

## Public Sector Equality Duty and key implications of the Act for Public Authorities

Mungo Bovey QC

1. Section 149 of the Equality Act 2010<sup>1</sup> is in the following terms:

### 149 Public sector equality duty

(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.

(2) 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).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to 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

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public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) tackle prejudice, and
- (b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

- (a) a breach of an equality clause or rule;
- (b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect.

2. This section came into effect on 5th April 2011<sup>2</sup>. The exceptions in schedule 18 relate to the fields of education, immigration, judicial work, Section 149(2) does not apply to the Parliaments of Scotland Wales or the UK or the secret services in relation to the works of the parliaments.
3. As with much of the rest of the Act, the provision is not entirely new but is a reworking of pre-existing duties under previous legislation.
4. Although the Parliaments of the UK, Scotland and Wales have the power<sup>3</sup> to impose specific duties in addition to those in section 149, on 8 March 2011, the Scottish Parliament's Equal Opportunities Committee voted against introducing the duties proposed to them under this power. The Equality and Human Rights Commission, Scotland has produced interim non-statutory guidance.

### **The pre-existing duties**

5. The pre-existing Public Sector Equality Duties (PSED) are to be found in section 71 of the Race Relations Act 1976 (as amended), section 76A of the Sex Discrimination Act 1975 and section 49A of the Disability

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2 SI 2011/1066

3 Sections 153 to 155

Discrimination Act 1995 (as amended). All three PSEDs require public authorities to give due regard to the need

(i) to eliminate unlawful discrimination and harassment in the respective fields of race, sex and disability;

(ii) to promote equality of opportunity between those with a protected characteristic and others;

in addition the Race and Disabilities Duties include the need

(iii) to promote good race relations; and

(iv) to take steps to take account of disabled people's disabilities even where that involves treating disabled people more favourably than others, and to promote positive attitudes towards disabled people and to encourage participation by them in public life.

6. Because of the similarity of duties, many of the English cases cross-refer between the Acts when interpreting the duties. In some cases, all the duties are considered.

### The duty to have due regard

7. Due regard is...the regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority. ...At the same time, the public authority must also pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider. What the relevant countervailing factors are will depend on the function being exercised and all the circumstances that impinge upon it. Clearly, economic and practical factors will

often be important. Moreover, the weight to be given to the countervailing factors is a matter for the public authority concerned, rather than the court, unless the assessment by the public authority is unreasonable or irrational...<sup>4</sup>

8. ...how, in practice, does the public authority fulfil its duty to have 'due regard' to the identified goals that are set out in section 49A(1)? An examination of the cases to which we<sup>5</sup> were referred suggests that the following general principles can be tentatively put forward.

First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have 'due regard' to the identified goals... an incomplete or erroneous appreciation of the duties will mean that 'due regard' has not been given to them.

Secondly, the 'due regard' duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty.

Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of 'ticking boxes'.

However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have 'due regard' to the needs set out in the section is not determinative of whether the duty under the statute has been

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4 *R(Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) paragraph 82 in the context of Post Office closures

5 *R(Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) paragraph 89 to 96

performed. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non - statutory guidance in all cases where section 49A(1) is in play. 'In that way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced'.

Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non - delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have 'due regard' to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the 'due regard' duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its 'due regard' duty.

Fifthly, (and obviously), the duty is a continuing one.

Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record - keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1).

9. In *R (Meany & Others) v Harlow District Council* [2009] EWHC 559

[\(Admin\)](#) Davis J considered the duty in the context of a decision by a local authority to advertise an invitation to tender for its welfare rights and advice services. At paragraph 72 Davis J said:

'Mr Holbrook submitted that Mr Wolfe either had to show that no regard was had to the statutory criteria or that the decision was irrational. Since Mr Wolfe disclaimed the latter, he was, said Mr Holbrook, left with the former. I do not agree with that submission of Mr Holbrook for two reasons. First, the statutes require that the public body had 'due regard' to the specified matters; and what is 'due' depends on what is proper and appropriate to the circumstances of the case. Therefore, if a challenge is made, the question of due regard requires a review by the court. It is not simply a question of determining whether no regard at all was had to the statutory criteria. Second, if the submission of Mr Holbrook were right it would be contrary to the authorities, which indicate that a tick box approach may not necessarily in any given case give a complete answer. It is true that, as *Baker* and *Brown* make clear, how much weight is to be given to the countervailing factors is a matter for the decision maker. But that does not abrogate the obligation on the decision maker in substance first to have regard to the statutory criteria on discrimination.'

