‘the equality enactments had not been adequately’ or effectively enforced by the CRE, DRC or EOC (Harwood, 2006: 11, 13). PIRU was very critical of the Commissions’ overall enforcement approaches; it also concluded that the CRE had made limited use of its enforcement powers in relation to the RED (Harwood, 2006: 11, 13, 22, 23). In 2006, PIRU advocated that the EHRC should adopt a more robust enforcement approach and make more use of own name legal complaints (Harwood, 2006: 22, 23).

PIRU also advocated greater legal assistance to individuals, greater transparency in

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For some sense of the grounds covered, see appendix 8 and the column headed class of case and subject. This column provides some sense of the subject matter as do the case examples later in this chapter.

Claims for damages were awarded in a number of cases where false imprisonment charges were upheld.

Given the commencement timetable for the DED and GED no assessment could be made of enforcement by the DRC or EOC in respect of these general or specific duties.

The Equality Act 2006, s. 30(1) clarified that the EHRC had the power to ‘institute or intervene in legal proceedings, whether for judicial review or otherwise.’ Where the EHRC institutes a case, this may be called an ‘own name’ legal complaint.
in relation to enforcement and more use of research – all recommendations relevant to the RED, DED and what would become the PSED (Harwood, 2006: 22, 23).

The available evidence supports PIRU’s assessment that the CRE and DRC had made little or no use of their enforcement powers between 1999 and 2006 and the assessment that effective legal enforcement could encourage compliance (Harwood, 2006: 7, 11, 13). However, PIRU’s recommendations appeared to be based on the assumption that the Commissions operated within environments in which they could simply decide to use their enforcement powers. It is important to remember that whilst the Home Office proposed that the CRE would be the main vehicle for RED challenges, it also assumed that the CRE would make limited and strategic use of its RED enforcement powers (Home Office, 2001: 4, 7-10, 19-27). The CRE, DRC and EHRC all sought to straddle the potential divide, and conflicts, between being an enabler and facilitator of change and a proactive regulator with a strong emphasis on enforcement; all three struggled. The approaches adopted by the CRE, DRC and EHRC are considered next.

Between 2001 and 2003, the CRE described its role as an enabler and facilitator of change in relation to the RED; it also said that this approach was supported by the Government (CRE, 2007b: 5). Nevertheless, in 2004, the CRE decided that a more robust approach regulatory approach was required and it developed a new three year monitoring and enforcement strategy (CRE, 2007b: 5). In 2007, reviewing this monitoring and enforcement strategy, the CRE commented negatively on the support that it had received from Central Government and from the government unit that had overseen its work (the Home Office Race Equality Unit) (CRE, 2007b: 5). It reported that the Race Equality Unit (REU) had tried to ‘prevent’ it from taking action when ‘evidence of non-compliance’ had emerged and had instead tried to ‘smooth over’ such situations ‘rather than address the problems’ (CRE, 2007b: 5). Whilst noting the challenges faced by the REU, the CRE also commented that the REU’s loyalty had clearly been ‘with Whitehall departments and officers have often expressed a lack of knowledge of the legal requirements themselves’ (CRE, 2007b: 6). The CRE also reported that central government departments were
amongst the lead offenders in relation to non-compliance with the RED, six years after the general RED came into force.\textsuperscript{178}

A number of factors had worked against the CRE moving into a more robust enforcement role before 2004. First, the CRE had assumed that, what it would later call, its ‘softly, softly approach’ would secure results in terms of RED compliance (CRE, 2007b: 4). Although the CRE would subsequently reassess this approach in 2004, and reject it in 2007, the approach had delayed a move into earlier enforcement action (CRE, 2007b: 4). Second, the implementation of the RED’s legislative provisions – the general duty, the SEDs and the statutory code – had been spread over 14 months between April 2001 and May 2002. Third, the CRE had issued a range of non-statutory guidance, between 2002 and 2003, and, during 2003 and 2004, had had to allow time for this guidance to bed in. Fourth, robust enforcement, before all key parts of the legislative and associated non-statutory guidance framework had been in place, would have been problematic. Early enforcement might have left the CRE open to challenge on the grounds that public bodies had not had the guidance required or a reasonable amount of time to get to grips with the new RED regime. Fifth, given the backlash against the concept of institutional racism, referenced in preceding chapters, it is unlikely that the CRE would have wanted to run the risk of too robust an enforcement approach creating a negative response. Sixth, given the REU’s reported hands-off approach to enforcement and the extent of RED non-compliance by leading Whitehall Departments, moving into a more robust enforcement mode would have presented many challenges for the CRE. Seventh, the CRE was battling for its own continued existence and challenging a range of matters related to the planned single equality commission due to take over in October 2007. In view of all of these factors, it would have been difficult for the CRE to introduce a radically different RED enforcement regime between 2004 and its demise in October 2007.

In 2004, as part of its new RED enforcement strategy, the CRE developed a new reporting framework for securing compliance with the SEDS involving warning letters in respect of SED non-compliance (CRE, 2005: 30). It used this framework in 2005, sending formal SED

\textsuperscript{178} Public bodies, identified by the CRE as making poor progress, were Whitehall Departments, NHS Trusts, FE Institutions, District Councils, Olympic Delivery Agencies and Fire Authorities.
warning letters to 13 public authorities and serving two SED compliance notices on schools (CRE, 2006: 27). In 2005, the CRE sent 33 SED letters to Whitehall departments and inspectorates ‘as a precursor to the use of’ its compliance powers (CRE, 2006: 27). In its final 2006/7 annual report, the CRE referred to resolving the outstanding cases from 2005, dealing with 20 new cases related to breaches of the SEDs, sending formal SED warning letters to 17 authorities and serving two more SED compliance notices, one on the Electoral Commission and another on an unnamed local authority (CRE, 2007a: 22). In September 2007, in the month before its demise, the CRE indicated that it had initiated enforcement action against seven different Whitehall departments and agencies because of the non-compliance with Race Equality Employment Duty returns and, in the case of the Department of Health (DH), its failure to systematically carry out Race Equality Impact Assessments (REIAs) of new and proposed policies notices (CRE, 2007b: 4). In 2007, the CRE commented openly on its frustration at the poor rate of progress in relation to the RED (CRE, 2007b: 4). The CRE even suggested, that it might take further enforcement action in the final weeks before its closure (CRE, 2007b: 4). It reported separately that it had intervened, or planned to intervene, in two RED JR cases. The cases were: the Elias case, which had been the first successful RED JR case for a claimant; and what was to prove to be an unsuccessful JR planning related claim by Gypsies and Travellers (CRE, 2007a: 20, 23).

Six years after the general RED had come into force, the CRE argued that ‘there could be no excuses for continued non-compliance’ by public bodies with the RED (CRE, 2007b: 5-7). In the light of its experience, and on the eve of its own demise in September 2007, the CRE provided its final advice to the EHRC on legal enforcement. With little to lose, given

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179 It is interesting to note that the Electoral Commission had been the subject of the first non-EAT RED JR challenge in 2003 [R. (on the application of Elliott) v Electoral Commission [2003] EWHC 395 (Admin)]. However there is no evidence of a link between the eventual compliance notice and this 2003 JR judgment in which the claimant did not succeed.

180 The SEDs in relation to the RED, required public bodies to conduct Race Equality Impact Assessments (REIAs). These REIAs were intended to assess how existing, amended or planned policies would impact adversely or positively on the achievement of the general RED. In the event of an adverse impact, a public body, or body exercising public functions, was supposed to consider what action to take to ameliorate said adverse impact.

181 The CRE does not name the case, but from the references to the CRE’s 2005 intervention in the judgment, it would appear to be the case of McCarthy & Ors v Basildon District Council [2008] EWHC 987 (Admin) see appendix 8, case 15.
that it would cease to exist within weeks in October 2007, the CRE commented critically on elements of its own enforcement approach. It noted that it had: adopted a ‘softly, softly approach’ with Whitehall Departments; tried to work with Senior Whitehall managers; and even pulled back from enforcement action in some cases (CRE, 2007b: 4).

It also noted that its light touch approach had been driven by ‘politics and the positive messages’ which had come from parts of ‘the Whitehall machinery ... with responsibility for implementation of the duty across all government bodies’ (CRE, 2007b: 4). With the benefit of hindsight, the CRE commented that this ‘softly, softly approach’ had not secured the full implementation of the RED across government (CRE, 2007b: 4). Instead the CRE had been extremely disappointed that there had been ‘overwhelming evidence of poor compliance across Whitehall departments and agencies’ (CRE, 2007b: 4). Furthermore, it said that it was extremely disappointed that the Department for Communities and Local Government (DCLG), backed by the Cabinet Office, had ‘failed to deliver, and as a result to address poor practice and inadequate policy making across Whitehall’ (CRE, 2007b: 4).

In view of this, the CRE provided a 40 page monitoring report on enforcement which assessed key parts of the public sector’s compliance with the RED (CRE, 2007b: 2). Reflecting positively on the enforcement approach adopted by the DRC, which had moved almost immediately into enforcement, the CRE publicly advised the EHRC to adopt a robust enforcement and litigation strategy from the outset (CRE, 2007b: 5-7). Other key recommendations, in the enforcement monitoring report, were equally blunt and to the point (CRE, 2007b: 5-7). The CRE recommended: no ‘further toleration of non-compliance in respect of Whitehall departments and agencies’; initiation of ‘compliance action in relation to Whitehall departments arising from any failure to ensure compliance across those parts of the public sector for which they have responsibility’; ‘early utilisation of its [the EHRC’s] new powers of inquiry in respect of evidence of individual or sector wide non-compliance’; and ending ‘all one to one working with public authorities’ (CRE, 2007b: 6-7). The CRE also recommended routinely naming and shaming public authorities which were ‘subject to even the most basic levels of compliance action’ (CRE, 2007b: 6-7). The CRE noted that anecdotal feedback suggested that it was only since the CRE had ‘started to take robust action against non-compliance, using the press and public statements to
advertise this, that public authorities’ had made work on compliance ‘a priority’ (CRE, 2007b: 5).

The CRE’s monitoring report also reflected positively on the approach adopted by the Office for Disability Issues (ODI), its working relationship with the DRC and the ODI’s approach to the DED (CRE, 2007b: 5). It noted that the DRC’s swift move into a regulatory role had been ‘conspicuously helped by the robust and proactive attitude’ taken by the ODI which had ‘spelt out the requirements in relation to the DED to all public authorities’ (CRE, 2007b: 4). The CRE also commented, with evident chagrin, that the ODI’s approach had been ‘in marked contrast to the CRE’s experience with the Race Equality Unit (REU)’ (CRE, 2007b: 4). Given these comments, it is not surprising that the CRE advised the EHRC that it should ensure that it established ‘the nature of its relationship with its sponsor [government] unit as an independent regulator very early on’ (CRE, 2007b: 6).

The CRE’s 2007 monitoring report noted that the DRC had learnt from the CRE’s experience of enforcing the RED (CRE, 2007b: 5). The DRC, supported by the ODI, had adopted what might be called a twin track approach to its role as a facilitator and legal enforcement agency from the commencement of the DED (CRE, 2007b: 5). The DRC’s approach involved a swift move into enforcing the DED’s specific equality duties. This approach was underpinned by a number of important factors. First, the DED regime, the general DED, the associated SEDs and the DED statutory code, had been commenced simultaneously in December 2005. Second, the fact that, in December 2005, the first tranche of public authorities, subject to the disability SEDs, had been given until December 2006 to produce a Disability Equality Scheme (DES). Third, the ODI had actively supported the DRC’s enforcement approach. Fourth, during 2006 and 2007, after the DED statutory code had come into force in December 2005, the DRC issued extensive non statutory guidance on the DED and undertook ‘extensive promotional activities’ to support the implementation of the DED (DRC, 2007a: 99-100). The DRC avoided many of the pitfalls previously experienced by the CRE. The DRC’s approach was important because it demonstrated that it was willing to use its teeth in relation to the SEDs and so laid the foundation for early enforcement of the general DED. Early in 2007, following the deadline for the production of the first DESs, the DRC commissioned research, ‘Up to the
Mark?’ (DRC, 2007b), which sought to assess whether government departments had complied with various elements of the DED’s SEDs and in particular with the requirements in relation to the production of a DES (DRC, 2007a: 100). The DRC also commissioned the Office for Disability Issues (ODI) to conduct research into all public authorities in England and Wales, apart from schools, ‘to establish whether they had a Disability Equality Scheme’ (DRC, 2007a: 101, Ipsos Mori, 2007). In May 2007, following receipt of the ODI report (Ipsos Mori, 2007), which provided evidence of non-compliance, the DRC moved promptly by issuing nine compliance notices against government departments that ‘had failed to produce a Disability Equality Scheme’ (DRC, 2007a: 100).182

The DRC also adopted a more robust, transparent and public approach to communicating with non-compliant public authorities, in line with the CRE’s name and shame mantra. As well as publishing ‘Up to the Mark?’ (DRC, 2007b), the DRC published its correspondence online with the government departments, identified in ‘Up to the Mark?’, that it deemed not to be performing adequately with respect to the SEDs’ requirements (DRC, 2007a: 100). How this strategy encouraged future activities by VCOs to ensure that public bodies complied with the DED and associated SEDs is considered briefly in the next chapter. With respect to JR, the DRC indicated that it had intervened in one case Eisai Ltd v National Institute for Health and Clinical Excellence (DRC, 2007a: 100).183 Eisai is considered later in this chapter, as it was the first DED JR claim to be considered by the courts and the first DED claim upheld in favour of a claimant.

Despite the DRC’s robust enforcement approach, including naming public bodies, and the robust enforcement strategy advocated by the CRE and PIRU, the available data identifies that the EHRC used compliance notices sparingly and much less than either the CRE or DRC had in 2006 and 2007 (EHRC, 2011: 17).184 Nor did the EHRC adopt the more

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182 In 2007, the DRC noted that the response of public bodies had been such that no court orders had been required or sought in relation to these compliance notices.

183 Eisai Ltd. v The National Institute for Health and Clinical Excellence (Nice) [2007] EWHC 1941 (Admin). This case is explored later in this chapter (see case 7, appendix 8).

184 The EHRC’s annual reports only record 3 race SED compliance notices between 2008 and March 2014; all 3 were against separate NHS Trusts (December 2009). 3 gender SED compliance notices were issued to district councils in November 2009.
transparent approach to enforcement advocated by PIRU. For example, it did not adopt
the DRC’s practice of publishing the names of, and correspondence with, public bodies
deemed not to be in compliance with the DED or RED or their associated SEDs.\footnote{The EHRC appeared to have routinely named authorities only where a legal adjudication had already been made and fault found, for example in a High Court JR judgment or in a judgment issued by a Coroner.} The
EHRC’s ability to be effective was undermined by its well documented problems leading
many to express concerns about its ability to be effective (Pegram, 2012, Liberty, 2011,
Rubenstein, 2009).

As noted in chapter 5, section 30 of the Equality Act 2006 allowed the EHRC to take legal
action, including JR claims, in its own name or intervene in legal action, including JR
claims, launched by others. The CRE and the DRC had made limited use of JR and did not
take any own name psted JR claims. The EHRC embraced its section 30 powers as a third
party intervener in psted JR cases. The EHRC acted as a third party intervener in 20 (15%)
of the 136 cases listed in appendix 8 (see appendix 5).\footnote{It should be noted that whilst the CRE and DRC had both indicated that they intended to intervene in JR cases in 2007, their ability to implement these plans was curtailed by the fact that both bodies ceased to exist in 2007 when the EHRC, initially called the Commission for Equality and Human Rights (CEHR), was created.} By contrast, it only launched one
substantive race or disability psted JR claim in its own name between October 2007 and
July 2014.\footnote{The Equality & Human Rights Commission), R (on the application of) v Secretary of State for Justice Secretary of State for the Home Department [2010] EWHC 147 (Admin), see appendix 8, case 45.}

A number of potential advantages of such third party interventions have been identified.
First, such interventions may allow the intervener to make strategic arguments and
second, the process may allow ‘relatively surgical, short, sharp and to the point’
interventions (O’Brien, 2012: 5). Third, such interventions may be relatively cheap for an
intervener which could be important for the EHRC given its increasing financial
constraints (O’Brien, 2012: 5). By contrast, launching a JR claim in the EHRC’s own name
ran a number of risks including financial, reputational and other risks. The financial risks
included: preparation time and costs; costs associated with bringing a claim; and the
potential costs associated with losing a claim.\footnote{Preparing a strong case is time-consuming and would normally require barristers to be instructed. Costs will be incurred just to submit a claim and secure permission to proceed. If the claim proceeds, then normally the party bringing the claim would have to pay some or all of their own costs. If a claim is lost, this costs associated with losing a claim.} In terms of reputational risk, the EHRC

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losing a case might attract negative attention from journalists. In terms of other risks, the EHRC would need to carefully select any own name case to ensure that it really was one of strategic significance. Furthermore, the EHRC losing a case could impact adversely on an area of law in a way that the loss of a claim by an ordinary claimant probably would not.

