

Additional Submission from HEAR Equality and Human Rights Network on Matter 2 (M2) Greater London Authority's Equality Impact Assessments (EqIA) on the new London Plan (NLP)

HEAR and its members are grateful to the Inspectors for requesting publication of individual assessments and necessary supporting data. We also appreciate the efforts made by the Panel and EiP Secretary to ensure reasonable adjustments were made to enable access. HEAR Equality and Human Rights Network, 800+ VCS organisations working on equality and human rights in London, cover all protected characteristics and are an expert voices on pan-equality and intersectionality.

This submission considers:

- The draft London Plan (GLA, August 2018)
- GLA London Plan IIA (Arup, (Nov 2017)
- Post-consultation addendum report (Arup, 31 July 2018)
- GLA M2 Equality of Opportunity written submission (Author, date unknown)
- London Plan IIA Consultation Document (Arup, Nov 2017)
- IIA Supplementary Equality Impact Assessment Information (Arup, 21 Jan 2019)
- “GLA... published detailed matrices of the Equality Impact Assessment (EqIA) relating to the final policies” (Author, date unknown), *cited as ‘detailed matrices’*
- Integrated Impact Assessment Scoping Report (Mayor of London, Feb 2017)
- Summary of Consultation Responses (Mayor of London, Nov 2017)
- A City for All Londoners: Consultation report (Mayor of London, July 2017)

Matter 2 :Equality of Opportunity

Does the Integrated Impact Assessment and Addendum Report (NLP/CD/04 & 05) indicate that the Plan will help to advance equality of opportunity between people who share a “protected characteristic” as defined in the Equality Act 2010 and those that do not share it and further the other two aims of the Act?

In particular, which policies of the Plan will achieve this?

This submission does not “make representations about the Plan as such” (The London Plan Examination in Public 2018-2019, Panel Note 5, Nov 2018) rather provides examples to support the Inspectors. Examples are illustrative, not exhaustive.

Re: part two of M2, elucidating which policies will achieve advancement of equality (or more significantly which might exacerbate or further embedded discrimination, victimisation, health inequalities etc.) is the exact purpose of completing EqIA.

Public Sector Equality Duty(PSED) requires public bodies to have due regard to the need to achieve goals, “not a duty to achieve a result” (R(Baker)v Sec. of State for Communities and Local Government [2008] EWCA Civ 14;[2008] LGR 239 per Dyson LJ at § 31)

Completing EqIAs enables decision makers to consider impacts on different groups, cumulative impacts and how to mitigate them.

HEAR's submission considers whether the methodology and procedures for NLP plan-making, as presented in these documents and at the EiP, indicates the GLA having due regard to their equality duties.

The Equality Act (2010)

Section 149 of the Equality Act states that equalities considerations apply *to plan-making, consultation and all aspects of plan preparation*. The duty *applies to all the Mayor's functions, not just to the plan-making and EqIA but to each of the decisions which informed the preparation and testing of the plan*.

Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345; [2014] EqLR 60 at § 26 McCombe LJ summarised the principles to be derived from the authorities on section 14. The Bracking summary (and case law more generally including summary approved by the Supreme Court in R (Hotak) v London Borough of Southwark [2015] UKSC 30; [2016] AC 811 per Lord Neuberger at § 73)) as applicable to the work of the inspectors in the EiP is as follows:

- i. *PSED is "not a duty to achieve a result", but to have due regard to the need to achieve the goals identified in section 149(1) of the EA 2010 (R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141; [2008] LGR 239 per Dyson LJ at § 31)*
- ii. *The equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation (Bracking at § 28(1) and § 60; R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293; [2006] 1 WLR 3213 per Arden LJ at § 274)*
- iii. *It is not sufficient for the decision-maker to have a vague awareness of their legal duties, instead they must have a focused awareness of each of the section 149 duties and their potential impact on the groups (R (MA) v Secretary of State for Work and Pensions [2014] EWCA Civ 13; [2014] PTSR 584 (per Dyson MR at § 91) (which passage was approved by the Supreme Court in R (Carmichael and Rourke) v Secretary of State for Work and Pensions [2016] UKSC 58; [2016] 1 WLR 1550 (per Lord Toulson at § 68))*
- iv. *The duty must be fulfilled before and at the time when a particular policy is being considered, and not as a "rear-guard action" following a concluded decision (Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) per Moses LJ, sitting as a Judge of the Administrative Court at § 23-24).*
- v. *The PSED involves a duty of inquiry, a public authority must be properly informed before taking a decision. If the relevant material is not available, there is a duty to acquire it, frequently through consultation with relevant groups (Bracking at § 28(8); and R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) per Elias LJ at § 89-90)*
- vi. *When there are large numbers of vulnerable people, very many of whom fall within one or more of the protected groups, the due regard necessary to discharge the duty is "very high" (R (Hajrula) v London Councils [2011] EWHC448 (Admin), the High Court held (at § 62))*

IIA /'detailed matrices' inadequate assessment of impacts on protected characteristics

The IIA does not consider the particular impacts on persons with protected characteristics. Neither 'detailed matrices' nor IIA note positive or negative impacts on protected characteristics, despite containing a key to assess impact on every page (++ (Significant positive)...O (Neutral), - (Minor negative...))

