

## THE PUBLIC SECTOR EQUALITY DUTY SECTION 149 OF THE EQUALITY ACT 2000 Peter Oldham QC

1. The public sector equality duty is now so well-known that this year I will just summarise the legal principles and then concentrate on some practical issues to which the PSED gives rise. Section 149 is set out in full at the end of this paper.

2. Whilst there have been many High Court and appellate decisions on section 149 since last year's 11KBW Local Authority Law conference – about 25, including the Supreme Court decision of Hotak v Southwark LBC [2015] 2 WLR 1341 – they have not taken the basic principles further. But the numbers show that the PSED remains a claimant's weapon of choice.

### THE PRINCIPLES

3. A quick reminder of the basic principles:-

(1) The duty is to **have due regard to the need to** (a) eliminate unlawful discrimination; and (b) advance equality of opportunity, and (c) foster good relations, between people with protected characteristics and those without it. The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

(2) The PSED is not a duty to **achieve** any of those things, or to **take certain steps**. It is **not even a duty to avoid taking steps which might be retrograde**, as far as those aims are concerned. This is important because reduced funding will frequently present authorities with the prospect of service cuts having an adverse effect on people with protected characteristics.

(3) While decision makers must have a “**focussed awareness**” on each of the three separate duties under section 149, if they arise on the particular facts, in practice, and especially in the context of service reduction, the first limb of section 149(1) is the most clearly engaged i.e. the duty to have due regard to the need to eliminate unlawful discrimination. For this reason **the PSED is above all a means of confronting decision makers with the indirectly discriminatory effects of their decisions, and ensuring that these effects are considered in the decision making process.** (As we will see, the protected characteristic of disability is perhaps a special case.)

(4) “Due regard” means **the amount of regard that is appropriate** in all the circumstances. The public authority and not the Court is the arbiter of the weight to be given to the PSED and to countervailing factors (usually budgetary constraints).

(5) The duty can be owed to **groups of people, or to a single person**, but in the case of a small group (e.g. cuts to a service provided only to disabled people). In the latter case, it may be unrealistic for a claimant to say that decision maker had not taken on board their status as people with a protected characteristic, even if there was nothing in the paperwork to suggest that section 149 was specifically considered.

(6) There is **no duty to carry out an equality impact assessment**, but if an EIA is carried out effectively, it will be a great help in showing that the authority has acted in accordance with the PSED.

(7) The PSED must be fulfilled **before, and at the time of, the decision**. It will be very hard to justify retrospectively a decision taken in breach of the duty. Consequently it is important to keep records of any consideration of the PSED. It is an “essential preliminary”, not a “rearguard action”.

(8) The duty **is a continuing** one. If circumstances change, it may be necessary to reconsider the impact of the PSED on the proposed course of action.

(9) Whilst the duty must be discharged “**with rigour**” and an open mind, decision makers are **not expected to explore every last possible differential impact** of a proposed decision: the latest word is as follows from Underhill LJ in R ota UNISON v Lord Chancellor [2015] EWCA Civ 935, para 116:-

*“... the Court should go no further in its review than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational. Inessential errors or misjudgments cannot constitute or evidence a breach of the duty.”*

## PRACTICAL ISSUES

### (1) Confronting the reality

4. Since the decision maker will fail to comply with the PSED unless it is aware of the principal negative differential effects of a decision on people with protected characteristics, it is vital that those effects are made clear in material put before the decision maker. As long as they are brought to the decision maker’s attention, and the decision maker is aware of the PSED, it will be a very rare case that the Court will interfere.

5. There is nothing to be gained from ducking the uncomfortable result which a decision may entail. As it was put by Sedley LJ in R ota Domb v LB Hammersmith and Fulham [2010] ACD 20, para 79:-

*“Members are heavily reliant on officers for advice in taking these decisions. That makes it doubly important for officers not simply to tell members what they want to hear but to be rigorous in both enquiring and reporting to them ... .”*

### (2) Mitigation: confronting the uncertainty

6. Authorities are entitled also to take into account factors which mitigate the negative differential impact of a decision on people with protected characteristics.

7. So for instance, if a library is being shut, and this increases travel difficulties for physically disabled people in the locality wishing to borrow books, or use other service provided by the library, it may be a mitigating factor that another local library is to extend its opening hours.

8. However, sometimes there is a lot of hope value in so-called mitigating factors. Very often it will not be known whether these hoped for outcomes will become a reality. Using the library example again, authorities will sometimes be forced to cut services, while hoping to be able to reach agreement, some time in the future, for the provision through some form of community organisation. But these things take time to arrange, and so, if at the time of the closure decision, no firm arrangement is in place, this must be reflected by the officers' report or EIA explaining that the mitigation is uncertain.

9. Otherwise the authority risks being accused of underestimating the negative differential impact of the proposed decision and thus of having failed to have "due regard" to the need to eliminate discrimination, or more simply of having taken an irrelevant factor into account.

### **(3) Miscellaneous issues with equality impact assessments**

10. A good EIA is an invaluable way of helping to show that a decision maker has complied with the PSED. However, writing an effective EIA is often both difficult and time consuming. The following are a selection of issues which I have found to arise from time to time.