However, third party interventions were not riskless; O’Brien also identified two key risks. First over-reliance on the use of third party interventions ran the risk of diminishing returns if the ‘force’ of an EHRC intervention was ‘gradually dissipated’ over time (O’Brien, 2012: 5). Second, attention and resources could be diverted from other important EHRC functions and activities (O’Brien, 2012: 5). However since 2010, another more important threat has emerged, namely legislative action by the Government to restrict JR and third party interventions. The nature of these changes and their implications are briefly explored in the penultimate section of this chapter. Associated access to justice implications are considered in the next chapter. The CRE intervened in one case, Elias in 2005 (see appendix 8, case 2). The EHRC served as a third party intervener in 20 (15%) of the cases listed in appendix 8, and brought one case in its own name. Where the EHRC intervened as a third party intervener, claimant success rates were higher than for claimants where there was no intervention by the EHRC (see appendix 6: E and chapter 7).

The development of JR, principles, themes and judgments
Public law lawyers and legal academics have written important assessments about the development of the pseds and key JR judgments. The most extensive work has been produced by Professor Mark Bell (Bell, 2010), John Halford (Halford, 2013, Halford and Khan, 2011, Halford, 2010, Halford and Bindman and Partners, 2006), Professor Aileen McColgan (McColgan, 2013b, McColgan, 2013a), Karon Monaghan QC, (Monaghan, 2012), Helen Mountfield QC (Mountfield, 2012) and Martin Westgate QC (Westgate, 2012).  

\[\text{\textit{would mean paying both its own costs and those of the defendant body. Even a partial win, could involve paying some of the costs of the defendant.}}\]

\[189\] Apart from Professor Bell, each of these leading legal commentators has also acted on behalf of claimants in five or more of cases listed in appendix 8. John Halford, now a partner in Bindman and Partners Solicitors, was the solicitor who acted on behalf of Mrs Elias whose case resulted in the first successful RED
The evaluation that follows draws on this work referencing important judgments identified in appendix 8.

First, consideration has been given to why it took until 2005 for the first successful RED judgment to be handed down. Next, the foundations laid, between 2005 and 2007, by claimants’ first successful and unsuccessful race and disability psed JR judgments are discussed. Key principles that have emerged from psed judgments on due regard are identified next. This information is then used to facilitate an assessment of whether the race and disability JR judgments have provided vehicles for challenging institutional discrimination and addressing the separate equality aims in the RED, DED and PSED.

The first question is why did it take four years for the first successful RED judgment to be handed down? Although the general RED came into force in April 2001, the first successful JR judgment for a claimant was not handed down until July 2005 (Elias). The analysis set out in the preceding chapters provides a number of clues. First, the language of ‘due regard’ left a significant degree of ambiguity about what would be required of public bodies.

Second, the final component of the RED regime, the RED statutory code, did not come into force until May 2002. Third, the race SEDs and the RED statutory code focused on process but were less than clear about what change the RED was intended to bring about (see chapters 4 & 5). Fourth, until Elias, the CRE had not intervened in an RED JR claim taken by another party or taken an RED JR case in its own name. Fifth, Professor Bell suggests that between 2001 and 2004, few litigants appeared to think that the ‘RED might be an effective weapon to secure race equality’ (Bell, 2010: 677). This is not surprising given that lawyers and legal academics had questions about what type of duty the RED would be and the CRE had not intervened in a successful RED JR claim until Elias in 2005.

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JR judgment for a claimant in 2005. John Halford served as the solicitor for at least five of the claimants listed in appendix 8.

190 Fairly detailed consideration has been given to the first successful RED and DED applications by claimants.

191 Elias, R (on the application of) v Secretary of State for Defence & Anor [2005] EWHC 1435 (Admin). The reasons for the slow start by the CRE were examined earlier in this chapter and are not rehearsed again here.
John Halford, the solicitor in the Elias case, and a number of other important cases that followed, noted that the RED had been ‘considered a white elephant by many discrimination lawyers and little more than a target duty by their public law counterparts’ (Halford and Bindman and Partners, 2006: 2).

Matters were not assisted by the fact that there were insurmountable difficulties with the first four JR claims and judgments, which cited the RED, handed down in 2003 and 2004. Three were employment judgments but each was problematic. As a consequence, questions of compliance or non-compliance with the RED were not addressed by these cases and no meaningful assessment, in relation to the RED, was provided in any of the judgments. In 2003, Elliott v the Electoral Commission came before the High Court but it has been argued that this case was another false dawn. The waters were muddied by the fact that the CRE had mistakenly told the Electoral Commission that it was not subject to the RED (Bell, 2010: 677-678). This inauspicious start was further undermined by the nature of the case; the claimant was seeking to challenge how electoral boundaries had been redrawn but the election was imminent and it was also argued that the case was out of time. The judgment that emerged was equally problematic as it suggested that the RED ‘would rarely be enforceable by private parties’ (Bell, 2010: 678). However, this was not the end of matters because in 2005, the case of Elias v the Secretary of State for Defence came before the High Court. This was to be the first successful case for a claimant.

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The Elias case

The Secretary of State for Defence had established a compensation scheme for those people who had been interned by the Japanese during the second World War. However blood link criteria limited eligibility for compensation to British Civilians who had been born in the UK or had either a grandparent or parent who had been born in the UK.

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192 In Henry v UNISON, an applicant wrongly sought to challenge UNISON’s actions relying on the RED; however trade-unions were not subject to the RED. In the other two employment cases, each involving the same claimant (Shodeke), the RED was cited but each case presented irresolvable problems and each case was ultimately dismissed by the courts without any adjudication of the less than clear RED claims.

193 R. (on the application of Elliott) v Electoral Commission [2003] EWHC 395 (Admin), appendix 8, case 1. Judgment, para. 7: ‘The position in relation to the Race Relations Act is different: it appears that the [Electoral] Commission was unaware when the order was made that the duty created by section 71 of the Race Relations Act applied to it; indeed, it seems that it was misled by the Commission for Racial Equality itself as to the applicability of the statutory duty to it. In consequence the [Electoral] Commission did not take it specifically into account.’

195 See case 2, appendix 8.
Mrs Elias and her legal representatives successfully established that both that ‘bloodlink criterion unlawfully breached the 1976 Race Relations Act and that the Secretary of State had failed to discharge his statutory race equality duty’ (Halford and Bindman and Partners, 2006: 2). It was held by the High Court that the RED ‘was breached by the Secretary of State, as no regard was had to the potentially racially discriminatory nature of the eligibility criteria.’ The Secretary of State did not appeal that ruling. ‘He accepted that no detailed review of the Compensation Scheme was undertaken on the coming into effect of section 71 and that there should have been.’

Elias, R (on the application of) v Secretary of State for Defence & Anor [2005] EWHC 1435 (Admin) 196

The Elias judgment was to prove ground breaking and it clearly engaged issues of institutional racism. It was estimated that ‘between 1700 and 2500’ people had been refused access to the compensation scheme in June 2001 on the basis of the “bloodlink” criteria (Halford and Bindman and Partners, 2006: 1). This legal judgment successfully challenged a scheme which discriminated against many hundreds of people on the basis of their nationality, a racial ground, it clearly positively challenged institutional discrimination.197 Elias is rightly regarded as a landmark case. Mrs Elias was the first claimant to win a JR claim relying on the RED (see appendix 8, case 2).198 The RED element of judgment was not challenged on appeal.199 However, Mrs Elias’ attempts to argue that the Secretary of State should have given due regard to promoting equality of opportunity were rejected by the High Court. Furthermore, she had to take separate legal action in the County Court to seek to secure compensation. The compensation that Mrs Elias did secure (£3000), from the County Court, did not amount to the £10,000 that she would have received if she had not been excluded from the original Compensation Scheme (Halford and Bindman and Partners, 2006:17). So a ground-breaking and successful case for a claimant but, without the introduction of new criteria for the Compensation Scheme, Mrs Elias’ success was limited. John Halford, Mrs Elias’s solicitor, argued that ‘a

196 Para. 17, Secretary of State for Defence v Mrs Diana Elias [2006] EWCA Civ 1293.
197 Section 3 of the Race Relations Act 1976, prohibited discrimination on racial grounds. Nationality was deemed to be a racial ground.
198 Two JR employment claims and one appeal to the Court of Appeal, not listed in appendix 8, had been brought by claimants unsuccessfully in November 2003, May 2004 and July 2004.
199 Appendix 8, case 4: Secretary of State for Defence v Mrs Diana Elias [2006] EWCA Civ 1293.
declaration that section 71 has been breached, is by itself, of little value to an individual claimant’ (Halford and Bindman and Partners, 2006: 17).

Halford, also commented that it was ‘disturbing’ that the legal action to enforce section 71 had to be taken by an individual when the CRE ‘had been made aware’ of the problems associated with the ‘blood-link’ criteria in 2001 (Halford and Bindman and Partners, 2006: 18-19). Despite this criticism, Halford also commented that even if the EHRC was to prove to be ‘an active and litigation-minded equalities body’, it would not be able to ‘identify or act on every case’ and argued for lawyers to be proactive to support claimants (Halford and Bindman and Partners, 2006: 19). The proactive approach proposed by Halford is a key theme picked up in the next chapter on cause lawyers.

Between 2006 and 2007, three planning cases, taken by Gypsies and Travellers, citing the RED were heard. These planning claims involved access to appropriate sites, evictions from sites, allegation of unlawful occupations and evictions and associated matters. None of the claimants succeeded and this pattern was to be replicated in that none of the subsequent planning claims by Gypsies and Travellers, listed in appendix 8, were successful. The best that the courts offered, in these unsuccessful claims, was a delay or deferment of the implementation of an injunction, eviction notice or planning decision and advice to the public bodies involved that the needs of Gypsies and Travellers should be considered.

The general DED had come into force in December 2005, the first successful DED claim was decided in August 2007, just over 18 months later. Like Elias before it, Eisai v the National Institute for Health and Clinical Excellence, raised substantive issues in relation to institutional discrimination and equality of access that could affect significant numbers of people. The case was argued, and succeeded, on both RED and DED grounds.

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201 See appendix 8, cases 12, 15, 21, 24, 25, 34, 83 and 89

202 Case number 7, appendix 8. This was a case that the DRC had intended to intervene in but the DRC ceased to exist in October 2007 and there is no evidence that the EHRC intervened.
The Eisai case

The Claimant and Interested Parties challenged the decision in relation to access to a drug identified as being of potential benefit to those suffering from Alzheimer’s Disease. The decision was taken by NICE on 6th October 2006 and the consequent Guidance issued by NICE on 22nd November 2006. The challenge was on three grounds: i) procedural unfairness, ii) discriminatory effect of rigid guidance and iii) irrationality of certain decisions of the NICE Appeal Panel.

The RED and DED aspects of the claim succeeded on the basis that the approach adopted by NICE ‘was flawed in that no proper consideration was given to the institute’s duties as a public authority to promote equal opportunities and to have due regard to the need to eliminate discrimination. It was unreasonable and unlawful to overlook that responsibility. The same was true of the guidance. Also there were arguably two possible interpretations of the guidance and the institute should make its position clear. Guidelines published by the institute did not save the guidance from being discriminatory.’

‘In the light of the court’s finding that the Guidance is discriminatory, the court directs NICE to amend the Guidance so as to ensure its compliance with NICE’s duties and obligations under anti-discrimination legislation. The extent of the amendment and the way in which this is to be achieved will be clarified following further submissions by the parties.’

Eisai Ltd. v The National Institute for Health and Clinical Excellence (Nice) [2007] EWHC 1941 (Admin)

The High Court’s judgment was robust and required NICE to amend its Guidance to ensure compliance with its duties and obligations under anti-discrimination legislation; the judgment made explicit reference to equality of opportunity and the peds placed on NICE.

In 2008, two judgments – Baker v the Secretary of State for Communities and Local Government and Brown v the Secretary of State for Work and Pensions – laid the foundations for the principles for making adjudications in future psed claims. Karon Monaghan QC has provided a focused summary of ten key principles and referenced relevant judgments. Monaghan’s assessment is consistent with the somewhat more

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203 Source: Westlaw case analysis of the judgment.
204 Para. 139 judgment handed down by Mrs Justice Dobbs DBE
205 Baker & Ors, R (on the application of) v Secretary of State for Communities & Local Government & Ors [2008] EWCA Civ 141 & Brown, R (on the application of) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) (see appendix 8, case 12 and case 22.)
expansive narrative exposition provided by her colleague at Matrix Chambers, Helen Mountfield QC (Monaghan, 2012: 18-20, Mountfield, 2012: 13-15). As these two QCs represented claimants or third party interveners in 30 (22%) of the cases listed in appendix 8, they are exceptionally well placed to comment on these key principles. Each of the ten principles is summarised briefly next.

First, those taking decisions in relation to the pseds must be ‘made aware of their duty to have “due regard” to’ the equality aims or goals (Monaghan, 2012: 18-19). Second, compliance requires ‘a conscious approach and state of mind’ which ‘can only occur where the decision-maker is aware of the duty’ (Monaghan, 2012: 19). Third, the ‘duty must be exercised in substance, with rigour and with an open mind’ (Monaghan, 2012: 19). Fourth, due regard ‘must be fulfilled in advance of a particular policy’ that could affect the relevant protected classes or groups of people, ‘it is an essential preliminary to lawful decision-making’ (Monaghan, 2012: 19). Fifth, the duty will not be discharged by ‘attempts to justify a decision as being consistent with the exercise of the duty’ that were not considered before the decision was made (Monaghan, 2012: 19). Sixth, the requirement in relation to due regard applies to each of the equality aims (Monaghan, 2012: 19). Seventh, the duty has to be integrated into how an authority discharges its public functions (Monaghan, 2012: 19). Eighth, compliance is not about box ticking, so just mentioning that a step has been taken may not discharge the duty. However, the absence of a reference to the duty ‘is not determinative of whether the duty has been performed’ (Monaghan, 2012: 19). Adequate record keeping is therefore advisable because it can provide evidence in the event of a challenge but it also will assist compliance. Ninth, the duty is a ‘continuing one’ (Monaghan, 2012: 19). Tenth, and finally, the ‘duty is non-delegable’. This means that it remains the responsibility of the body subject to the duty even where third parties have been commissioned. This means that the body subject to the duty must ensure that any third party is able to operate in accordance with the duty and that it maintains appropriate supervision (Monaghan, 2012: 19).
Monaghan’s assessment of these ten principles referenced 13 of the cases listed in appendix 8.\textsuperscript{206} Just one case referenced has not been considered in appendix 8, Hereward & Foster LLP v Legal Services Commission was argued on GED grounds and so fell outside of this study’s scope.\textsuperscript{207}

These ten principles address how the ‘due regard’ duty should be exercised however the courts have also come to a settled view about the boundaries between ‘due regard’ and an obligation to achieve equality outcomes. In Brown v the Secretary of State for Work and Pensions (SSWP), a leading judgment on the pseds, the court noted that the general DED was ‘expressed in broad and wide ranging terms of the needs or targets to bring about a change of climate, but the section is silent as to how it should be done’ (The judgment: para. 35).\textsuperscript{208} The court also expressly stated that ‘the duty is not to achieve the objectives or take the steps set out in paragraphs (a) to (f) of section 49A(1)’, because if that had been what Parliament had intended the words ‘have due regard to the need to’ would have been omitted. Instead the general DED requires public authorities ‘to bring these important objectives relating to discrimination into consideration when carrying out its public functions’ (The judgment: para. 36). Importantly, the Brown judgment made specific reference to the importance of section 49A(1)(d), of the general DED, the requirement to have due regard ‘to the need to take steps to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons’ (The judgment: para. 37). The court made it clear that section 49A(1)(d), imposed a ‘most important’ requirement on decision-makers in relation to disabled people. It should be noted that this requirement is specific to the general DED and an equivalent general PSED disability provision (section 149(4), EqA 2010); given its disability specific nature, it is not part of the general RED regime.

In a judgment, handed down in May 2015, the Supreme Court confirmed that the PSED was not a duty that required specific outcomes to be achieved but it did require conscious

\textsuperscript{206} Appendix 8, cases 4, 7, 8, 10, 11, 12, 19, 22, 30, 49, 65, 84, 88 and case 1 of the 3 Welsh cases.

\textsuperscript{207} Hereward & Foster LLP & Anor v The Legal Services Commission [2010] EWHC 3370 (Admin)

\textsuperscript{208} Brown, R (on the application of) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)
consideration of the PSED’s equality aims (see appendix 4). The Supreme Court’s judgment also confirmed that PSED was intended to bring about ‘a culture of greater awareness of the existence and legal consequences’ of relevant protected characteristics, citing a number of key cases also identified by Karon Monaghan. Monaghan’s ten principles, the limitations of the ‘due regard’ duty and the judgments handed down in substantive race and disability cases have been considered. Between 2005 and 2007, substantive race or disability psed claims had had a fairly auspicious start in the courts, eight High Court judgments were handed down and claimants succeeded in four (50%) of these cases. However, there was one significant caveat, from the outset it proved almost impossible for Gypsies and Travellers, or anyone else, to win psed planning claims (Halford et al., 2010: 10).