In the IIA equality is treated 'generically' (if at all). In the 'detailed matrices' the impacts on protected characteristics are noted as 'Y' or 'N' under 'Receptors and/or affected groups'. The narrative summary in the neighbouring column summarises against overall objectives of the NLP (not narrative of the impact on protective characteristics, plans to mitigate negative impacts, research, references)

The IIA, addendum and 'detailed matrices' are incomplete with many gaps in cells; matrices where there are question marks (and colour coded 'unknown'), some 'impacts' are rated N/A (Not Applicable) and some cells are 'greyed out' with no explanation as to why GLA/Arup decided their statutory duties did not apply.

As above PSED involves a duty of inquiry, public authorities must be properly informed before taking a decision, acquiring material about and from relevant groups, particularly when this duty is "very high" due to large numbers of vulnerable people (as in London's communities of protected characteristics)

Matrices do not reflect narrative appraisals

The narrative appraisal of impacts on equality streams is not reflected in some matrices in IIA or 'detailed matrices'.

Policy GG1 'Building strong and inclusive communities' option 1 (Infra-structure led) in both IIA and 'detailed matrices' narratives describe negative impacts on disabled people and those with higher needs for affordable accommodation. In the IIA, however the EqIA are marked +, ?/+ or n/a in all but one cell of the matrix, whilst in the 'Receptors and/or affected groups column' in the 'detailed matrices' all protected characteristics and low income are given a 'Y' (except a few LGBT marked 'N' -Failure to find evidence for details) contradicting the evidence in the neighbouring column.

In option 3 for GG1, 'Participation and citizen-led' the appraisals describe benefits to diversity, engagement of 'hard to reach' groups, inclusivity, community cohesion etc., however *the matrices are similar to that of option 1*. One noticeable difference is this approach being marked as having no impact on "maintaining and strengthening London's position as a leading... global city and... support a strong, diverse and resilient economic economy structure providing opportunities for all" *despite the narrative* (this is notable as one of the very few 'neutral' impacts noted in the entire IIA)

These two options for GG1 will have cumulative impacts on protected characteristics, potentially opposing cumulative impacts. The 'Potential cumulative effects' column in the 'detailed matrices' document is, however, either empty or N/A throughout (apart from a handful that include a pasted statement about links to other policies or strategies).

Equalities impacts not analysed rigorously as required (R (Carmichael and Rourke)

Policy H10 prior to consultation did not refer to any negative impacts. Following consultation, in response to Just Space submission, the IIA addendum noted "potential to fragment community networks" "reduce the security of residents" and to "cause disruption to families and communities" generally to communities (p:59, addendum). Due regard, however was not taken, to consider the particular impacts on protected groups despite evidence in case law (R (oao Buckley) v Bath and North East Somerset [2018] EWHC 1551 (Admin)) and research (e.g. older and disabled people, BAMER and disproportionately likely to live in housing which will be the subject of these policies).

Policy H12 proposes housing sizes from one to two bedrooms to family homes and Boroughs not set policies or guidance that requires set proportions of different sized units. Trust for London in their submission evidence BAMER and faith communities (e.g. Somali community, ultra-Orthodox Jewish community) are more likely to have large families and are therefore impacted by current and future scarcity of family size homes. The IIA and 'detailed matrices' do not reflect these intersectional realities.

The IIA and 'detailed matrices' do not contain sufficient information to take due regard in a rigorous manner. There is no mention in the IIA (matrix or narrative assessment) of equalities impacts and in the 'detailed matrices' there is a 'Y' against race and religion, with no mention of the above evidence in the summary or cumulative column.

Failure to find or accept evidence

As above within PSED is a duty to find out about impacts on equalities if the evidence is not known. Inclusion London and others (consultation submissions) specifically raised the lack of detailed EqlA so Arup/ GLA had experts highlighting the lack of evidence and due regard by March 2018 at the latest. Responses (pp:2,8,12, addendum) demonstrate consultants' lack of understanding of statutory equality duties.

It appears from narratives and matrices that consultants have substituted protected characteristics for 'low income' for many considerations. HEAR welcomes the inclusion of poverty alongside the protected characteristics. It cannot be assumed, however, that policies designed to work for those with low income will have positive impacts on 'protected characteristics'. Instead 'generic' options, where due regard has not been taken, could instead unwittingly repeat discriminatory practices.