### **Regard for the need to take steps**

10. Paragraph (iv) is different, however. That paragraph places on public authorities a duty to have proper regard for 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 phraseology is convoluted. It does not identify a goal which is an end in itself. However, in our view the paragraph imposes a duty on public authorities to pay 'due regard' to the need *to take steps* to do two things which are means which will assist in achieving the goals identified in the other paragraphs in section 49A(1). First, public authorities must have 'due regard' to the need to take account of the fact of disabled persons' disabilities in the context of 'carrying out their functions'. Secondly, public authorities must have 'due regard' to the need to recognise that this may involve treating disabled persons more favourably than others. But we emphasise that, in both cases, no duty is imposed to take steps themselves, or to achieve results. The duty is only to

have 'due regard to...the need to take...' the two steps we have identified. The court will only interfere if the public authority has acted outwith the scope of any reasonable public authority in the circumstances.

To do both of these things, 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. We emphasise once again, however, that the duty is to have due, ie. proper, regard, to 'the need to take steps'.<sup>6</sup>

11. In contrast, one can cite the more recent dicta of the Court of Appeal in

*Pieretti v London Borough of Enfield*<sup>7</sup>:

For practical purposes, however, I see little difference between a duty to "take due steps to take account" and the duty under s.49(A)(1)(d) to "have due regard to ... the need to take steps to take account". If steps are not taken in circumstances in which it would have been appropriate for them to be taken, i.e. in which they would have been due, I cannot see how the decision-maker can successfully claim to have had due regard to the need to take them<sup>8</sup>.

In my view, therefore, the reviewing officer was in breach of her duty under s.49(A)(1)(d) if she failed to take due steps to take account of a disability on the part of the appellant. In the context of her duty of review under s.202 of the Act of 1996 I would refine the question as follows: did she fail to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled

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6 *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 per Dyson LJ at paragraph 34.

7 [2010] EWCA Civ 1104 (12 October 2010)

8 *Pieretti* paragraph 34

in a sense relevant to [what she had to decide]?

### **Impact assessments**

12. 'Accordingly, we do not accept that either section 49A(1) in general, or section 49A(1)(d) in particular, imposes a statutory duty on public authorities requiring them to carry out a formal Disability Equality Impact Assessment when carrying out their functions. At the most it imposes a duty on a public authority to consider undertaking a DEIA, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability. To paraphrase the words of WB Yeats in *An Irish Airman Foresees his Death*, the public authority must balance all, and bring all to mind before it makes its decision on what it is going to do in carrying out the particular function or policy in question.<sup>9</sup>

### **Cases under the former provisions**

13. In *R (on the application of Luton Borough Council ) v Secretary of State for Education*<sup>10</sup> Holman J upheld a challenge by six education authorities to the decision of the incoming coalition government to scrap a programme called Building Schools for the Future (BSF). The programme aimed over a fifteen year period from 2005 – 2020 to rebuild or refurbish every secondary school in England, of which there are about 3,500. Having

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9 *Brown* at paragraphs 89-96

10 [2011] EWHC 217 (Admin) (11 February 2011) Holman J

found a breach of a legitimate expectation of consultation, Holman J also found a breach of all three equality duties. In doing so, he relied on the lack of any mention of equality impact:

113 Whilst the absence of such references or records is not determinative (as the third and sixth Brown principles make clear), I regret to say that in this case I regard the absence as glaring and very telling. I am simply not satisfied that any regard was had to the relevant duties at all, let alone rigorous regard.

114 The tie-in is, of course, with the lack of consultation. Different claimants have emphasised to me schools of particular disability (special needs), race or gender (single sex schools) relevance in their respective areas. The point is that if only the Secretary of State had consulted with them they would have been able (if they wished) to highlight those special equality considerations to him.

*14. R on the application of Rahman, v Birmingham City Council*<sup>11</sup> was an application for judicial review made by claimants who are users of Legal Entitlement Advice Services (“LEAS”) funded by the defendant Birmingham City Council pursuant to its discretionary powers claimants challenge the decision taken by the defendant's Cabinet on 29 November 2010 to terminate funding for the LEAS. At paragraph 30 Blake J said:

It is now common ground that withdrawal of the services provided by the LEAS to people like the claimants who are disadvantaged because of a combination of age, ethnic

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11 [2011] EWHC 944 (Admin) (31 March 2011) Blake J

origin, language skills and other disabilities creates a prejudicial loss of services.