John Halford’s 2010 guide to the Equality Act 2010 and its Impact on Planning Law, only identifies one psed planning case in which the claimant succeeded (Halford et al., 2010: 16). The courts acknowledged that the principal problem for Gypsies and Travellers was a lack of suitable sites. However, claimants were unsuccessful in their attempts to deploy the pseds to address this issue of the substantive inequalities, faced by Gypsies and Travellers, in relation to somewhere to live. Bell suggested that one possible reason for this lack of success was that such cases involved ‘exercises of discretion in relation to individual decisions, whereas’ cases like ‘Elias’ had challenged ‘an underlying rule or policy’ (Bell, 2010: 683). However, it is likely that two other key factors were also in play. First, the ‘due regard’ nature of the RED, DED and PSED, and second, the degree of discretion and power given to decision-makers under the Town and Country Planning Act 1990. Due regard requires that consideration be given to competing needs. It also requires a conscious balancing, by decision-makers, of equality considerations and other needs. However since the pseds do not offer new substantive rights, so long as a ‘public body has given due consideration to the protected group, the duty is fulfilled’; due regard ‘does not necessarily require a change in policy’ (Fredman, 2011b: 406-407). Although

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209 This judgment is not listed in appendix 8 because it was handed down after 31 July 2014. However, an exception has been made because this is a clear judgment from the highest court in the land which clarifies what the Supreme Court consider that ‘due regard’ means; the judgment is highly relevant and helpful to this study.

210 The successful planning claim was a Court of Appeal case (Harris v London Borough of Haringey), case 49 in appendix 8, the claimant’s original claim had failed in the High Court (see case 36, appendix 8).
psed planning claims, by Gypsies and Travellers, were unsuccessful, it is also true that only one successful psed planning claim is listed in appendix 8 (see Harris, case 49, appendix 8). 211

Appendix 8 lists the 45 cases in which claimants’ succeeded. Most of the claims challenged some rule, policy, procedure, practice or decision that adversely impacted on the claimants but also on others that fell into the same class. Nearly half the claims (65, 48%) involved local authorities, 19% (26) were London local authorities. Just over four in ten claims (65, 41%) were taken against Government Departments and Secretaries of State. 15 cases (11%) were taken against the Home Secretary, 11 cases (8%) were taken against the Secretary of State for Work and Pensions, 7 cases (5%) were taken against the Secretary of State for Justice and 7 cases (5%) were also taken against the Secretary of State for Communities and Local Government. The high percentage of claims brought against government departments is consistent with the concerns about non-compliance by Whitehall Departments expressed by the CRE in 2007.

Most of these successful claims therefore engaged, and challenged, institutional discrimination because challenging rules, policies, practices or procedures which discriminated against groups of people is institutional discrimination territory as defined by the Stephen Lawrence Inquiry (Macpherson of Cluny, 1999c: 321). 212 Claims were raised in relation to local government, benefits, financial entitlements, detention matters, funding for local government and planning. Many RED, DED and PSED claims raised equality of opportunity grounds but some were unsuccessful. For example, in Elias, the claimant’s arguments in relation to equality of opportunity were unsuccessful. However, some RED, DED and PSED claimants successfully argued equality of opportunity grounds. In relation to the RED’s and PSED’s good relations’ equality aims, fewer judgments cited this equality aim in the decision. In relation to the DED’s other equality aims, replicated in

211 The claimant had been unsuccessful before the High Court (see case 36, appendix 8) but succeeded before the Court of Appeal.
212 “Institutional Racism” consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people. Para. 46.25, MACPHERSON OF CLUNY, W. 1999c. The Stephen Lawrence Inquiry: Report of an Inquiry, Cm 4262. Vol.1. London, TSO.
large measure in the PSED, the courts have been willing to hand down some judgments on these grounds but there have been fewer successes. Four case examples have been provided that show that the courts have been willing to issue judgments which look beyond the pseds’ discrimination grounds. The decisions issued in the psed judgments listed in appendix 8 are consistent with the limitation, stated in Brown v the SSWP and Hotak vs Southwark LBC, that decision-makers must take stated equality aims/considerations into account rather than achieve equality aims.

**Chavda v the London Borough of Harrow**

This was a challenge to a local authority. The LA decided to restrict adult care services to people with critical needs only. This claim engaged issues in relation to discrimination as well as equality of opportunity.

The claim was brought by three local residents who received community care services; all three were disabled. The claimants argued that around 500 other people would be affected by the disputed decision. Judge Mackie QC concluded that the council’s decision did breach the DED, it was ‘unlawful in the sense that it was taken without the decision-makers having had sufficiently drawn to their attention the seriousness and extent of the duties which the Defendant owed under the Disability Discrimination Act 2005.’[The judgment: paragraph 46]

**Chavda & Ors, R (on the application of) v London Borough of Harrow [2007] EWHC 3064 (Admin)**

213 The DED’s remaining equality aims apart from those aims addressing discrimination were: the need to take steps to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons; or the need to promote positive attitudes towards disabled persons; or the need to encourage participation by disabled persons in public life. Disability Discrimination Act 1995, section 49A
South West Care Homes

South West Care Homes provides an important example of a modern judicial approach to equality of opportunity.

The claimants owned and operated care and nursing homes in Devon. ‘There are over 400 such homes in the county, which is the third largest county in England. Each of the claimants’ homes has residents who pay fees and residents who have fees paid by Devon County Council (the council), and each has residents who are elderly and/or who have a disability. On 3 April 2012 the council issued a decision letter setting such fees for the financial year 2012-13. It is the claimants’ case that those fees provide for an effective nil rate of return on capital which means that some of the homes will no longer be financially viable resulting in unplanned closures and deteriorating conditions and quality of care. (Para. 7, judgment). The first ground argued was that the ‘council failed to comply with its duty under section 149 of the Equality Act 2010 to have due regard to (i) the need to eliminate discrimination and/or (ii) the need to advance equality of opportunity among elderly and disabled persons.’

His Honour Judge Milwyn Jarman QC said that the council’s approach had failed ‘to have due regard, in substance or with rigour or with an open mind, to the need to eliminate discrimination and to promote equality of opportunity amongst elderly or disabled residents. The council in carrying out this exercise failed to ask itself what it could do in respect of those needs’ [The Judgment: paragraph 53].

South West Care Homes v Devon County Council [2012] EWHC 2967 (Admin)

Harris v Haringey LB – Court of Appeal

Harris provides an important example of a judgment that cited good relations.

Lord Justice Pill determined, and Lady Justice Arden and Lord Justice Sullivan concurred, that the RED was not discharged by Haringey Council when planning permission had been granted. The judge saw no references to the RED, or evidence of RED compliance, in council reports or minutes of committee deliberations. Lord Justice Pill concluded that ‘there was sufficient potential impact on equality of opportunity between persons of different racial groups, and on good relations between such groups, to require that the impact of the decision on those aspects of social and economic life be considered.’ Crucially the required ‘due regard’ for the need to ‘promote equality of opportunity and good relations between persons of different racial groups’ was not demonstrated in the decision making process. Although due regard did not require the promotion of equality of opportunity but, on the material ‘it did require an analysis of that material with the specific statutory considerations in mind.’ The Court of Appeal judges allowed the appeal and quashed the planning decision. [The Judgment: paragraphs 37-40]

Harris, R (on the application of) v The London Borough of Haringey [2010] EWCA Civ 703
Stuart Bracking – Court of Appeal

The claim challenged the Government’s decision to close the Independent Living Fund. The PSED ground argued was that ‘the Respondent failed in making the decision to close the fund lawfully to discharge the public sector equality duty imposed under section 149 of the Equality Act 2010 (“the PSED”)’ (judgment para. 3).

Lord Justice Kitchin said that ‘it is simply not possible to infer that the Minister ever considered the proposals with a proper focus on the particular matters to which she was required to have due regard. There is no evidence she directed her mind to the need to advance equality of opportunity. Nor is there evidence she considered the proposals having due regard to the need to minimise the particular disadvantages from which ILF users and other disabled persons suffer or the need to encourage such persons to live independently and to participate in public life and other activities’ (Judgment para. 71).

Stuart Bracking & Ors v Secretary of State for Work and Pensions [2013] EWCA Civ 1345

Chavda and Bracking are considered further in the next chapter in order to explore the ‘what happened next’ questions raised earlier in this chapter.

JR outcomes in race and disability psed judgments (2001 – 2014)

Appendix 8 lists 136 judgments which gave substantive consideration to the RED, DED or race or disability provisions within the PSED. Appendix 8 identifies how the judgments were identified and the criteria used. Of the 136 race and/or disability cases heard over the 13 year review period, applicants succeeded in 45 (33%) of the cases but lost in 79 (58%) of cases (see appendix 5). This may appear to be a relatively low success rate. However, it is eight to ten times higher than the much lower success rate enjoyed by claimants who made race and disability discrimination Employment Tribunal claims between 2002 and 2013 (Courts and Tribunals Judiciary, 2015: 9, Employment Tribunals Service, 2002: 22).214 47 (35%) of the 136 cases were race psed cases, 63 (46%) were disability psed cases and the remaining 26 cases (19%) were argued on both race and disability psed grounds. Claimants’ success rate in cases argued on both race and disability grounds, was higher, they won 14 of the 26 cases (54%).215

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214 Between 3- 4% of claimants succeeded in race or disability claims considered by the ETs between 2001 and 2013.
215 This may not be statistically significant as with a relatively small cohort of cases, modest additions have a significant statistical impact.
High Court and Upper Tribunal cases made up the bulk of the cases with 104 (76%) of the judgments. There were 28 Court of Appeal cases, nearly 21% of the overall judgments, so there was a greater than one in four chance that a case considered by the High Court would be appealed to the Court of Appeal. With respect to the House of Lords and Supreme Court, just four judgments were handed down and two of these were handed down in relation to different aspects of the same case (see appendix 8, case 40 & case 43). These appeals to the House of Lords or Supreme Court, either did not challenge the earlier successful psejudgment handed down by the High Court or Court of Appeal, or, in the case of McDonald vs Royal Borough of Kensington and Chelsea, the claimant failed to overturn a psejudication which had not been awarded in their favour. Perhaps unsurprisingly, what this analysis shows is that there was a higher success rate in the High Court for claimants than in the Court of Appeal; the one case that was appealed to the House of Lords on psejud grounds was lost by the claimant.

The overall success rate for claimants at the Court of Appeal averaged nearly 29% in the 28 cases examined but these figures need further explanation. In relation to the ten race psejudgments, claimants succeeded in two cases and failed in five cases. However categorising the three remaining cases was challenging because the Court of Appeal’s judgments did not disturb the successful RED judgments issued by the High Court. The three cases have been identified as having a neutral effect, neither successes nor failures. The outcomes in such cases are explored further in the next chapter. In relation to the DED, the picture was less ambiguous. 12 High Court judgments were appealed and the success rate was nearly 42%, claimants succeeded in five of the 12 cases, and lost seven appeals. Once again, this success rate of more than 40% was considerably higher than the 3% or 4% success rate in race or disability Employment Tribunal cases.

The nature of the public bodies that were challenged gives some sense of the type of issues engaged. Whilst almost half (47%) of the cases involved local authorities as the

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216 The 104 judgments included just two Upper Tribunal judgments.
defendant, 41% involved government departments but only 3% involved health bodies as
the defendant. Of the government departments, the Home Office and Department of
Work and Pensions were challenged repeatedly – the Home Office was the defendant in
15 cases or 11% of the cases whereas the Department for Work and Pensions was the
defendant in 11 cases or 8% of the cases. 20 of the 45 cases in which claimants succeeded
have been reviewed to see whether issues of institutional discrimination or wider equality
issues were engaged and what the remedy was that was offered by the courts. Of the 20
cases examined, 75% engaged issues of institutional discrimination, 45% also engaged
issues of equality of opportunity. Only two also clearly engaged the wider issue of the
right to participate in public life. The remedy in 50% of these claims involved fully or
partially quashing the decision that had been the subject of the complaint.

With respect to overall trends, the overall number of race or disability cases heard grew
from between 1 to 5 a year, between 2003 to 2007, increasing to 13 in 2008.218 The
annual cases peaked at 26 in 2011, before dropping back to 19, in 2012 and 17 in 2013.
14 judgments were handed down in between January and 31st July 2014 (see appendix
5).219 In terms of the overall success rates for claimants, since 2010, in 2010 claimants
succeeded in 5 of the 17 cases (29%), in 2011 the claimant success rate was 38%; in 2012
it rose to 47% before dropping back sharply to 12% in 2013. Claimants only won 2 of 17
judgments in 2013. 14 judgments were handed down between 1st January and 31st July
2014, but claimants succeeded in 6 of the claims (43%). The data suggests that the
number of substantive race and disability psed cases in which the High Court issued
judgments hovered between 12 to 19 per annum between 2009 and 2014.

With respect to the High Court, the number of substantive race and or disability psed
cases where claimants succeeded rose to 44% in 2011 and 47% in 2012, before dropping
back sharply to 7% in 2013. Based on partial data for 2014, the success rate (44%) for
claimants recovered in 2014.220 Key questions are whether the changes to the JR regime,

218 This data refers to all psed judgments, High Court/Upper Tribunal, Court of Appeal and House of
Lords/Supreme Court. 
219 14 of the 24 judgments handed down in 2014 were heard before the cut-off date (31/7/14) for this
study.
220 See appendix 5.
especially the new provisions in the Criminal Justice and Courts Act 2015, will reduce the number of PSED JR claims considered by the High Court, reduce PSED third party interventions, reduce the success rates of PSED claimants and limit the remedies offered to successful claimants?

**Changes to the JR regime**

In December 2012 and September 2013, the Conservative led Coalition Government launched two major consultation documents on proposed ‘reforms’ to the JR regime (MoJ, 2013, MoJ, 2012). A helpful summary of the main changes proposed is provided in a House of Commons’ Note (Dawson and Horne, 2013). Given that JR is the only legal remedy available to individuals and organisations seeking to challenge an alleged breach of the pseds, it is important to have a basic understanding of the changes already implemented and those changes that are due to be implemented. The aim is to outline the key changes and key questions for further consideration.

The House of Commons’ Note, from February 2013, identified that three key measures had been introduced in July 2013, through changes to the CPR. First, reductions in the time limits for bringing certain JR claims, previously referenced; the time limit for planning cases was reduced from three months to six weeks and to 30 days in relation to procurement cases. Second, a new fee was introduced for oral hearings ‘where the claimant does not accept a refusal of permission on the papers, and asks for the decision to be reconsidered at a hearing’ (Dawson and Horne, 2013: 1). Third, the right to an oral renewal was removed if a case was ‘assessed as totally without merit on the papers’ (Dawson and Horne, 2013: 1).

The further proposals for reforming JR, contained in, and/or associated with, the Government’s consultation document (MoJ, 2013) were more extensive. Key proposals

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221 Courts that have heard some psed planning cases under the Town and Country Planning Act 1990 appear to be exercising the powers available under judicial review in making a psed determination. One assumes that they will be subject to the JR regime rules in relation to such cases as well as the tighter restrictions in relation to planning cases.

222 The oral renewal is a full reconsideration of the matter, supported by oral submissions. Where permission is granted, the claim will continue as normal. If refused, the claimant may appeal to the Court of Appeal.
were incorporated in what eventually became the Criminal Justice and Courts Act 2015 (CJ&CA 2015). Section 84 requires the court not to grant relief if ‘it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred’ unless there is an ‘exceptional public interest’ (CJ&CA 2015, section 84 (1) & (5)). Section 85 of the Act, allows the introduction of new provisions, that will require applicants to provide a wide range of financial information about their circumstances and the financial circumstances of those involved in, or backing their case. Section 86, requires the court to consider whether to order costs ‘to be paid by a person, other than a party to the proceedings.’ Section 86, identifies when third party interveners may be required by the court to pay costs incurred by relevant parties to the JR case ‘as a result of the intervener’s involvement in that stage of the proceedings.’ Section 88, specifies when, and if, a costs capping order may be issued and restricts the circumstances in which such caps may be issued; section 89 specifies matters which the court must take into account in making a section 88 determination. Section 90 allows the Lord Chancellor to exclude certain environmental cases from costs capping orders. Sections 91, 92 and schedule 16 introduce new provisions further limiting the ability of people wishing to make planning challenges.

Other changes, incorporated in part 3 of the Criminal Justice and Courts Act 2015, make provision to widen the scope for appeals from the High Court to be made directly to the Supreme Court (sections 62 to 66). The provision to send more cases direct from the High Court to the Supreme Court, bypassing the Court of Appeal, if applied to PSED JR claims, could present problems for PSED JR claimants. First, whilst claimants’ overall psed success rate was 33%, the success rate at the High Court was 35% but the success rate at the Court of Appeal was lower (29%). Although none of the four judgments handed down by the House of Lords or Supreme Court overturned a previously successful psed judgment, claimants did not ‘win’ any of these cases. It is more challenging to present a case to the Supreme Court and likely to be more costly, almost certainly more intimidating for claimants. Whilst identified by the Coalition Government as provisions to speed up the justice system, the obvious question is: will justice be sacrificed for speed? Furthermore, since the Supreme Court is the highest court in the land, and there is no appeal domestically beyond the Supreme Court, the provisions remove the key checks and
balances associated with the Court of Appeal hearing cases. It could also run the risk of a Supreme Court judgment being handed down, without the benefit of the prior deliberation of the Court of Appeal, simultaneously undermining the Court of Appeal and requiring the Supreme Court to hear matters that should have exhausted the normal appeals process. As Supreme Court judgments bind all lower courts, there is also a risk that there will be no mechanism to challenge problematic judgment and that this judgment will restrict the proper latitude that should be available to the Court of Appeal.