#### **(a) Irrelevant material**

11. Most, maybe all, local authorities will by now have their own pro forma EIAs for officers to fill in. Some pro formas are not necessarily well designed to get at the key issue which the PSED is normally getting at: **will the proposed decision have a disproportionate impact on people with a protected characteristic?** Or in lawyers' words: will the decision have indirect discriminatory effect? (Again, as we will see, disability may be a different case.)

12. An effective EIA will normally be focussed on the extent to which a proposal will have differential impact on people with protected characteristics, and if so, whether that impact can be lessened by mitigating action.

13. In the local authority context, some EIAs provide a fair amount of information which is extraneous to these central issues – for instance, about the consultation which has taken place. Consultation will no doubt be an important part of the decision making process, but it is a separate legal process from the PSED.

14. Quite apart from the fact that this often results in a long document for hard pressed officers to write and members to read, and in which the really relevant material gets rather hidden, the tone is sometimes to the effect that the breadth of consultation should itself be taken into account in deciding whether the PSED has been discharged.

15. That would be wrong, and the danger is that members will have their eyes taken off the real question to be thought about (extent of differential impact) or think that the differential impact can somehow be excused or softened by the extent of consultation.

16. The only real relevance which detailed discussion of consultation might have in an EIA is if the consultation responses show that people with a protected characteristic were particularly exercised by the possible outcome of the proposals being consulted on – though even that is secondary to the central issues, which are whether and the extent to which a decision will have a differential impact – not what consultees' views about it are.

## (b) Not answering the question which the legislation asks

17. As stated above, it seems to me that in practice the central issue will be whether people with protected characteristics will be disproportionately adversely affected by the proposed decision (again, disability perhaps being a special case, for reasons which I will deal with).

18. Sometimes the EIA provides information about people with protected characteristics without getting to the bottom of whether they will be disproportionately affected.

19. For instance, an EIA might record that a particular area of an authority has a greater than area average proportion of elderly residents (say 30%), and conclude that therefore the closure of the area's library will affect elderly people disproportionately. But if the library's usage figures show that the elderly are only 15% of users, the closure of that library will not affect the elderly disproportionately as a group, because they are under-represented as users - though it may affect particular elderly people disproportionately because they find it much harder than younger people to get to another library.

## (c) Women; and pregnancy and maternity

20. Sex and pregnancy/maternity are different protected characteristics, but are not always dealt with as such.

21. A service might have broadly proportionate use between men and women, so that its cessation or modification would have no significant disproportionate impact on people having the protected characteristic of being a woman.

22. But within that group of women, women who are expectant or who have young children may be disproportionately affected. Libraries are (happily) once again a good example. Pre-school and early years primary school children are usually found to be disproportionate users. Since they are likely to be accompanied on such visits, and often by their mothers, mothers with young children are likely to be disproportionate users even though women may not be.

## (d) Disabled people

23. The following two points are significant.

24. First, disability discrimination is different from other types of discrimination since it includes the duty to make reasonable adjustments. That is, there can be a positive duty to take action to help a disabled person which there is not for people who are not disabled.

25. The PSED imposes a duty to have due regard to the need to eliminate unlawful discrimination. Therefore in relation to disabled people, the duty to have regard to the need to eliminate discrimination does not necessarily start from the enquiry about whether disabled people are disproportionately affected by a proposed decision. It is appropriate to consider how disabled people, whatever proportion of service users they are, would be affected by a measure – though the numbers and proportion of people affected by reason of their being disabled may well be relevant in considering the PSED.

26. Second, different disabilities are likely to affect people in different ways. Reduced library opening hours in the evening may present particular problems for physically disabled people, who find it hard to travel to the library after working. A change from a staffed to a non-staffed service may present difficulties (albeit different ones) for both mentally and physically disabled people.

27. Of course, a simple division between physical and mental disability is very crude. Each disability will have a different effect on the disabled person's life. But it will be impracticable for an EIA to cover differential effects according to particular disabilities where a service provided to the entire public is in issue.

28. But in some circumstances, it may well be necessary to consider the position of people with different disabilities in some detail.

29. For instance, take a proposal to close a special school catering for people with a variety of disabilities and its replacement by various provisions elsewhere. Some groups may be very well catered for – indeed the provision for them may improve. But other groups may be less fortunate. In this kind of situation, the decision maker may well need to reflect on the position of people with differing disabilities in carrying out the PSED.

#### **(4) Report to members**

30. It is not always safe to rely on a reference in reports to members to the PSED generally: it may be as well to have a short explanation on the effect of the PSED in the legal implications section of the report, and to draw members' attention specifically to any EIA which forms part of the papers supporting the report. If there is no EIA, but officers believe that there may be PSED implications, these should be spelt out.

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## **SECTION 149 OF THE EQUALITY ACT 2010**

### **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 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—

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- (a) a breach of an equality clause or rule;
- (b) a breach of a non-discrimination rule.
- (9) Schedule 18 (exceptions) has effect.