One example of consultant substituting 'low income' rather than considering appropriate evidence is in relation to LGBT Londoners. In the 'detailed matrices' LGBT people were considered as not benefiting from policies that impact on those with low income, however in London "research highlight[s]... LGBT people[do]... not [have] the profile typically associated with financial hardship or low-income (e.g. high level of respondents in poverty having received Higher Education)" (p:10, "Still Out There: An Exploration of LGBT Londoners un-met need", LGBT Consortium and Angela Ruskin University, 2016)

It is a concern that Arup/GLA state wanting to "support the interpretation of the assessment tables by providing clarity on how the published EqlA assessment scores were derived" (p: Arup, 21 Jan 2019) but provide incomplete matrices, no references, research, details of consultation events or expert equality engagement.

Failure to reflect and follow the evidence

The 'detailed matrices documents contain no date, author, contents or page numbers, however, in these papers the preferred option is arranged ahead of the proposed options. PSED must be fulfilled before and whilst a particular policy is being considered so the lack of schedule, publication dates and this order of preferred/options could be seen to indicate that the 'details matrices' did not lead to the selection of preferred options with due regard to equalities impacts and planned mitigations.

Generally the preferred options are a combination of the proposed (usually 3) options. The impact matrices of the preferred rarely reflect a combination of the cells of proposed options. There is no indication as to split/weight of investment/ratio between the proposed options within the preferred option or reasoning and impacts for the preferred option.

Stonewall housing, an LGBT+ housing organisation, raised the fact that the policies did not consider LGBT housing needs. GLA/Arup's response is that LGBT people are referenced in policies HC5 and HC7, 'cultural provision' (p:8, addendum); evidence of negative impact on a protected characteristic did not precipitate due regard but rather a response that could be seen as discriminatory unconscious bias.

A large number of written consultations were submitted to the GLA NLP that should have been used to enable statutory bodies to show due regard. At a quick glance 50+ submissions from organisations working on equality were received, however, in the 'Summary of Consultation Responses' contains only one mention of equality in one submission (p:11, document produced in Nov 2017 despite the draft NLP and IIA being published that month and the consultation running until March 2018). The GLA does not answer the concern in

that that document.

Future monitoring and retroactive amendments

Responses that the NLP is a strategic or 'high level' plan or that detail on equalities impacts will be collected during future monitoring or at a Borough-level are untenable. EqlA cannot be produced after a decision has been made or retroactively amended. That is because the purpose of the EqlA is to *fulfil the duty before and at the time when a particular draft is being considered* (see *Kaur & Shah v LB Ealing* above)

Comments about technical language or complex issues say more about unconscious bias and structural discrimination than about Londoners from 'protected characteristics' ability to understand planning documents or human rights law.

Consultation and Equalities

Consultation and engagement were covered in Matter 6 (M6) of the EiP. HEAR, however, would encourage Inspectors to consider M2 in light of M6 as the PSED requires public bodies to be properly informed before taking a decision, which in turn gives rise to a duty of inquiry (R (Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 McCombe LJ at [25]). One of the best ways that to gather evidence is to consult and engage with those with expertise. Even without the requirement to find evidence the Mayor is has statutory duties to consult and engage. Concerns about timings, accessible information, digital by default exclusions, engagement events are well documented, but as an example the time given for consultation (by GLA own dates) on the draft NLP and 400+ pages of the IIA was from 1st Dec 2017 - 2nd March 2018, 91 days over the Christmas period.

The fact that the Mayor has generally consulted on the draft NLP does not discharge his duty of inquiry specifically in respect of discharging the PSED. As above there are no references to consultation on specific equalities issues with expert VCS in a position to provide such evidence or indeed generally since the draft NLP considered for the EiP.

The lack of a clear schedule of publications, time given for consultation, accessible versions of the NLP/IIA ('reasonable adjustments' are an anticipatory statutory duty), or paperwork in community languages, and the Inspectors having to request EqlA, adds to concerns that the GLA and their consultants are unable to demonstrate having due regard.

Conclusion

Due to the concerns outlined above relating to process, procedure, and application of their own methodology/keys etc., HEAR cannot say that the Integrated Impact Assessment, Addendum Report or 'detailed matrices' indicate that there has been due regard taken in relation to impacts on protected characteristics.

There is little information in the incomplete 'detailed matrices' or IIA that could assist the decision maker about the equalities impacts of the policy options in the plan, and it is not clear that matrices have been completed or could have influenced the decisions made.

Instead the planning process of the NLP demonstrate that understanding of statutory equality duties is not yet sufficiently embedded within City Hall or its consultants Arup.

The Mayor, the Panel and the Secretary of State need to take into account equalities impacts prior to adopting the plan. PSED does not limit decision-makers, but enable them, whether the Mayor, the Panel or the Secretary of State, to know what the equalities impacts of policy are and plan to mitigate and negative impacts.

Appendix Main Principles of the case law on PSED summarised in para 26 of the judgment in *Bracking v SSWP*:

(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77-78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89-90]

"[89] It is also alleged that the **PSED** in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]):

'....the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'

[90] I respectfully agree....."

Additional link to the Equality and Human Right Commission

https://www.equalityhumanrights.com/sites/default/files/technical_guidance_on_the_psed_england.pdf