Section 67, wasted costs orders, ‘creates a duty for the court to consider whether to notify either the legal representative’s regulator (under the Legal Services Act 2007) and/or the Director of Legal Aid Casework if it considers it appropriate to do so when making a wasted costs order’ (Explanatory Notes to the Criminal Justice and Courts Act 2015).223 This raises further financial risks for lawyers taking on public interest litigation and JR claims when taken together with other changes introduced to the Legal Aid regime since 2010. Perhaps unsurprisingly, given the depth and breadth of the changes, the Public Law Project’s view was that the provisions represented ‘a profound and constitutionally significant attack on the ability of individuals, charities and NGOs to access judicial review’ (PLP, 2013: 1). The proposals, now enshrined in law, also weaken the rule of law and ‘insulate executive action from judicial scrutiny’ whilst making it more difficult and possibly more expensive ‘to challenge the actions of public bodies’ (PLP, 2013). They were not alone in this assessment with leading law firms, members of the judiciary, newspapers and voluntary and community organisations (VCOs) all raising profound concerns about these proposals and other changes to the legal aid regime (Toynbee, 2014, Bindman and Partners, 2014, The Constitutional and Administrative Bar Association, 2013, Thornberry, 2013, DLA, 2013).

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223 If a legal adviser has been deemed by the court, to have acted in an improper, unreasonable or negligent manner and in so doing to have caused unnecessary costs, the court may award a wasted costs order against said legal adviser to make them liable for some or all of these wasted costs (section 51 of the Senior Courts Act 1981).
Conclusions

The central themes identified relate to: the importance of the JR regime; the effectiveness of the pseds as legal tools; intervention and enforcement by the CRE, DRC and the EHRC; and the impact of changes to the JR regime.

The importance of the JR regime in psed claims

Unless a PSED claim can be raised, and remedied, as part of another wider appeals process, JR is the only way for parties, other than the EHRC, to challenge a breach of the general PSED.\(^2\) The success of the pseds as legal tools is therefore intimately tied up with the effectiveness of the JR regime as a vehicle for challenging the acts or omissions of public bodies, and others, subject to the pseds. Although the JR regime was clearly very complex, a steady flow of important cases was adjudicated by the courts between 2003 and 2014. Claimants succeeded in 33% (45) of their substantive race or disability JR claims. This claimant success rate was 7% below the average 40% success rate experienced by claimants whose JR claim was decided at a full hearing in 2012. Nevertheless, these psed claimants had a one in three chance of success, which was 8 to 10 times higher than the annual success rate of 3% to 4% experienced by those who brought individual race or disability discrimination claims before employment tribunals between 2001 to 2013. Moreover, the judgments in which claimants succeeded had the potential to benefit significant numbers of people, in addition to the claimant(s) represented in court, who fell into the same class or group as the claimants.\(^2\) The judgments issued also covered a wide range of issues and territory. The JR regime and the pseds have been used successfully to challenge institutional discrimination and seek to secure substantive equality aims in the RED, DED and PSED. In addition to those who might benefit because of a more inclusive rule change, such judgments could also be used to encourage other decision makers to take the PSED more seriously.

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\(^2\) Planning appeals may allow psed claims to be raised and decided by the courts without the need to bring an additional JR claim.

\(^2\) The meaning of class or group in this context means those who will benefit directly from any change to rule, policies, practices or provisions.
**Intervention and enforcement by the CRE, DRC and EHRC**

The review of the enforcement strategies adopted by the CRE, DRC and EHRC provided useful historical data which suggests that active use, by the EHRC, of its powers to issue compliance notices in relation to the SEDs and naming and shaming can be very effective components of an enforcement strategy. However, given the EHRC’s ever declining budget, it may be that the EHRC has insufficient staff and staffing resources to adopt such a robust approach to the use of compliance notices. The EHRC may also be unwilling to adopt such a strategy because of the possibility of a negative backlash. Whilst an easier ‘win’ would be the adoption of a name and shame strategy, the Commission may be in too weak a position to deal with the blow back from such a strategy.

The EHRC appears focused on using its role as a third party intervener in relation to enforcing the RED, DED and PSED. However, there is a danger that the changes to the JR regime, in relation to third party interveners, may impact particularly adversely on the EHRC because it has played such a significant role as a third party intervener in psed claims. It will be essential for the EHRC to assess whether the potential negative impact of changes incorporated in the 2015 Act can be reduced for itself and potential claimants. Access to justice issues are explored further in the next chapter.

**The impact of the Criminal Justice and Courts Act 2015**

The changes to the JR regime, incorporated in the 2015 Act, run the risk of introducing more uncertainty for claimants, third party interveners and their legal representatives. Greater judicial discretion in the JR regime may reduce consistency and equal access to justice. The changes appear to disadvantage potential claimants and third party representatives whilst not presenting the same challenges for public bodies subject to the PSED. The changes run the risk of undermining the ability of individuals, third parties and organisations to challenge public bodies subject to the PSED. However, the provisions in the 2015 Act have the potential to completely undermine the previous JR regime. The proposals in relation to making claimants and third party interveners pay more, limiting cost capping provisions for claimants and introducing more risks in relation to JR, are of particular concern. The proposals on leap frogging cases to the Supreme Court, by-passing the Court of Appeal (sections 63 &63), wasted costs orders (section 67) and the
requirement to withhold relief if a substantially different outcome is not envisaged for a claimant, if there is no ‘exceptional public interest’ defence (section 84) present clear problems for claimants, their lawyers and the public interest more broadly. These provisions also strike at the rule of law. Key questions include: Will potential claimants and third party interveners be frightened off by the new risks associated with the limitations on costs capping and the associated new rules for assessing costs? Will the changes further reduce the numbers of PSED cases considered by the High Court? Will cause lawyer and community activists find ways to address the new challenges? Much will however depend on whether the proposed changes are implemented in full, whether the leapfrogging provisions will apply to PSED JR claims and whether there are successful legal challenges and/or other ways are found to reduce the effects of the changes.
Chapter 7: Cause lawyers, community activism, legal empowerment and campaigning

Introduction
Scheingold’s theory of the Politics of Rights contends that legal judgments alone are unlikely to advance social justice. Instead, this theory proposes that a combination of legal action, legal empowerment, community activism and political or social mobilisation – involving cause lawyers, community representatives and communities – will be required. This chapter explores whether Scheingold’s Theory of the Politics of Rights adds to our understanding of the race and disability public sector equality duties (pseds) and their ability to serve as positive legal duties, advance equality and hold public bodies to account. This chapter contributes to answering both research questions.  

First, key elements of Scheingold’s theory of the Politics of Rights and the concept of cause lawyers are examined. Scheingold’s theories are assessed against the backdrop of government claims that JR was being ‘abused’ and had to be reformed (MoJ, 2013: 3). Second, consideration is given to the roles played by lawyers and legal firms and the extent to which it is reasonable to regard leading legal firms, solicitors, chambers and barristers, involved in the substantive race and disability psed judgments, as cause lawyers. Consideration is also given to the roles played by community activists, particularly voluntary and community organisations (VCOs), in these substantive race and disability psed claims. Third, case studies have been used to explore approaches adopted by cause lawyers and VCOs, working in partnership, to promote legal empowerment in relation to the pseds. Three case studies have been provided, a broadly framed generic case study, a race focused case study and a disability focused case study. Fourth, the use of psed cases as part of wider campaigns, to achieve race or disability objectives, is

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226 First research question: Have the race and disability equality duties been effective positive legal duties and legal public accountability tools? Second research question: Does Scheingold’s Theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties and advancing equality?

227 The term ‘leading’ refers to the leading roles played representing clients particularly in terms of the frequency with which they represented claimants, VCOs, other civil society organisations (CSOs) or the Equality and Human Rights Commission as third party interveners. An assessment has also been made of whether any of these firms or lawyers were identified, by leading legal directories, as leaders in the field.
examined using the medium of three additional case studies; the focus is on campaigns that either challenged institutional discrimination and/or seek to advance equality of opportunity. Again, a disability specific case study, a race specific case study and a generic case study have been used. Fifth, the DRC’s ‘Doing the Duty’ programme and its ‘Up to the Mark’ research, cited in previous chapters, and their relevance to legal empowerment and supporting the Disability Equality Duty (DED) have been considered. Sixth, attention turns to key access to justice issues, including central concerns identified in the literature review, costs associated with JR and the changes to the JR regime introduced by the Criminal Justice and Courts Act 2015. The chapter concludes with key findings, recommendations and conclusions.

**Scheingold’s theory of the Politics of Rights**

Scheingold’s theories of the Myth of Rights and the Politics of Rights set out a number of important propositions. Central are arguments about the limitations of the law but also the contention that legal action and judgments may be used to advance social justice as part of a wider strategy. It is helpful to recap some of the key propositions for the purposes of this study (Scheingold, 2004). Legal processes may have a limited ability to neutralise power imbalances and courts may not be immune from political pressures that may undermine individuals’ legal rights (Scheingold, 2004: 85-87). Some fundamental elements of an underlying social struggle may not be justiciable; where there is litigation, this may not invoke ‘a declaration of rights from court’ (Scheingold, 2004: 5-8). Legal action can support pressure group activity if there is a political strategy, political action and political mobilisation (Scheingold, 2004: 95-96). Activist or cause lawyers have key roles to play including as legal strategists, litigators and as players in political movements (Scheingold, 2004: 141-143). A cause lawyer is a lawyer who is dedicated to using the law for the promotion of social change, who espouses ‘ends that are above and beyond the provision of legal services’ and explicitly claims ‘to use the law in the service of causes’ (Shdaimah, 2005:4, 8). Scheingold’s theories focused on cause lawyers who have espoused social justice and equality objectives and so does this study. The literature

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228 A fuller analysis is provided in the literature review (see chapter 2).
229 Whilst Scheingold used the term ‘political’, this was not a reference to party political activities. Instead this referred to socio-political activities or non-party political activities.
review suggested that Scheingold’s theories, of the Myth of Rights and the Politics of Rights could complement Fredman’s, Hepple’s and O’Cinneide’s assessments of the limitations of positive equality duties (see chapter 2).

Scheingold’s theories suggest that it is reasonable, and acceptable, for lawyers and others to be committed to social justice and to use the law in order to advance social justice objectives. By contrast, the Conservative-led Coalition Government, in power between May 2010 and May 2015, argued that JR had expanded ‘massively in recent years’, had been abused and proposed far reaching legislative measures to significantly curb JR’s use (MoJ, 2013: 3). Between 2013 and 2014, the Conservative-led Coalition Government introduced changes to legal aid rules, new fees and some new JR rules (Dawson and Horne, 2013: 1). In 2014, the Government sought to introduce far reaching changes to the JR regime through the Criminal Justice and Courts Bill. Part 4 of, what became, the Criminal Justice and Courts Act 2015 contained the central changes to the JR regime. Even though the Labour Party committed itself to repealing part 4 of the 2015 Act, if it won the 2015 General Election (The Bar Council, 2015), it would be a profound mistake to view attempts to restrict JR as in any way the sole province of the Conservative or Liberal Democrat Parties or Governments. A 2006 House of Commons Research paper on JR, neatly summed up the inherent challenge posed, saying that JR was ‘always likely to prove a contentious process, since it allows groups and individuals to challenge decisions made by the Government’ (Horne and Berman, 2006: Foreword). Between 2004 and 2010, the Labour Government introduced restrictions to JR and sought, but failed, to introduce other much more far reaching changes to the JR regime. For example in 2004, the Labour Government attempted, but failed in an Asylum and Immigration Bill, to remove some immigration cases from the scope of JR; members of the legal profession, who opposed the proposals, called one clause ‘the most draconian ouster clause ever seen in Parliamentary legislative practice’ (Horne and Berman, 2006: 39).

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230 Sections 84 to 90 of the Criminal Justice and Courts Act 2015 were examined in chapter 6.

Central concerns about the JR regime, voiced by the Conservative-led Coalition Government in 2013, led to legislative changes introduced in 2015. These concerns included: the growth in the number of JR claims since 1998; the time and money ‘wasted in dealing with unmeritorious cases’; the alleged use of JR cases ‘simply to generate publicity or to delay implementation’ of a properly made decision; ‘too many weak’ JR applications funded by the tax payer; the costs to defendant public authorities, including bearing claimants’ legal costs; the costs to the legal system through court costs and resources; and the drain on the legal aid budget (MoJ, 2013: 3, 8). The Government argued that the JR system was ‘unsustainable’, and that it needed to stop JR claims brought by groups seeking ‘nothing more than cheap headlines’ (MoJ, 2013: 3). The Government also made much broader claims arguing that the JR regime was having a negative impact on the country as a whole, limiting ‘dynamism and growth’ and that changing the JR regime was important for taxpayers and industry as a whole (MoJ, 2013: 3).

It is important to note that key respondents to the Ministry of Justice’s consultation firmly rejected the Government’s analysis, challenged the Government’s evidence and argued that the Government’s ‘reforms’ represented a fundamental attack on civil liberties, the rule of law and the ability of individuals to hold public bodies to account (Patrick, 2014, EHRC, 2013a, DLA, 2013, The Constitutional and Administrative Bar Association, 2013: 1-3, Bondy et al., 2013). Profound concerns, largely rejected by the Government, about the JR reform proposals, were also raised by Parliament’s Joint Committee on Human Rights (JCHR, 2014, MoJ, 2014b). The Government introduced the Criminal Justice and Courts Act 2015; and part 4 of this Act (sections 84 to 90) included many of the provisions that lawyers and civil rights campaigners had argued against (see chapter 6). Rather than regarding joint legal action and socio-political campaigning strategies as suspect or improper, it is important to recognise that Scheingold’s theory of the Politics of Rights argued that they – legal action and socio-political campaigning – should be used together and that this was entirely legitimate. Scheingold maintained that it was unlikely that legal

232 The Government suggested that ‘in 1998 there were over 4,500 applications for judicial review and that by 2012 this had reached 12,400’ MOJ 2013. Judicial Review: Proposals for Further Reform Cm. 8703. London, TSO.
action on its own would achieve social justice or resolve fundamental inequalities; even where a legal judgment was won by a claimant. Scheingold argued convincingly that the legal system is not stacked in favour of claimants but rather it is stacked against them.

Like beauty, views of JR are therefore very much in the eye of the beholder. The previous Government argued that activist lawyers, judges and community organisations and individuals have misused, and abused, JR and the JR regime (MoJ, 2013). However these assertions are not supported by evidence provided in the previous chapter. There was no evidence that the pseds had benefited from judicial activism. Judges set out clear principles, consistent with the legislative framework, introduced by Parliament, for the pseds and reiterated those principles in judgment after judgment. Whilst the number of substantive race and disability cases determined by the courts did rise between 2003 and 2014, even at its height, in 2011, only 26 cases were determined, averaging just over two a month (see appendix 5). The Government has argued that there is a very high rate of withdrawal of claims and permission refusals, that ‘only a small proportion of JR applications reach a final hearing’ possibly around 4% and that too many claims have little or no merit (MoJ, 2013: 10). However, leading researchers into JR contest that this analysis is ‘exaggerated either because the evidence relied upon is inadequate or because it has been misinterpreted’ (Bondy et al., 2013). For example, JR claims may be withdrawn because the claim has served its purpose by forcing a rethink by the public body (Bondy et al., 2013). Furthermore, a failed permission claim may reflect the lack of adequate representation for a claimant not the merits of the claim. Lack of access to specialist JR representation, addressed further later in this chapter, is an issue which has been highlighted time and time again by the Public Law Project (PLP, 2013 :1-2, PLP, 2011: 2, PLP, 2005: 4, PLP, 2000: 1, PLP, 1990).

Reducing the ability of individuals and organisations to access JR because ‘too many cases’ did not succeed, is not evidence-based policy and is simply illogical (Bondy et al., 2013). For example, if we look at the issue of domestic violence, for decades UK prosecution rates languished. Prosecution and conviction rates only improved

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233 In 2004, ‘Inspectors concluded that of the 463 incidents to which police were called, there should have been approximately 260 crime reports with potential offenders. In the event, 118 crimes were actually
significantly, between 2004 and 2014, as a result of proactive steps taken by successive Governments, the Crown Prosecution Service, Police Forces, the Women’s Aid Movement and other organisations (CPS, 2014). In addition, against a background of austerity and cuts, which the narrative assessment identifies have fallen disproportionately on the disabled, black and minority ethnic communities and the poor, it is hardly surprising that concerned parties would utilise available legitimate legal avenues to challenge these widening social inequalities UK’ (TUC, 2012: 3, 7, PLP, 2011: 3). It is equally logical, where legal challenges did not resolve the fundamental issues or inequalities complained of, that those concerned about social justice would seek to raise the matter in the Press, campaigns and mobilise to seek redress. Access to justice issues are explored further later in this chapter. Consideration now moves onto an examination of whether cause lawyers have played significant roles in deploying the race and disability pseds as legal tools.

**Cause lawyers, VCOs, Civil Society Organisations (CSOs) and psed judgments**

136 substantive race and disability judgments, determined by the courts between April 2001 and July 2014, were examined to identify the firms of solicitors, chambers, barristers, VCOs and other civil society organisations (CSOs) involved and the frequency of their involvement (see appendices 6, 7 and 10). It is important to note that, in relation to psed judgments, only successes or failures in relation to the race or disability psed grounds have been considered; this study does not seek to analyse whether the claimant succeeded on other non-psed grounds. This analysis generated important results in relation to firms of solicitors, barristers’ chambers, individual barristers and VCOs.