15. Applying the principles set out in the authorities just mentioned, Blake J accepted the claimant's submission that one of the challenged decisions failed to have due regard to the PSED since it was not in the minds of all the decision makers taking the decision.

16. *Capacity Building Project v City of Edinburgh Council*<sup>12</sup> a similar sort of organisation sought judicial review of a decision of the Council to terminate their lease and dedicate the premises to office space for social workers. Given their client base, they relied on the equality duty under section 71 of the Race Relations Act. Lord Malcolm discerned two decisions: Firstly there is the decision to terminate the petitioners' lease. Secondly there is the decision to use the building for social work department purposes, which is said to conflict with its "dedication" and long standing use as a community centre for Craigmillar and the surrounding area. A decision to terminate the petitioners' lease does not necessarily lead to abandonment, in whole or in part, of the community centre function of the building. Furthermore, in my view any flaw in the decision-making process on one aspect does not necessarily impact upon the legality of the other. One part of the decision relates to the private relationships between the parties; the other potentially to wider issues as to the public interest in the use of the building in the future and the

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12 [2011] Scot CS CSOH\_58 25 March 2011

respondents' obligations when making a decision on that aspect.<sup>13</sup>

17. Only the SDA provision of the old law defines “functions” to mean “functions of a public nature” - a limitation that underpins Lord Malcolm's decision in *Capacity Building Project*. It is not self-evident that in the absence of specific restriction, the fact that the duty applies only to public bodies restricts it to functions of a public nature.

18. In *Barnsley Metropolitan Borough Council v Norton & Ors*<sup>14</sup> the issue related to the recovery of possession of a caretaker's house occupied by the former employee and his disabled daughter, Sam.

19. There is no issue, at this stage, that the Council is entitled to possession of the house. The appeal does not put forward any private or property law defence to the claim. Rather it amounts to a public law challenge to the decision to bring and continue the proceedings<sup>15</sup>.

20. In terms, section [49A] is entirely general. It applies to the carrying out of any function of any public authority. On the other hand, it does not necessarily follow that whenever a public authority is considering or exercising any function, whatever it may be and in whatever circumstances, it must give conscious thought to how it might affect a disabled person. It is not necessary for us to decide what is the scope of the circumstances in which the duty would come into play. In the

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13 Paragraph 26

14 [2011] EWCA Civ 834 21 July 2011

15 Lloyd LJ paragraph 1

present case it would have been obvious to any person considering whether or not to start possession proceedings ... that if a possession order were obtained as a result of those proceedings, Sam's way of life and wellbeing might be substantially affected by the outcome<sup>16</sup>.

21. Lord Malcolm rejected the criticism of the termination of the lease but he

found the decision to change its use flawed at common law:... little, if any, thought and consideration was given to the question of whether, and especially given its history, the building should remain as a community centre...<sup>17</sup>

22. To do that he had to hold ...contrary to the submission [for the council], I am

prepared to proceed upon the basis that the petitioners have both title and interest to raise the wider public law issues, either on their own behalf or as representatives of the community.<sup>18</sup>

23. As regards the equality duty, I consider it unnecessary to reach a concluded

view on the submissions based upon section 71 of the 1976 Act. As [counsel for the petitioners] readily accepted, in reality they are but part of his wider common law case. However, I entertain considerable doubts as to whether the decision facing the council in 2008 truly engaged the duties under section 71. If it did, it was only on an extended definition of the scope of those duties, which could equally be expressed as a duty to have regard to material considerations, namely the implications and consequences of the loss of the building as a community centre. I have dealt with that issue above, and in these circumstances a full discussion of the Act and of the English cases on section 71 would be academic

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16 Lloyd LJ paragraph 15

17 Paragraph 30

18 Paragraph 34

and superfluous.

## Remedies

24. In *Norton*, the Court of Appeal found that the housing authority had failed to address the duty under section 49A DDA at any stage. But it did not follow that the possession order appealed against was set aside:

What is needed is for the Council to give proper consideration to the factors which are relevant under section 49A (1)(d), above all to the need for suitable accommodation to be found for Sam, her parents and her baby. We were told that an application has now been made for assistance under Part 7, though only as recently as the week before the hearing of the appeal. In practical terms the Council will have to offer reasonably suitable alternative accommodation to the Norton family, and the Norton family must accept that it will have to move when suitable alternative accommodation is made available. One side-effect of the relatively active debate between Counsel and the court in the course of the hearing was that it will have become clear that what is needed is that both sides should address, in a collaborative way, the need for suitable alternative accommodation to be made available, sooner rather than later. As mentioned earlier, the Council can decide whether, and if so when, the possession order is to be enforced, and its decision in that respect is also one in taking which it is under the section 49A(1)(d) duty, or rather, now, the equivalent duty under the Equality Act, section 149<sup>19</sup>.

## **The new duties**

25.... section 49A of the Disability Discrimination Act 1995 ...a section which ... will

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19 Lloyd LJ paragraph 34

be replaced in stronger and wider terms by s.149 of the Equality Act 2010<sup>20</sup>

26. The most obvious element of the change is the extension to groups not covered or not expressly covered by the previous legislation in line with the general scheme of the Act. Notable omissions are marriage and civil partnership.

27. The new provision refers to the need to advance equality of opportunity whereas the previous duty was in relation to the need to promote it. The Shorter Oxford English Dictionary defines both words to mean “move forward” and each definition uses the other word at some stage. It is difficult to see what difference the change will make.

28. In *Capacity Building Project* Lord Malcolm<sup>21</sup> expressed sympathy a submission for the Council that the petitioners' argument on the 1976 Act ...did not focus on the question raised by section 71, namely the potential for detriment to equality of opportunity or treatment. In the judgement of Lord Justice Pill in *R (Janet Harris) v London Borough of Haringey*<sup>22</sup>, it was emphasised that the promotion of equality of opportunity and good relations between persons of

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20 *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104 (12 October 2010) Wilson LJ paragraph 1

21 Paragraph 35

22 [2010] EWCA Civ 703

different racial groups (his emphasis) is not the same as the promotion of the interests of a particular racial group or groups. If a local authority closes down a facility which is used by various organisations, including groups representing ethnic minorities, in my view that will not, of itself, mean that section 71 duties are engaged. As was submitted to the court in *Harris* there must be a demonstrable application of the statutory duty to the particular facts. One could approach this by asking whether a policy or proposal could have an adverse impact on equality of opportunity for one or more racial groups, and whether that could be reduced by taking particular measures. Viewed in this way, I have difficulty in identifying any breach by the respondents of their section 71 obligations in 2008. There does appear to have been a material increase in the extent of the use of the building by ethnic minority groups after the withdrawal of the petitioners' funding. This may have made it easier to identify section 71 issues when Mr Croft came to review the position in the course of 2010. In any event, a full equalities impact assessment has now been carried out, all as detailed earlier.

29. The introduction of the ideas mentioned in section 149(3) might meet this point.

### **Functions**

30. It is clear that the new provision creates three classes of body:

(a) public authorities listed in schedule 19 in respect of whom the duties in section 149 apply to all their functions;

(b) public authorities listed in schedule 19 that are only public bodies for certain purposes in which case the duties under section 149 apply only in relation to

those functions<sup>23</sup> and

(b) bodies that are not public bodies but who exercise public functions: the duties under section 149 apply only in relation to those functions<sup>24</sup>.

31. This is a distinct point from the legal enforcement of the duties: Section 156 provides that:

A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law.

32. Although the public sector equality duty was not yet in force, when a divisional court decided *R (on the application of Johns) v Derby City Council*<sup>25</sup> on 28 February 2011, the Court considered its impact on a claim relating to fostering services who refuse to approve a prospective foster carer who evinces antipathy, objection to, or disapproval of, homosexuality and same-sex relationships and an inability to respect, value and demonstrate positive attitudes towards homosexuality and same-sex relationships<sup>26</sup>

33. Tackling one aspect of the difficulty posed by conflicting protected

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23 Section 150(3)

24 Section 149(2)

25 [2011] EWHC 375 (Admin)

26 Johns paragraph 28

interests , the Court said:

Religion, belief and sexual orientation are protected characteristics under the Equality Act 2010: see sections 4, 10 and 12. While as between the protected rights concerning religion and sexual orientation there is no hierarchy of rights, there may, as this case shows, be a tension between equality provisions concerning religious discrimination and those concerning sexual orientation. Where this is so, Standard 7 of the National Minimum Standards for Fostering and the Statutory Guidance indicate that it must be taken into account and in this limited sense the equality provisions concerning sexual orientation should take precedence.<sup>27</sup>

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10 October 2011

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27 Johns paragraph 93