Firms of solicitors played important roles in advising their clients, case preparation and instructing barristers on behalf of both claimants and third party interveners. In the 136 cases listed in appendix 8, solicitors instructed barrister(s) on behalf the claimant(s) in 109

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234 Whilst most of the organisations involved can be defined as voluntary and community organisations (VCOs) others – the Association of Chief Police Officers, the British Board of Deputies, the Trustees and Governors of Chaim Primary School and the United Synagogue – are regarded as civil society organisations (CSOs).
(80%) of the claims. However, whilst some firms of solicitors only acted in one or two cases, some firms were particularly active and acted on behalf of the claimants and VCOs more frequently. The firms of solicitors that most frequently represented claimants were Bindmans, Irwin Mitchell, Deighton Pierce Glynn, Leigh Day, Bhatt Murphy and Public Law Solicitors. Each issued instructions to barristers, on behalf of claimants, in 4% to 11% of the 136 cases (see appendix 6). Bindmans and Irwin Mitchell represented claimants most frequently. To assess whether the firms most frequently involved could be regarded as cause lawyers, using publicly available information, five evaluative criteria, set out in the methodology, were applied.

The criteria were have they: i) espoused a commitment to the advancement of equality and/or human rights; ii) used the law to advance social justice; iii) publicised how the duties may be successfully deployed; iv) promoted legal empowerment; and v) engaged in wider activities to advance social justice or contributed to social mobilisation? Five of the six firms of solicitors met all five criteria; Irwin Mitchell partially met four of the criteria but expressed itself in somewhat different terms compared to the other five firms (see appendix 7). Whilst the other five firms demonstrated a client centred approach and/or made it clear that they primarily represented claimants, Irwin Mitchell made it clear that it represented both claimants and defendants. In many ways, as one of the top 20 legal firms in the country in 2014 with a turn-over of £200 million, it would be surprising if such a large firm were to adopt the ‘niche’ positioning espoused by smaller and much smaller firms. Bindmans, Deighton Pierce Glynn, Leigh Day, Bhatt Murphy and Public Law Solicitors each made their commitment to using the law to advance social justice objectives clear, each espoused a strong human and civil rights focus as well as commitment to social responsibility and legal empowerment (see appendix 7). Whilst

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235 VCOs instructed the claimants’ barrister(s) in 23 cases, with the Equality and Human Rights Commission providing instructions in one case. The roles played by VCOs are considered later in this chapter.

236 The information used primarily came from the firms’ websites but some publicly available information was located in or on key Legal Directories and websites, the Legal 500, Chambers and Partners and the Lawyer.

237 The five firms were Bindmans, Deighton Pierce Glynn, Leigh Day, Bhatt Murphy and Public Law Solicitors.

238 In 2013 of the six firms, only Irwin Mitchell was listed on the Lawyer UK 200 which lists top UK law firms in terms of annual turnover; it was listed at number 19. THE LAWYER. 2015. THE LAWYER UK 200 [2013] [Online]. Available: http://www.thelawyer.com/analysis/intelligence/uk-200-2013-free/uk-200-financial-data/3011203.article [Accessed 31 May 2015].
Irwin Mitchell’s social responsibility umbrella incorporated commitments to equality and diversity, a range of pro bono activities and supporting VCOs, the social justice focus was limited and no specific campaigning focus could be identified from the publicly available material (see appendix 7). All six firms were described as experts in the field of Administration and Public Law by leading legal directory the Legal 500. In 2014, five of the six firms were ranked in bands 1, 2 and 3 of the Legal 500 London and the other was ranked in band 6; band 1 is the highest ranking and band 6 the lowest (see appendix 7).

In the case of Bindmans, founded in 1974 by Geoffrey Bindman, the commitment to using the law to advance social justice could almost be regarded as part of the firm’s DNA. The longevity of the commitment, predates the 1976 Race Relations Act, and Geoffrey Bindman, alongside Anthony Lester QC, now Lord Lester of Herne Hill, played an important role in shaping the development of the UK’s race relations and sex discrimination legislation (see chapter 4). Five of the six firms of solicitors, which appeared most often for claimants, were unapologetically claimant focused. In addition to having represented claimants in leading psed legal cases; each of the six firms had represented claimants in other leading human rights, equalities and civil rights cases. Three other firms of solicitors, which represented three or more claimants or interested third parties, Christian Khan, Hossacks and Public Interest Lawyers fully met the cause lawyer’s criteria whilst Blavo and Co met three of the five cause lawyer criteria. The average success rate for claimants across the 136 cases was 33% (45 of the 136 claimants succeeded). According to the Government, where JR claims, lodged in 2011, were considered at a full hearing around 40% of adjudicated decisions were made in favour of

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239 The UK Legal 500’s Administrative and Public Law category covers JR and psed claims. The UK Legal 500 assesses the strengths of law firms in 106 jurisdictions. The rankings are based on a series of criteria; the Legal 500 highlights the practice area teams who are providing the most cutting edge and innovative advice to corporate counsel. The Legal 500 is divided up by region and subject. UK LEGAL 500. 2015. UK Legal 500 [Online]. Available: http://www.legal500.com/assets/pages/about-us/about-us.html [Accessed 28 May 2015].

240 Public Law Solicitors, a small legal firm based in Birmingham that employs six solicitors, was ranked in band 6 of the Legal 500: London Administration and Public Law in 2014.

claimants (MoJ, 2013: 10). The data, reviewed for this study, suggests a positive relationship between claimants’ success rates and representation by cause lawyers or those with cause lawyer attributes. Blavo and Co and Public Interest Lawyers each handled 3 cases, all of their claimants succeeded in their psed JR claims – a 100% success rate for both firms. Deighton Pierce Glynn’s claimants succeeded in seven out of nine cases – a 78% success rate. Whilst the barristers involved, in the cases listed in appendix 8, could be identified by reviewing the judgments, individual solicitors were not listed on the judgment. However, participant observation activities have identified John Halford and Louise Whitfield as two leading psed solicitors; both met all five of the cause lawyer criteria (see appendix 7).

In relation to the chambers that represented claimants, VCOs, CSOs or the EHRC, three of the four most important chambers, in terms of appearances by members of their chambers, met all of the five cause lawyer criteria; the other Chambers met four of the criteria (see appendix 7). The chambers were: Matrix Chambers, 67 appearances; Doughty Street Chambers, 39 appearances; Blackstone Chambers, 19 appearances; and Garden Court Chambers, 15 appearances. Matrix Chambers clearly stood out with appearances in nearly 50% of the 136 cases followed by Doughty Street Chambers with appearances in nearly 29% of these cases. Both Matrix and Doughty Street Chambers met all of the cause lawyer criteria. Blackstone Chambers, met four of the five cause lawyer criteria, and Garden Court Chambers, met all five of the criteria, respectively making 19 (14%) and 15 (11%) appearances. According to the Legal 500, each of the chambers was rated in the field of Administration and Public Law; in 2014 each was ranked between bands 1 and 4 on Legal 500: London Bar.

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242 The data relates to claims lodged in 2011 which generally were decided in 2012.
243 The term ‘success rate’ is used in this context to identify the percentage of claimants who succeeded in their claims; it has no meaning beyond this.
244 By 2014, John Halford had become a partner at Bindmans in 2014 and Louise Whitfield had become a partner at Deighton Pierce Glynn.
245 These appearances were primarily for claimants but also involved appearances on behalf of the Commission for Racial Equality (CRE) and EHRC as third party interveners, for VCO third party interveners and for other VCO interested parties. For the definitions of interested parties and third party interveners see chapter 6.
In cases where the barrister represented the claimant, in terms of the success rate for claimants, a series of barristers from Matrix Chambers evidenced a greater than 40% claimant success rate. The success rates for members of Matrix Chambers were: Professor Aileen McColgan, 75% (three of four claimants succeeded); Matthew Purchase, 66% (two of three claimants succeeded); Helen Mountfield QC, 57% (eight of 14 claimants succeeded); Nick Armstrong, 50% (two of four claimants succeeded); and David Wolfe QC, 42% (five of 12 claimants succeeded) (see appendix 6: F). Richard Drabble QC from Landmark Chambers, who had a 50% success rate (claimants succeeded in two of four cases), was the only non-Matrix barrister who evidenced a 50%, or greater, success rate in representing claimants. If one looks at cases where the barristers appeared for the claimants, for a third party intervener (usually the EHRC) or for a VCO interested party, then the success rates for claimants were: Lord David Pannick QC, 66% (two of three claimants succeeded); Helen Mountfield QC, 52% (11 of 21 claimants succeeded); Michael Fordham QC, 50% (two of four claimants succeeded); Karon Monaghan QC, 44% (four of nine claimants succeeded); and Dinah Rose QC, 44% (four of nine claimants succeeded) (see appendix 6: F).²⁴⁶

The barristers, who most frequently represented claimants or third party interveners, were: Helen Mountfield QC of Matrix Chambers, 21 appearances; David Wolfe QC of Matrix Chambers, 16 appearances; Ian Wise QC of Doughty Street Chambers, 10 appearances; Karon Monahan QC of Matrix Chambers, 9 appearances; Dinah Rose QC Blackstone Chambers, 9 appearances; and Paul Bowen QC of Doughty Street Chambers, 8 appearances (see appendix 6: H). Drawing on their CVs and other publicly available information, all six barristers met most or all of the cause lawyer criteria (see appendix 7). Helen Mountfield, David Wolfe and Karon Monaghan of Matrix Chambers, all met all five cause lawyer criteria as did Ian Wise QC of Doughty Street Chambers and Dinah Rose QC of Blackstone Chambers. Paul Bowen QC, also of Doughty Street Chambers, met four of the five cause lawyer criteria.²⁴⁷

²⁴⁶ Lord David Pannick QC, Dinah Rose QC and Michael Fordham QC were all members of Blackstone Chambers. Helen Mountfield QC and Karon Monaghan QC were both members of Matrix Chambers.
²⁴⁷ Work in relation to legal empowerment could not be located although it could exist.
The involvement of VCOs and CSOs as third party interveners and as interested parties was expected (see appendix 6: D). However, the number of cases in which VCOs directly instructed barristers was unexpected. VCOs instructed barristers on behalf of claimants in 23 cases, just over one in six of the 136 cases examined (see appendix 6: D). 20 separate VCOs and four CSOs were involved – instructing barristers on behalf of claimants, acting as third party interveners or as interested parties – in 37 (27%) of the 136 cases (see appendix 6: D). A number of classes of VCOs and CSOs were involved, most were law centres or VCOs with a legal focus or medical and/or disability rights VCOs. Three migrants’ or immigration rights organisations were involved, their focus, as one would expect, was on immigration and migrants rights (see appendix 6: D). Three Jewish civil society organisations were involved, their focus was on a school admissions case. As important as these issues were, the generalist race equality sector appeared to be underrepresented.

In terms of VCOs with a legal remit, the Public Law Project (PLP) was particularly important both in terms of its level of involvement and its claimant success rate. PLP instructed the barristers in ten of the 136 cases (7%) and the claimants, represented by PLP, succeeded in seven out of ten of these cases, a 70% success rate. This success rate was much higher than the average claimant success rate of 33% across the 136 judgments. PLP’s remit and work are examined further in this chapter. It is important to note that PLP falls fairly and squarely into the cause lawyer category as ‘an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers’ (PLP, 2015).

The most frequently involved legal firms, chambers and QCs were identified as leaders in the field of Administration and Public Law by the Legal 500 and often by Chambers and Partners (see appendix 7). Most of the firms, chambers, barristers and the leading legal

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248 Five VCOs were third party interveners in eight separate cases, two CSOs were third party interveners in one of these eight cases, they also were third party interveners in two other cases. Six VCOs were interested parties in six other cases and two CSOs were interested parties in two other cases.

249 The case involved the application of Jewish religious law and its compatibility the Race Relations Act 1976.

250 Chambers & Partners provide UK and global guides to the world’s leading lawyers - and these directories are online without charge. Firms can be selected by specialisation and region. CHAMBERS AND PARTNERS.
charity that represented, or appeared most frequently on behalf of, claimants and third parties could either be regarded as cause lawyers or evidenced what we can call significant cause lawyering attributes. The data suggests a positive relationship between psed cases won by claimants and representation by cause lawyers. This positive relationship appeared in relation to firms of solicitors, chambers, barristers and the charities selected for the case studies, which included the Public Law Project, engaged in this work. If these higher success rates in part reflected the expertise of the lawyers involved, an important concern must be whether smaller firms of solicitors and chambers will survive the cuts to the legal-aid system and the changes to the JR regime. Moreover, as lawyers move to other firms and chambers seeking work, there are questions about whether their commitment to social justice, and to taking potentially unattractive and poorly remunerated cases, will also survive? If key firms, chambers, barristers or key legal VCOs reduce in numbers, cease to exist, contract or refocus, this would almost certainly undermine access to justice for claimants wishing to pursue PSED JR claims.

The pseds and legal empowerment
Scheingold’s theories recognise the importance of legal empowerment and campaigning activities. Legal empowerment related to the pseds is examined using three case studies. The case studies focus on psed related legal empowerment initiatives undertaken by the Public Law Project (PLP), the Deaf & Disabled People’s Organisations Legal Network (DDPOLN) and Race on the Agenda (ROTA).

The Public Law Project (PLP) has developed one of the most extensive legal empowerment programmes in relation to the pseds; it works in partnership with lawyers and a range of other VCOs to deliver the programme. It is helpful to set this legal empowerment work in some context by reflecting on PLP’s remit and mission. PLP is an independent national legal charity based in London that delivers programmes across England; it was established in 1990. PLP has three main objectives: ‘increasing accountability of public bodies; enhancing the quality of decision-making; and improving access to justice’ (PLP, 2011: foreword). In order to achieve these objectives, PLP aims to

provide support and expertise to the lawyers and advisers who work on behalf of those marginalised within the UK’ (PLP, 2011: foreword). Where litigation may change policy, PLP may assist claimants or take a legal case in its own name. PLP is therefore placed squarely at the interface between VCOs and the legal world. PLP works closely with the firms of solicitors, chambers and barristers identified as cause lawyers in this chapter. PLP’s relationship with the legal world dates back to its conception as an organisation in 1990 and has been nurtured over the last twenty five years (PLP, 1990). PLP’s management committee members have included leading solicitors and QCs. The Committee has also included leading legal academics, leaders of the UK’s university law schools and active members from the law centres movement and advice sectors. PLP has also maintained close working links with major national VCOs and CSOs across a broad range of social action areas (e.g. disability, housing, legal reform, mental health, poverty, older people). It is against this backdrop that PLP’s legal empowerment work, in relation to the pseds, is examined. PLP’s 5-year review and impact report provides important information on its wide ranging psed related legal empowerment activities UK’ (PLP, 2011). Key empowerment related activities included: specialist support; empowering the voluntary sector; fighting for access to justice, advice and guidance; conferences and training; and research and publications. Whilst these activities did not focus solely on the pseds, the pseds were considered as part of this work.

In terms of specialist support, between 2005 and 2011, PLP ran a public law advice line which provided support to legal practices advice agencies and not-for-profit organisations operating under what was then the Community Legal Service. The approach adopted by PLP included advising on detailed or complex legal issues, and informal advice on tactics and procedures (PLP, 2011: 4). To empower the voluntary sector, PLP worked in partnership with the National Association of Voluntary and Community Associations (NAVCA) and the National Council for Voluntary Organisations (NCVO) ‘providing advice and training on public law principles to voluntary organisations’ (PLP, 2011: 4). As part of this work PLP was involved in ten of the substantive psed race and/or disability cases decided between 2007 and 2014. PLP’s interventions and legal empowerment activities

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251 See appendix 8 and case numbers 10, 19, 23, 28, 30, 38, 52, 65, 79 and 132.
were also designed to support small voluntary organisations to challenge breaches of the pseds without necessarily having to pursue a JR claim to a full hearing (PLP, 2011: 5-8). PLP’s review report cites examples where PLP’s intervention, working in partnership with a local organisation, enabled the resolution of psed issues with public bodies. Under the banner of fighting for access to justice, advice and guidance, PLP supported the continued existence of Greenwich Community Law Centre; in turn, this Law Centre was able to support local individuals, advance equality of opportunity locally and support psed cases. PLP also provided a wide range of advice and guidance to voluntary and community organisations and others. In terms of conferences and training, PLP has been a key source of guidance on JR trends since 2004. Its annual conference - Judicial Review London: Trends and Forecasts – brings together lawyers, community organisations, individuals and others concerned about using JR generally and in psed cases. PLP’s key objectives, in relation to the training activities, include building capacity in the public law and human rights sectors, providing tools, spreading good practice and empowering lawyers, advisers and VCOs – this has included work related to the pseds (PLP, 2011: 14). PLP’s legal empowerment activities, which have also addressed the pseds, have been supported by their research and publication activities. PLP has provided extensive written guidance on JR and the pseds. This guidance draws on PLP’s extensive experience and is particularly useful. PLP’s research, often undertaken in partnership with leading academics, is designed to inform and develop a solid evidence base for reforming the JR regime (PLP, 2011: 16).

The case study considered next, examines the psed legal empowerment programme developed by Race on the Agenda. Race on the Agenda (ROTA) is a London based charity and social policy research organisation, first established in 1984. It focuses on issues impacting on Black, Asian and minority ethnic (BAME) communities. In 2010, ROTA ran a number of one and two day training programmes targeted at London VCOs focusing on the Race Equality Duty. Following the PSED coming into force in 2011, ROTA delivered a series of similar one and two day training programmes to London’s VCOs on the new PSED. ROTA’s legal empowerment work focused on supporting Black, Asian and Minority Ethnic VCOs through one or two day training programmes and supporting resources. In 2013 and 2014, ROTA developed a more fully fledged legal empowerment programme. By
2014, ROTA had, secured funding for and, developed the Equality Law Project, the purpose of which was to support frontline organisations to: comply with equality law; and hold public authorities to account under equality law (health, education and criminal justice). The programme had four key elements: online services and guidance; training for VCOs on the Equality Act 2010 and the PSED; train the trainer; an online web-chat facility and free preliminary legal advice on the PSED.

The online guidance offered: information on key equalities developments, PSED and equalities cases and judgments; best practice in relation to the PSED; news and events. Whilst the approach centred on race, other protected characteristics and broader equalities and human rights issues were also considered. ROTA continued to offer a one or two day training programme on the Equality Act 2010 and using the PSED to hold public bodies to account. A new regular component to the legal empowerment programme, introduced in 2014, was a train the trainer session on the PSED. Perhaps the most creative new component is the joint initiative with Deighton Pierce Glynn Solicitors. An online weekly one hour web chat allows London’s BAME VCOs and other VCOs to speak to a solicitor at Deighton Pierce Glynn and seek free preliminary legal advice.252 Some of the training for VCOs was also developed in partnership with Deighton Pierce Glynn Solicitors.

This, the third, legal empowerment case study looks at the Deaf & Disabled People’s Organisations Legal Network (DDPOLN). The Network was established in January 2012; it was run, organised and chaired by Inclusion London, a pan-London disability equality organisation and the Public Law Project. Louise Whitfield, a partner at Deighton Pierce Glynn was a founding member of the DDPOLN (Deighton Pierce Glynn, 2015).253 The DDPOLN aimed to ‘bring together DDPOs and lawyers’ in order ‘to raise understanding of the legal system, legislation, case law and policy that relates to the quality of life, rights

252 Deighton Pierce Glynn solicitors are available to chat with live on ROTA’s ‘Holding to Account on Equalities’ website once a week. Advice is provided one to one on a first come first served basis. Each person is given 10 minutes to chat to a solicitor about any PSED related issues they are facing or to clarify any technical legal points relating to the PSED.

253 Louise Whitfield is a founding member of the DDPOLN. She was nominated for a Legal Aid Lawyer of the Year award for her work with the Network, DEIGHTON PIERCE GLYNN. 2015. Louise Whitfield [Online]. Available: http://www.deightonpierceglynn.co.uk/people/people_11.htm [Accessed 1 February 2015].
and inclusion of Deaf and disabled people’ (Deighton Pierce Glynn, 2015, Inclusion London, 2014). The Network also served as a forum ‘for disseminating legal information of strategic importance’ (Inclusion London, 2014). Lawyers and DDPOs could also ‘share information on current case law relating to the quality of life, rights and inclusion of Deaf and disabled people’ (Inclusion London, 2014). Quarterly forum meetings explored ‘the implications of case law for DDPOs advising, representing and advocating for disabled people’; identified ‘potential legal challenges and relevant evidence to strengthen existing cases’; and exchanged ‘information, ideas and evidence on strategic litigation about the issues affecting disabled people’ (Inclusion London, 2014). To reach as many people as possible, Inclusion London’s website included information on the Network and key resources and materials. Key speakers included barristers and QCs from a range of chambers including Doughty Street, Landmark and Matrix Chambers (Inclusion London, 2014).

The three case studies provide evidence of close working relationships between VCOs and firms of solicitors, chambers, individual solicitors, barristers and other VCOs actively involved in cause lawyering. Whilst the work undertaken by PLP dates back nearly 25 years, the DDPOLN and the ROTA programmes are much newer having been initiated since 2010 and only developed fully between 2012 and 2014. Although PLP is a national organisation, there is a London centric potential downside where these programmes depend on funding and depend on the availability of very busy QCs and solicitors. Solicitors and QCs who have played leading roles in relation to the pseds have attended the DDPOLN’s quarterly meeting both as speakers and as participants. This model would probably only work in London because of the fact that these often specialist lawyers can fit the DDPOLN meetings into their busy London focused schedules. Participating in either PLP or DDPOLN events also secures legal Continuing Professional Development (CPD) points, to make attendance more attractive.

**Campaigns**

PLP, ROTA and DDPOLN were all involved in delivering legal empowerment programmes to support the pseds; each has also supported campaigns on the pseds. PLP was directly involved in the case of Southall Black Sisters which is one of the three case studies on
campaigns which is explored below. ROTA also actively promoted information on the Southall Black Sisters case and other psed judgments to the BAME voluntary sector (ROTA, 2014). Inclusion London and DDPOLN were actively involved in the fight coordinated by Disabled People Against the Cuts in relation to the Independent Living Fund.

The case studies examined next explore whether there is evidence that supports Scheingold’s theories which assert that cause lawyers and mobilised communities can play important roles in relation to using legal claims and campaigning activities to advance social justice. Scheingold’s theories are examined through the lens of three case studies on psed related campaigns. A disability specific case study, the closure of the Independent Living Fund and the work of Disabled People Against Cuts, is considered first. A race specific case study is considered second, the Southall Black Sisters case. Then the Fawcett Society’s challenge to the Government’s 2010 budget is considered. Although the Fawcett Society relied on the Gender Equality Duty, the judgment also has implications for other protected characteristics and resulted in a broader campaign and activities. Each of these case studies identifies how a psed legal judgment has been used as part of a broader campaign to challenge institutional discrimination and/or advance some aspect of substantive equality.

This first case study examines the campaign to challenge the Government’s proposals to close the Independent Living Fund (ILF). In 2013, Stuart Bracking and others challenged the Coalition Government’s decision to close the ILF. Having first been heard by the High Court in April 2013, a case which the claimant lost, a successful appeal was made to the Court of Appeal, in November 2013, and the claimants won.

255 The Fawcett Society attempted to use the Public Sector Equality Duty to challenge to the Coalition Government’s budget setting process in 2010.
256 ‘ILF supports around 18,500 users across the UK and 97p in every £1 of ILF money goes to the user. Without ILF funding Group 1 users in particular (about 6% of ILF users) would be at risk of losing all their funding as they would not in many cases meet the eligibility criteria now in place in most local authorities.’ DPAC 2013. Independent Living Fund Closure Factfile. n.p.: DPAC.
257 The first High Court case which the claimants lost: Bracking & Ors, R (on the application of) v Secretary of State for Work and Pensions [2013] EWHC 897 (Admin) (See appendix 8, case 110). The appeal to the Court
grounds successfully argued was that ‘the Respondent failed in making the decision to close the fund lawfully to discharge the Public Sector Equality Duty imposed under section 149 of the Equality Act 2010 (“the PSED”)’ (judgment para. 3). However, one of Scheingold’s arguments is that even successful legal judgments may not provide enforceable legal rights or secure social justice; the ILF case demonstrates this clearly.

Following the Court of Appeal’s decision against the Government in November 2013, the Government reconsidered the future of the ILF; again it decided to close the ILF. So in 2014, campaigners brought another disability PSED challenge to the closure of the ILF; this challenge was decided by the High Court in December 2014. This time the High Court determined that due regard to the PSED had paid when the Government confirmed its decision to close the ILF. Following the High Court decision in December 2014, the Coalition Government confirmed that the ILF would be closed in June 2015. Campaigners, and in particular Disabled People Against the Cuts, have worked with lawyers campaigning to fight the closure of the ILF. The campaign included a wide range of media activity, attempts to mobilise disabled people and providing information to enable local activities (DPAC, 2015a). DPAC and others are supporting a challenge against the UK Government; the challenge was submitted to the United Nations in February using the UN Convention on the Rights of Persons with Disabilities (DPAC, 2015b). The Solicitor representing the claimants was Louise Whitfield, a partner at Deighton Pierce Glynn, and a co-author of the complaint was Tracey Lazard, the Chief Executive Officer of Inclusion London whose legal empowerment work with the DDPOLN was explored earlier. Both the solicitor and barrister provided their services on a pro bono basis (DPAC, 2015b). The

of Appeal which the claimants won: Stuart Bracking & Ors v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 (see appendix 8, case 120).

258 R (on the application of Aspinall, Pepper and others ) (Formerly Including Bracking) v Secretary of State for Work and Pensions v The Equality and Human Rights Commission [2014] EWHC 4134 (Admin)

259 Disabled People Against Cuts (DPAC) was formed by a group of disabled people after the first mass protest against the austerity cuts and their impact on disabled people held in Birmingham, England. It was led by disabled people under the name of The Disabled Peoples’ Protest. DPAC, 2015b. UK Disabled people appeal to the UN over Independent Living fund closure [Online]. Available: http://dpac.uk.net/category/independent-living-fund-ilf-2/ [Accessed 16 May 2015].

260 ‘The UK is signed up to the UNCRPD Optional Protocol. This means that individuals can take complaints to the UN disability committee for breach of the UNCRPD if all domestic avenues have been exhausted. If the committee find the complaint admissible, they will investigate and produce a set of recommendations for the State in question. One previous complaint was made to the UN disability committee but found inadmissible as the incidents in question which related to employment discrimination occurred before the UK ratified the convention. ’ibid.
challenge to the UN which as of June 2015 had not been resolved is nevertheless a good example of Scheingold’s Theory of the Politics of Rights. A campaign which involves legal challenges was launched. Both the legal challenges and the wider campaign involve individuals, VCOs, cause lawyers and attempts to mobilise groups of individuals to secure social justice objectives; the social objectives here being the continuation of the ILF and the freedom to participate in public life.

The second case study involves Southall Black Sisters and Ealing Council. In 2008, Ealing Council issued new criteria which would have led to a generic domestic violence service being commissioned by the Council. Until that time, the Council had commissioned a range of domestic violence services; including services from Southall Black Sisters (SBS). SBS had been funded for many years to provide culturally specific and sensitive services to BME women facing domestic violence. Southall Black Sisters launched a campaign to fight for its survival and against the Council’s decision and two service users launched a JR claim in the High Court backed by Southall Black Sisters (2008). The claimants’ case was supported by the Public Law Project, whose Director of Casework at the time was Louise Whitfield.\(^{261}\) PLP instructed Helen Mountfield and Professor Aileen McColgan; Karon Monaghan represented the EHRC which was an effective third party intervener.\(^{262}\) In July 2008, the Council was deemed by the High Court to have acted unlawfully in how it set new criteria for commissioning domestic violence services and the High Court quashed the Council’s decision.\(^{263}\) Following the High Court’s ruling and taking account of the EHRC’s intervention, the Council decided to reverse its decision. Following the High Court decision, Southall Black Sisters (SBS) noted the following:

‘The result of all this is that Ealing Council must now go back to the drawing board and although the outcome could be the same again, hopefully, our victory will make it more difficult for it to ignore the guidance and therefore SBS. The Council has agreed to continue to fund SBS at the previous level until it completes the

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\(^{261}\) Louise Whitfield subsequently joined Deighton Pierce Glynn (DPG) Solicitors, represented claimants in key psed cases and had become a partner at DPG by 2014. Louise also met the five criteria for a cause lawyer.

\(^{262}\) The EHRC’s third party intervention was welcomed by the High Court in its written judgment.

\(^{263}\) *Kaur & Shah, R (on the application of) v London Borough of Ealing & Anor* [2008] EWHC 2062 (Admin) (see appendix 8, case 19).
The process of commissioning based on any new decision on domestic violence services’ (Southall Black Sisters, 2008).

SBS noted that Ealing Council had been influenced by a misguided approach to cohesion and the government’s approach which regarded ‘activities carried out by a single ethnic groups as separatist’ (Southall Black Sisters, 2008). SBS argued that it was concerned that the government’s cohesion strategy, its ‘one size fits all’ approach and the approach originally adopted by Ealing Council, and by some other councils, could jeopardise the future of VCOs ‘working for the human rights of black and minority ethnic people’ (Southall Black Sisters, 2008). SBS said its victory was ‘important for all grassroots specialist organisations ... faced with ... cuts in their funding on the spurious grounds’ of cohesion and equality (Southall Black Sisters, 2008). Ealing Council also agreed to pay SBS’s legal representation costs and those of the EHRC. The total costs were estimated to be around £100,000, ‘the amount that the Council previously gave SBS on an annual basis!’ (Southall Black Sisters, 2008). Seven years on, in 2015, SBS is still funded by Ealing Council and the case is still widely quoted in the BME voluntary sector. Although, as the narrative assessment made clear, many BME VCOs have lost funding in the last seven years, many believe that without the SBS judgment even more BME VCOs would have suffered this fate. The SBS JR judgment has been widely publicised by SBS, ROTA, the Public Law Project, the EHRC and the wider voluntary sector.

The third case study considers the Fawcett Society’s 2010 challenge to the Government’s budget setting process. On 1st August 2010 the Fawcett Society filed for JR of the Government’s 2010 emergency budget. They asked the courts to examine whether the budget had been drawn up in accordance with the law – in particular, the legal requirement that the government consider the way in which different measures impact differently on men and women. The High Court gave leave for a permission hearing on 6th December 2010. The Government conceded that ‘they had not met all the requirements’ of the GED when drawing up the budget; in fact it acknowledged that they had only looked at the likely impact on women in 2 of ‘over 100 budget measures’ (The Fawcett Society, 2013). The Government also expressed regret and pledged to take a different approach in future (The Fawcett Society, 2013). Although, the JR claim did not
succeed, the Fawcett Society has cited a number of important positive outcomes from this ground breaking case and the associated high profile campaign. Key benefits included: making people aware of the pseds; making central Government aware that they ‘need to consider the way in which policies impact differently’ on groups covered by the pseds (The Fawcett Society, 2013).

‘Our case achieved widespread media attention such that the unequal impact of the cuts on women is now well known ... how women will be affected by different fiscal measures is more commonly considered. The media interest also boosted the profile of this small but vital piece of equality law. Local councils and other authorities spending public money during a time of cuts are more aware than ever of the legal requirement that they consider the way in which their policies impact differently on women and men – as are the people watching them!’ (The Fawcett Society, 2013).

So three different cases, each of which engaged institutional discrimination and substantive equalities issues, but different outcomes in each case. With Southall Black Sisters (SBS), the combined effect of an effective campaign, the EHRC’s intervention and the High Court judgment against the Council, meant that Ealing reversed its decision and SBS is still funded to this day. The judgment also had wider positive benefits, in particular for BME VCOs, and has continued to be widely quoted. According to Westlaw, the judgment is still regarded as good law (see appendix 8, case 19). Issues of institutional race discrimination and substantive equality were engaged and, in part, positively addressed by SBS’s continued funding. By contrast, the Court of Appeal’s decision in November 2013 looked as if it might have secured the ILF’s future. However, the Government was determined to close the ILF and another High Court Judgment in December 2014 went in the Government’s favour. Disability campaigners continued to campaign and seek legal redress with an appeal to the UN. Substantive institutional disability discrimination issues and equality issues were engaged but the PSED’s due regard framework did not secure the ILF’s future. By contrast, although the Fawcett Society did not secure permission for a full JR hearing, many benefits accrued from their high profile campaign and widely reported judgment (McKinnell, 2010). In addition to the benefits cited by the Fawcett Society, following the case, the EHRC was able to enter into discussions with the Treasury, and other Government Departments, using its section 31
powers under the Equality Act 2006 (EHRC, 2015d). Although the Fawcett Society case was a GED case, it brought benefits to other groups covered by the PSED, as well as women, not least because of its implications for budget setting processes, implications which were followed up by the EHRC and its section 31 review and subsequent EHRC guidance (EHRC, 2015d, EHRC, 2012).

The DRC’s ‘Doing the Duty’ and the ‘Up to the Mark’ initiative
In chapters 4 and 6, reference was made to an extensive programme of work undertaken by the DRC to support the DED and the associated SEDs and statutory Code. Between 2006 and its incorporation within the EHRC in October 2007, the DRC embarked on a major programme called ‘Doing the Duty’, designed to support public sector bodies and enable disability campaigners to use the new DED. Under the banner ‘Doing the Duty’, the DRC published a range of documents. Some of the resources were targeted at disabled people’s organisations (DPOs) and disabled people (DRC, 2006b, DRC, 2006f) and some of the resources were targeted at public bodies (DRC, 2006e). However, most of the tools were designed to be used by DPOs, public bodies, disabled people and anyone else concerned about the DED (DRC, 2006c, DRC, 2006d, DRC, 2006g, DRC, 2006a, RADAR, 2007b). By funding leading disability rights organisations including RADAR, to deliver reports to support the Doing the Duty Programme (RADAR, 2007a, RADAR, 2007b), the DRC sought to secure its legacy because as an organisation committed to securing the rights of disabled people, RADAR would be concerned to promulgate this initiative long after the DRC’s demise in October 2007. The overarching aims were to familiarise organisations and people with both the Disability Discrimination Act (DDA) 2005 and the new DED regime and encourage/facilitate compliance by public bodies. The package of resources made it clear what the DRC expected in key areas such as equality impact assessments, information gathering, using information and involving disabled people. Importantly, key concepts, such as the social model of disability (DRC, 2006c: 9), were explained and the practical benefits of involving disabled people were explained and practical guidance on what to do was provided (Office for Public Management, 2007b).

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264 Section 31 of the Equality Act 2006 enables the CEHR to assess a public authority’s compliance with the PSED and provides a framework for such an assessment. The admissions made during the case strengthened the EHRC’s hand.
The programme was a model for how to do legal empowerment however the demise of the DRC meant that the central co-ordinator of the programme ceased to exist less than a year after the DED’s first compliance deadlines.265

However, the DRC’s ‘Up to the Mark’ initiative (DRC, 2007b, Ipsos Mori, 2007) also promoted action by others after the DRC’s demise. In 2008, the Secretary of State Report on Disability Equality Health and Care Services reflected on the concerns by the DRC in Up to the Mark and what progress had been made and what was planned (DH, 2008: 7, 23, 26, 35, 89).266 Also in 2008, the National AIDS Trust published its research report ‘Where is HIV in Disability Equality Schemes?’ which built on ‘Up to the Mark’ to examine the DESs commended by the DRC to see whether public bodies that were seen to be good at considering disability issues also had taken HIV into account. Consideration is given to the lessons from these initiatives in the conclusions.

**Access to justice issues**

A number of potential limitations in relation to JR were identified in chapter 2. Key problems include the costs of JR, lack of eligibility for legal aid, limited access to Protective Costs Orders (PCOs), discretionary rationing by the courts, technical jargon, difficulty securing advice and the uneven geographical distribution of access to specialist legal advice including a London centric approach. Cause lawyers, VCOs and networks and others have publicised the pseds and sought to enhance the understanding of other VCOs about the pseds.267 However, the cuts, especially to legal advice services, legal aid and VCOs have reduced the capacity to inform and empower individuals and organisations to use the pseds. An analysis of the 136 cases also suggests a somewhat London centric focus in that: most JR claims were heard in London; most of the most successful lawyers

265 The DED regime came into force in December 2005; the first tranche of Disability Equality Schemes had to be produced in December 2006.

266 The Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005. Regulation 5 required certain Secretaries of State to ‘a) give an overview of progress towards equality of opportunity between disabled persons and other persons made by public authorities operating in the policy sector; and (b) set out the reporting authority’s proposals for the coordination of action by public authorities operating in that sector so as to bring about further progress towards equality of opportunity between disabled persons and other persons.’

267 VCOs that have promoted an understanding of the pseds, and developed psed related legal empowerment activities, include PLP, ROTA, the DDPOBLN, Disabled People Against Cuts (DPAC) and law centres.
in terms of representing claimants were based in London; and many of the claims were
taken against London councils and bodies based in London (see appendix 8).

The issue of access to representation has become more challenging as the scope of public
law has expanded but potential sources of affordable advice have reduced as law centres
and other agencies, that might give advice on public law issues, have contracted their
services or ceased to exist (Baski, 2014).  
The success rate for claimants, on psed
grounds, where the PLP issued the instructions was high but the success rates for
claimants on psed grounds, where other VCOs issued the instructions were generally poor
(see appendix 6: D).  
If one excludes the PLP, the Child Poverty Action Group, Shelter
and the Council for Disabled Children, no claimants, represented by other VCOs, secured
positive psed judgments (see appendices 5 & 6).

Conclusions
A number of key themes have been identified: Scheingold’s theories of the Myth of Rights
and the Politics of Rights; the JR regime, legal-aid and access to justice; cause lawyers;
legal empowerment; and campaigns.

The psed principles, and the psed ‘due regard’ framework, considered in the preceding
chapter, identify important limitations. These limitations constrain the power of the
courts to neutralise power imbalances in relation to equality of opportunity.  
The framing of the pseds, as duties of ‘due regard’ rather than requirements to achieve the
stated equality aims or specific equality objectives, places limitations on what claimants
could expect the pseds to deliver. Scheingold’s two theories do add to our understanding
of the race and disability pseds and their ability to serve as positive legal duties and
advance equality. The evidence presented in this chapter supports Scheingold’s theories
that a combination of race and disability psed legal action, psed related legal

268 In just one year (2014), nine law centres closed leaving 50 open across England BASKI, C. 2014. Law
centres: Picking up the pieces. The Law Society Gazette [Online]. Available:
http://www.lawgazette.co.uk/analysis/features/law-centres-picking-up-the-pieces/5042728.fullarticle
[Accessed 1 March 2015].
269 It is important to note that some claimants won their JR claim on other grounds that are outside of the
scope of this study. In some of those cases, decisions were quashed and damages were awarded.
270 The pseds were not duties to achieve equality objectives or equality outcomes but instead a mechanism
to give proper consideration to the achievement of equality objectives and equality outcomes.
empowerment, community activism and political or social mobilisation using the pseds and campaigns – involving cause lawyers, community representatives and communities – can, and have been, successfully deployed to challenge institutional race and disability discrimination and advance substantive race and disability equality.

However, the ILF and Fawcett Society judgments and campaigns offer some sobering lessons. If PSED challenges are made against Government Departments which involve substantive equality demands and have associated significant financial costs, experience of the psed race and disability judgments suggests that it is likely that such psed demands will be successfully resisted by an austerity focused government. Nevertheless, some gains may still be made by securing PSED judgments that set out processes, requirements or boundaries that Government Departments, and others, will be expected to consider. These judgments may then be used by cause lawyers, VCOs and CSOs to hold public bodies to account and to make some progress in relation to substantive equality demands; the war may not be won but individual battles and gains may be made.

JR was, and remains, the central legal means of challenge in relation to the pseds. As a consequence, changes which enhance or undermine this regime, from a claimant’s perspective, tend to enhance, or undermine, the effectiveness of the pseds as legal tools for claimants. Many of the firms of solicitors, chambers, barristers, VCOs with a legal remit and would-be claimants who have taken psed JR claims have relied heavily on the legal-aid regime and/or measures such as Protective Costs Orders (PCOs). The changes introduced that restrict legal-aid, PCOs, access to JR and increase the financial risks for lawyers and claimants, are likely to undermine access to justice and undermine the PSED. Each of the changes makes it more difficult to fund PSED and other JR cases. Furthermore, the full negative impact of the changes contained in part 4 of the Criminal Justice and Courts Act 2015 will not be felt until 2015/16. Unfortunately, for would be PSED JR claimants, it is almost certain that there will be further cuts, between 2015 and 2020, to government budgets, including the legal aid and courts and tribunals budgets.

\[271\] PCOs may limit the potentially extensive costs associated with pursuing a JR case.
Critical issues, in relation to access to justice, include finding a lawyer who understands issues of equality, inequality and discrimination and has the willingness, ability and expertise to take a PSED case and manage the complex legislative framework.\textsuperscript{272} The costs of JR also present real challenges which could be partially offset by Protective Costs Orders (PCOs). The changes introduced by the Criminal Justice and Courts Act 2015 pose a number of important questions. Will potential claimants and third party interveners be deterred by the new risks associated with the limitations on PCOs and the associated new rules for assessing costs? Will the changes further reduce the numbers of PSED cases considered by the High Court? Will cause lawyer and community activists find ways to address the new challenges? It is too soon to answer these questions and they are beyond this study’s scope but further research, focusing on these and associated access to justice issues, is suggested.

Options that might increase claimant success rates should be considered. Consideration should be given to expanding the work of those organisations that have evidenced success in relation to PSED legal cases; and initiatives that have the potential to extend or replicate this success. PLP’s legal empowerment programmes, ROTA’s Equality Law Project, the DDPOLN’s legal empowerment activities and other legal empowerment programmes should be mapped across England. A framework should be developed, in partnership with PLP, to assess the effectiveness of these legal empowerment programmes and whether these, or other, initiatives could be expanded and replicated to achieve better coverage across England.

The EHRC has focused on using its role as a third party intervener in relation to enforcing the RED, DED and PSED; the changes to third party interventions may impact particularly adversely on the EHRC because of this. It will be essential for the EHRC to assess whether the potential negative impact of changes in the 2015 Act can be reduced for the EHRC, potential PSED claimants, other third party interveners and interested parties.

\textsuperscript{272} Dealing with psed claims was, and remains, challenging and complex because it requires significant knowledge of anti-discrimination and equality legislation including the pseds and their interface with human rights and relevant subject or function related legislation.
Drawing on Scheingold’s theories, for the purposes of this study, a cause lawyer means a lawyer, or legal advocate, who: believes in social justice and that social inequalities should be reduced; believes that the law has a legitimate role to play in reducing social injustice and inequalities; and deploys their legal skills to achieve these social objectives.\(^{273}\) Scheingold argued that cause lawyers can play significant roles in advancing social justice by taking on legal cases, facilitating legal empowerment and supporting social justice campaigns. The evidence is that cause lawyers have played major roles in: the substantive race and disability psed judgments examined; psed related legal empowerment activities; and in social justice campaigns associated with the pseds. The majority of legal firms, chambers and lawyers who most frequently represented psed claimants, the EHRC and/or VCO third party interveners met all or most of the five criteria used to define cause lawyers. The average success rate for claimants in substantive race and disability psed cases examined was 33%; this was below, but not significantly below, the 40% success rate identified as the norm for such claims by the Government. However, the pattern of success appears to depend on whether or not a claimant was able to secure representation from the firms of solicitors, chambers or barristers or the Public Law Project who were particularly expert in the pseds. The claimant success rate for firms of solicitors, chambers, barristers and the Public Law Project was often higher, sometimes much higher, than the average 33% or the 40% norm, identified by the Government, for JR claims determined at a full hearing (see appendix 6). It was beyond the scope of this study to examine the reasons for this so further research is recommended.\(^{274}\)

The DRC’s ‘Doing the Duty’ and the ‘Up to the Mark’ initiatives provided important legal empowerment resources. The EHRC should consider developing more resources targeted at promoting legal empowerment with respect to the pseds using the ‘Doing the Duty’ and the ‘Up to the Mark’ initiatives as models. The importance of legal empowerment activities – in order to promote understanding of the pseds, share best practice across the legal profession and empower VCOs and others committed to securing social justice – was

\(^{273}\) A cause lawyer does not mean a lawyer who is seeking to misuse their legal position or skills to secure an undue or unfair advantage for their client.

\(^{274}\) Potential issues for further research: Are cause lawyers more likely to recognise arguable elements of a psed case? Are cause lawyers more likely to be willing to work with the client to find a way to take the case? Do cause lawyers bring particular expertise to psed cases?
recognised from the inception of the Public Law Project nearly 25 years ago. Over the last 25 years, the Public Law Project has developed a range of extensive legal empowerment initiatives. Over the last four years, ROTA and the DDPOLN have developed focused legal empowerment programmes in partnership with PLP and key cause lawyers. One important way to improve access to justice would be to map such legal empowerment programmes across England and assess how such programmes could be developed further and their impact extended. All three VCOs involved in psed legal empowerment activities were also involved in campaigning activities around the pseds. Legal empowerment activities were proactively used to identify potential psed legal claims and supported campaigning activities.

The campaigning case studies demonstrated that the pseds as duties of ‘due regard’ may have a positive impact if a case is determined in favour of a claimant. However, there is no guarantee of such a positive legal outcome or determination and no guarantee that even a positive legal adjudication will not be overturned. Scheingold’s contention that the combined impact of a social justice campaign, clear strategic objectives for the campaign and a positive legal judgment may be the best means of securing social justice objectives is supported by the evidence identified in this study.
Chapter 8: Findings, the research questions and recommendations

Introduction
This thesis has investigated whether, and, if so how, the race and disability public sector equality duties (PSEDs), and their associated regulatory frameworks, have provided legal tools that have advanced the ability of individuals and organisations to hold public bodies to account in relation to race and/or disability equality. Findings are identified which inform the responses to the two research questions. This thesis concludes with a series of five recommendations.

Finding 1: Campaigns for race and disability equality legislation
The study shows that securing race and disability legislation, and the RED, DED and PSED, involved long running campaigns which extended over decades.\footnote{The fight for the RED ran from the 1970s through to 2000. The fight for the DED ran from the 1990s to 2005.} The legislation obtained, including the public sector equality duties (PSEDs), often represented the best that could be secured at the time.\footnote{The narrative assessment, provided in chapter 4, demonstrates that often legislative provisions fell short of the recommendations made by the CRE, DRC, EHRC, cause lawyers or campaigners.} This compromise approach presented inherent challenges. Of the various major race and disability equality acts, only the DDA 1995 was developed under a Conservative Administration. Between the early 1990s and 2010 divergent, but not inconsistent, agendas developed in relation to race and disability equality legislation. Campaigners won a number of important battles for: the RED, DED and the PSED; the race and disability SEDs; and for strengthened race and disability equality provisions to comply with the new EU Directives. However, the CRE, DRC and race and disability equality campaigners were destined to lose their battles to retain the CRE and DRC.

The DRC, and disability equality campaigners, made sustained legislative progress between 1995 and 2005, securing legislative changes and important provisions consistent with the social model of disability.\footnote{For example, the reasonable adjustment provisions, the DDA 1995, the Disability Rights Commission Act 1999 and the DDA 2005.} By contrast, the picture for the CRE and race equality campaigners was less positive. Progress around race equality legislation
stagnated between 1983 and 1998. Although with the added impetus of the Stephen Lawrence Inquiry’s recommendations, the RED and associated race SEDs were introduced. However, race equality and RED policy agendas have tended to be undermined or even drowned out by: the backlash against the concept of institutional racism; and a number of competing agendas including anti-terrorism, austerity, cohesion, immigration, integration or small government.

**Finding 2: The impact of austerity and other competing agendas**

Since 2010, the austerity, small Government and the Red Tape Challenge agendas have reduced the space for race and disability equality, the RED, the DED and the PSED. Austerity, reducing the public sector deficit, cuts and creating an environment in which businesses can thrive became the mantra of the Conservative-led Coalition Government; as did reducing the welfare budget, welfare benefits, statutory regulation and red tape. Since 2010, both the race and disability equalities legislative agendas have been diminished or crowded out by these competing agendas.

The previous Conservative-led Coalition Government was, and the Conservative Government elected in May 2015 remains, committed to ongoing austerity measures and small government. It is therefore anticipated that these agendas will continue to dominate. They are likely to continue to crowd out the race and disability equality agendas, especially where substantive equality demands are being made. It is yet to be seen what role the PSED will be able to play in challenging discrimination and advancing equality especially as the previous Conservative-led Coalition Government had announced a full scale review of the PSED in 2016.

**Finding 3: The RED, the DED and the PSED as positive equality duties**

The regime, established by the Home Office for the RED in 2001, incorporated components of what would be needed to create a positive equality duty. Elements included provisions in primary legislation, supporting statutory regulations, a statutory code and regulatory and enforcement powers for the equality commissions. However, evaluations of the Northern Ireland section 75 duty and the DED, suggest that the RED’s

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278 The RED and the associated SEDs came into force between 2000 and 2002.
framework suffered from a number of important deficiencies. At the level of the general RED, the deficiencies were: a lack of clarity about what type of change or difference the RED was supposed to make; an undue focus on process rather than outcomes; a lack of focus on institutional racism; and the need for more proactive measures to be incorporated in the general RED. At the level of the specific equality duties, the SEDs for Scotland and Wales, and to some extent the SEDs that supported the DED, demonstrated that more comprehensive SEDs could better support a proactive general duty. At the level of statutory codes, the DED Code provided an example that combined outcomes, process, engagement, involvement and accountability measures. Furthermore, the general DED, the associated SEDs and the DED Code all drew on the social model of disability, implicitly or explicitly.

The transition from the general RED and DED to the general PSED held much promise. The general PSED was more outcome-focused, designed to promote change and incorporated requirements about the need to address the needs of different groups and address group disadvantage. It had the potential to draw on the 2010 Act’s augmented positive action provisions. However, the promise of the general PSED was constrained by limited SEDs and the absence of a PSED statutory Code. The confusion around whether the PSED would survive a series of government reviews further undermined its potential for promoting proactive change. Of the three duties, looking at each duty in the round, the DED came the closest to providing a comprehensive positive equality duty. Yet the leadership and vision, demonstrated by the DRC – that supported the DED, the associated SEDs and the DED Code, and ensured that the DED regime came into force on the same day – was not demonstrated by the EHRC when the DRC ceased to exist in October 2007.

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279 Section 158 of the Equality Act 2010 allows action to be taken which is to reduce disadvantages, underrepresentation or particular needs where this is ‘a proportionate means of achieving the aim of: (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage, (b) meeting those needs, or (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.’

280 In the round means taking account of the general duty, the associated SEDs, the associated Code or technical guidance and the prevailing enforcement and regulatory regime.
Finding 4: The pseds and the public accountability regimes

The public accountability regime provided by the RED was limited at all levels. There were no specific requirements in relation to public accountability in the general RED, the associated SEDs or the RED Code. By contrast, the DED’s commitments to the ‘social model of disability’ and to the principle of ‘nothing about us without us’ shaped the form and content of the general DED, the associated SEDs and the DED Code; all contained implicit or explicit accountability requirements. With respect to the PSED, whilst the general PSED did not incorporate explicit accountability or public accountability provisions, the due regard provisions set out in section 149(1), (2), (3), (4) and (5) could have been supported by SEDs that incorporated explicit public accountability measures. However despite the significant strengths represented by the construction of the general PSED, the overall PSED regime was undermined by the regressive approach adopted in relation to the PSED regulatory and enforcement regime for England. The two critical factors being the restricted SEDs for England and the absence of a PSED Statutory Code.

Finding 5: The call for legally enforceable pseds

The CRE, DRC, the EHRC and equality campaigners, including leading lawyers, consistently called for legally enforceable pseds which would promote public accountability. Both the CRE and the DRC were clear what legal enforceability required (see chapter 4). However, there have been long-running differences of opinion – about the need for the duties to be legally enforceable and at what point action should be taken to ‘enforce’ any legally enforceable psed – between: on the one hand, the equality commissions, equality campaigners and leading lawyers; and on the other hand, successive governments and government departments.

Finding 6: Cause lawyers, legal empowerment and community activists

For the purposes of this study, a cause lawyer means a lawyer, or legal advocate, who: believes in social justice; that social inequalities should be reduced; believes that the law

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281 As was the case for the SEDs developed for Wales and Scotland.

282 This omission was only partially addressed by the publication of Technical Guidance in January 2013 because: the PSED had come into force in April 2011, almost two years before; and the model of Technical Guidance was new.
has a legitimate role to play in reducing social injustice and inequalities; and deploys their legal skills to achieve these social objectives. Scheingold argued that cause lawyers can play significant roles in advancing social justice by taking on legal cases, facilitating legal empowerment and supporting social justice campaigns. The evidence, from this study, is that cause lawyers have played major roles in: the substantive race and disability psed judgments examined; psed related legal empowerment activities; and in social justice campaigns associated with the pseds. In the 1960s, 1970s, 1980s, 1990s and in the 2010s, cause lawyers, the CRE, DRC and campaigners committed to equality and social justice played pivotal roles in the development of race and disability equality legislation and the pseds.

The majority of legal firms, chambers and lawyers who most frequently represented psed claimants, the EHRC and/or VCO third party interveners met all or most of the five criteria used to define cause lawyers. The average ‘success rate’ for claimants in substantive race and disability psed cases examined was 33%; this was below, but not significantly below, the 40% ‘success rate’ identified as the norm for such claims by the Government. It should however be noted that the pattern of success appears to depend on whether or not a claimant was able to secure representation from the firms of solicitors, chambers or barristers or the Public Law Project who were particularly expert in the pseds. The claimant success rate for firms of solicitors, chambers, barristers and the Public Law Project, who appeared most frequently on behalf of claimants and often could be classed as cause lawyers, was often higher, sometimes much higher, than the average

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283 A cause lawyer does not mean a lawyer who is seeking to misuse their legal position or skills to secure an undue or unfair advantage for their client.
284 Geoffrey Bindman QC, Fred Willey, Professor Sir Bob Hepple QC, Lord Anthony Lester QC and Keith Vaz MP are, or were, all lawyers; each played important roles in shaping the UK’s race relations legislation often working in partnership with race equality campaigners. These lawyers also played important roles in shaping the RED and/or the infrastructure provided by Race Relations legislation. Hepple’s and Lester’s roles in relation to influencing and shaping the UK’s race relations legislation and the pseds ran from the 1960s to 2000 and 2010. In relation to disability equality legislation, disabled peoples organisations (DPOs) and disability equality campaigners were pivotal in securing the DDA 1995, the Disability Rights Commission Act 1999, the DDA 2005, the DED and the disability SEDs.
285 The cause lawyer criteria were whether they have: i) espoused a commitment to the advancement of equality and/or human rights; ii) used the law to advance social justice; iii) sought to publicise how the duties may be successfully deployed; iv) sought to promote legal empowerment; v) engaged in wider activities to advance social justice and/or contributed to social or political mobilisation.
286 The term ‘success rate’ is used in this context to identify the percentage of claimants who succeeded in their claims; it has no meaning beyond this.
33% or the 40% norm, identified by the Government, for general JR claims determined at a full hearing (see appendix 6). It was beyond the scope of this study to examine the reasons for this so further research is recommended.  

**Finding 7: Outcomes for claimants in substantive race and disability psed claims**

Although the JR regime is clearly very complex, a steady flow of important cases was adjudicated by the courts between 2003 and 2014. Claimants succeeded in 33% (45) of their substantive race or disability JR claims. Nevertheless, these psed claimants had a one in three chance of success, which was 8 to 10 times higher than the annual success rate of 3% to 4% experienced by people who brought individual race or disability discrimination claims before employment tribunals (ET) between 2001 to 2013. Moreover, the judgments in which claimants succeeded had the potential to benefit significant numbers of people, in addition to the claimant(s) represented in court, who fell into the same class or group as the claimants. The judgments issued also covered a wide range of issues and territory. The JR regime and the pseds have been used successfully to challenge institutional discrimination and seek to secure substantive equality aims in the RED, DED and PSED (see chapter 5). In addition to those who might benefit because of a more inclusive rule change, such judgments could also be used to encourage other decision makers to take the PSED more seriously.

**Finding 8: The possible impact of restrictions on judicial review (JR)**

The success of the pseds as legal tools is intimately tied up with the effectiveness of the JR regime as a vehicle for challenging the acts or omissions of public bodies, and others. The changes to the JR regime, incorporated in the Criminal Justice and Courts Act 2015, run the risk of introducing more uncertainty for claimants, third party interveners and their legal representatives. Greater judicial discretion in the JR regime may reduce consistency and equal access to justice. The changes appear to disadvantage potential claimants and third party representatives whilst not presenting the same challenges for

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287 Potential issues for further research: Are cause lawyers more likely to recognise arguable elements of a psed case? Are cause lawyers more likely to be willing to work with the client to find a way to take the case? Do cause lawyers bring particular expertise to psed cases?

288 On average 40% of those whose JR claim was decided at a full hearing in 2012 succeeded in their claim (see chapter 6 and chapter 7).
public bodies subject the PSED. They run the risk of undermining the ability of individuals, third parties and organisations to challenge public bodies subject to the PSED. In short, the provisions in the 2015 Act have the potential to completely undermine the previous JR regime. The proposals of particular concern include: making claimants and third party interveners pay more; limiting cost capping provisions for claimants; and introducing more risks in relation to JR. The proposals on leapfrogging cases to the Supreme Court, by-passing the Court of Appeal (sections 63 & 63), wasted costs orders (section 67) and the requirement to withhold relief if a substantially different outcome is not envisaged for a claimant, if there is no ‘exceptional public interest’ defence (section 84) present problems for claimants, their lawyers and the public interest more broadly. These provisions also strike at the rule of law. Much will depend on whether the proposed changes are implemented in full, whether the leapfrogging provisions will apply to PSED JR claims and whether there are successful legal challenges and/or other ways are found to reduce the effects of the changes.

Finding 9: The importance of the equalities infrastructure

In 2012, the Government took the decision that the EHRC would not issue any further statutory codes of practice. Although the general PSED was much stronger than the previous general RED or DED, key elements of the supporting legislative and civil framework, deemed crucial by the Home Office, CRE and others, were dismantled by the Government between 2011 and 2013. Although, in January 2013, the EHRC published technical guidance, to support the PSED, it was issued more than eighteen months after the PSED had come into force.

Equality campaigners contend that an effective and strong equalities infra-structure requires comprehensive equality legislation, good access to justice for victims of discrimination and dissuasive sanctions for violations of the law. It also requires an independent and effective statutory equality body responsible for enforcing the law, raising awareness of individuals’ rights and promoting a culture of compliance. The final component is ‘a strong civil society, capable of advocating on behalf of those most likely to suffer disadvantage or experience unequal treatment and which is given a voice in decision-making that affects those groups’ (TUC, 2012: 12).
The two research questions
Two research questions were set. The first was: Have the race and disability equality duties been effective positive legal duties and legal public accountability tools? The second was: Does Scheingold’s theory of the Politics of Rights add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality? The answers to these research questions draw on the findings set out in this chapter and the evaluative criteria developed (see chapter 3).

RQ 1: Have the race and disability equality duties been effective positive legal duties and legal public accountability tools?

Evaluating whether the psed were positive legal duties
The framework for evaluating the pseds as positive legal duties builds on the work of O’Cinneide, Fredman, Hepple and Scheingold. Ten evaluative criteria have been used to examine whether the duties have: i) been proactive; ii) been sustainable; iii) been effective; iv) been focused on outcomes rather than process; v) been implemented in a manner credible to public, private and the wider community sectors; vi) avoided excessive bureaucratic load; vii) supported by an effective enforcement mechanism; viii) avoided creating an hierarchy of inequalities; ix) provided, or been accompanied by, effective participation rights; and x) been considered to be transformative.

Each of the pseds required that public bodies be proactive in considering how to tackle discrimination and advance equality. However, the framing of the pseds, as duties of ‘due regard’ rather than requirements to achieve the stated equality aims or specific equality objectives, presented an important constraint. The ability of the pseds to promote a proactive response by bodies was undermined by way in which the RED and PSED were introduced; in each case, the psed regimes were introduced in a piecemeal manner which was not particularly credible and was inefficient (see chapter 5). In the case of the PSED, two actions undermined calls for public bodies to address the PSED: first, the Coalition Government almost immediately announcing that the PSED would be reviewed; and second, a negative approach was taken by the public sector focused Review Team. Until the PSED, the fact that the RED and DED focused on a specific protected characteristic
had the inherent potential to create hierarchies of oppression. None of the pseds avoided the danger of creating a bureaucratic load. However the assessment of whether the systems required to advance equality were unnecessarily burdensome is often in the eye of the beholder. The CRE, DRC and EHRC were given extensive enforcement tools. However, soon after the DED came into force, the DRC ceased to exist and the EHRC’s funding has been cut year on year since 2010. Whilst promoting the effective participation of disabled people in the development of the DED was central to the disability SEDs, the introduction of light touch SEDs, for England to support the PSED, ignored this important approach.

The 136 substantive race and disability cases examined, and the outcomes for claimants suggests that the RED, DED and PSED have served as effective legal tools for those who have been able to secure a substantive JR hearing (see appendices 6 & 8). The pseds have changed the legislative arenas and have been important. However their capacity to be transformative has been constrained by the limitations set out above. Of the three regimes, the DED regime was the strongest and best implemented. The PSED regime had the potential to be as strong, if not stronger, but it was let down by inadequate SEDs for England, poor implementation and negative messages from the Coalition Government, before it even came into force in April 2011 (see chapters 4 & 5).

**The pseds as legal public accountability tools**

The examination of the pseds as legal public accountability tools draws on the work of Bovens and Scott and has three evaluative criteria. These have been used to examine whether the duties: i) specified ‘who is accountable, to whom, for what, by which standards, and why; ii) satisfied Bovens’ seven conditions for an accountability relationship to exist; and iii) served as effective legal accountability mechanisms. Legal

289 Only the PSED covers eight of the nine protected characteristics set out in the Equality Act 2010.
290 33% of the claimants succeeded, which is around ten times higher than the 3% or 4% of claimants who succeeded in race or disability discrimination claims that went to a full hearing (see chapters 6 and 7 and appendices 6 & 7).
291 The seven conditions are: there is a relationship between an actor and a forum; second, an obligation is placed on the actor; third and fourth, there is an obligation to ‘explain and justify’ the conduct; fifth, the forum has the ability to pose questions and there is the possibility for debating judgements rather than ‘a monologue without engagement’ (Bovens, 2007: 185, 2005: 9); and sixth and seventh, the forum can pass judgement and the actor can be sanctioned.
accountability is deemed to operate where: public managers can be ‘summoned by courts to account for their own acts or on behalf of the agency as a whole’; and specific responsibilities have been formally or legally placed on authorities (Bovens, 2007: 187-188).

In terms of accountability standards, the statutory codes of practice produced by the CRE, DRC and EHRC went some way towards setting accountability standards. These ‘standards’ have been augmented by the principles set by the courts (see chapter 6). With respect to the pseds as legal accountability tools, the RED, DED and PSED were all legal accountability tools. The pseds placed duties on public bodies and it has been possible for claimants to demonstrate in court that public bodies have, or have not, complied with the duties. The main constraints in this regard are the fact that: making a legal challenge is not for the faint hearted; and JR is a very complex and difficult area of law to traverse. There are also important access to justice limitations.292 In relation to Bovens’ seven conditions for an accountability relationship to exist, the DED framework with its focus on the centrality of disabled people and the requirement that they be ‘involved’, not just consulted about the development of the DED, most closely satisfied the seven requirements. If the SEDs for England, that supported the PSED, had echoed the SEDs for Scotland and Wales, then the PSED regime for England would have satisfied most of Bovens’ seven criteria. Nevertheless, the light touch approach developed for the PSED’s SEDs and the old RED regime did not satisfy Bovens’ requirements.

With respect to whether the CRE, DRC and EHRC, as regulatory and enforcement bodies, were given sufficient powers and effective tools to hold public bodies to account, and whether they used these tools. All three bodies were given enforcement powers, however the CRE decided against using these powers between 2001 and 2004. When it did seek to move into a more robust legal enforcement approach, it met resistance from its own sponsor department and from government departments subject to the duties (see chapter 5). The DRC developed a more proactive approach to legal enforcement but

292 Key problems include the costs of JR, lack of eligibility for legal aid, limited access to Protective Costs Orders (PCOs), discretionary rationing by the courts, technical jargon, difficulty securing advice and the uneven geographical distribution of access to specialist legal advice including a London centric approach (see chapter 7).
had limited time to put this strategy into effect. The EHRC, adopted an enforcement approach more akin to the CRE’s softly, softly approach but it did actively use its powers to be a third party intervener in psed JR claims (see appendices 6 and 8).

The answer is again somewhat mixed with respect to whether individuals and others – interest groups, third parties and other societal stakeholders – were: given effective tools to hold public bodies to account in relation to the pseds; and were able to use the pseds as legal tools to hold public bodies to account. No claimant successfully used the RED until 2005 to challenge an RED breach (see appendix 8, case 2). Having carefully reviewed 136 substantive race and disability psed judgments, it is clear that – without the activities of cause lawyers, individual claimants and community activism – most claimants would have found it much more difficult to use the pseds to hold public bodies to account. This finding is directly related to Scheingold’s theories of the Myth of Rights and the Politics of Rights.

RQ 2: Do Scheingold’s theories add to our understanding of the constraints on the potential impact of positive legal duties in advancing equality?

Scheingold’s two theories do add to our understanding of the race and disability pseds and their ability to serve as positive legal duties and advance equality. The evidence supports Scheingold’s theories that a combination of race and disability psed legal action, psed related legal empowerment, community activism and political or social mobilisation using the pseds and campaigns – involving cause lawyers, community representatives and communities – can, and have been, successfully deployed to challenge institutional race and disability discrimination and advance substantive race and disability equality (see chapter 7). Furthermore, the case studies on campaigns, presented in chapter 7, support Scheingold’s contention that the combined impact of a social justice campaign, clear strategic objectives for the campaign and a positive legal judgment may be the best means of securing social justice objectives (see finding 6).

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293 The second question was whether Scheingold’s theory of the Politics of Rights added to our understanding of the constraints on the potential impact of positive legal duties in advancing equality.
Recommendation 1: How should the general PSED and the SEDs be strengthened?

The most effective ways to strengthen the PSED would be: i) to review the SEDs for England, Scotland and Wales and examine they could be improved; and ii) for the Government to make a public commitment to advancing equality and ensuring that there is an effective PSED regime in place. The second recommendation is unlikely to be adopted in the current political climate. However, the EHRC and VCOs could undertake work in advance of the Government’s planned review of the PSED in 2016, to ensure there is a strong evidence base for the planned review.

Recommendation 2: The broader regulatory and enforcement frameworks

The EHRC is the central enforcement agency. However, its funding is likely to be cut further over the next five years. Given these constraints, the EHRC should seek to commission innovative programmes that are designed to: i) promote and share best practice with respect to the PSED; and ii) assist public bodies encountering problems with solutions.

Recommendation 3: Legal empowerment, community activism and cause lawyering

i) Options that might increase successful outcomes for claimants should be identified. Consideration should be given to expanding the work of those organisations that have evidenced success in relation to psed legal cases (see appendix 6); and initiatives that have the potential to extend or replicate this success. ii) The Public Law Project’s (PLP) legal empowerment programmes, ROTA’s Equality Law Project, the DDPOLN’s legal empowerment activities and other legal empowerment programmes should be mapped across England. iii) A framework should be developed, in partnership with PLP, to assess the effectiveness of these legal empowerment programmes and whether these, or other, initiatives could be expanded and replicated to achieve better coverage across England. iv) Leading proponents of legal empowerment should be brought together to examine how best to support legal empowerment, community activism and cause lawyers.
**Recommendation 4:** The PSED review and future research?

There are a number of steps that should be taken in relation to any new review of the PSED. i) The membership of any new Steering Group should include representatives from equality and diversity groups. ii) As the Steering Group will need to be manageable in size, an organisation such as the Equality and Diversity Forum (EDF) should be asked to propose three members of the Steering Group and provide secretariat services to those people. iii) Alternatively, if the Government is unwilling to have community representatives, then VCOs and others should consider whether to run a shadow review in order to feed into the Government’s review. iv) The terms of reference for the review should be the subject of consultation with the EHRC and with equality and diversity organisations.

**Recommendation 5:** The Role of the EHRC and third party interventions

The EHRC has focused on using its role as a third party intervener in relation to enforcing the RED, DED and PSED. However, there is a danger that the changes to the JR regime, in relation to third party interventions, may impact particularly adversely on the EHRC because it has played such a significant role as a third party intervener in psed claims. It will be essential for the EHRC to assess whether the potential negative impact of changes incorporated in the Criminal Justice and Courts Act 2015 can be reduced for the EHRC, potential PSED claimants, other third party interveners and interested parties.
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