

The Public Sector Equality Duty: An Update and Overview

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Introduction

1. Section 149 of the Equality Act 2010 (“EA 2010”) is contained in Part 11 of the Act. It creates a “*public sector equality duty*” (PSED) and provides as follows:

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 –
 - (i) age;
 - (ii) disability;
 - (iii) gender reassignment;
pregnancy and maternity;
 - (iv) race;
religion or belief;
 - (v) sex;
 - (vi) 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. EA 2010 s 149 replaced section 71 of the Race Relations Act 1976 (“RRA”), section 49A of the Disability Discrimination Act 1995 (“DDA”) and section 76A of the Sex Discrimination Act 1975 (“SDA”). These provisions imposed similar public sector equality duties in relation to race, disability and gender respectively. The race duty was the first of the duties and was a policy response to the findings of Sir William MacPherson’s Inquiry into the handling by the police of the murder of Stephen Lawrence. The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson, Cm 4262-1, February 1999 described as “institutional racism” the potentially discriminatory or unequal effects of an institution’s policies and practices if they remained unexamined and unchallenged. The Report concluded: *“It is incumbent on every institution to examine their policies and the outcome of their policies and practices, to safeguard against disadvantaging any section of our communities”*.

3. EA 2010 s 150(1) that a “public authority” for the purpose of the PSED is a person who is specified in Schedule 19. Section 150(3) of the Act provides that a public authority listed in Schedule 19 is subject to PSED in relation to the exercise of all of its functions, unless the public authority is only specified in that Schedule in respect of certain specified functions.
4. PSED also applies to anyone performing a public function, in the exercise of that function (s.149(2)). A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998 (see s. 150(3) of the Equality Act 2010).
5. Section 153 provides that Regulations can require a public authority listed in Part 1 of Schedule 19 to comply with duties that enable the better performance by the authority of the PSED. The following Regulations have been made pursuant to s.153: Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, SI 2011/1064 (made under sub-s (2)) and Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260 (made under sub-s (1)).
6. Schedule 18 contains a number of specific exceptions to s.149, which include: the exercise of certain functions relating to children, Immigration and nationality functions (age, race, religion or belief); judicial functions (including those conferred on persons other than a court or Tribunal); Parliament and Security services.

Established Principles

7. Although the Public Sector Equality Duty (“PSED”) continued to be much litigated in 2015, the principles are now fairly well-established. In *Hotak v Southwark London Borough Council* [2015] UKSC 30 at [73 – 75] the Supreme Court approved a number of “valuable” judgments of the Court of Appeal on the PSED as follows:

[74] As Dyson LJ emphasised, the equality duty is “not a duty to achieve a result”, but a duty “to have due regard to the need” to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained that the parliamentary intention behind section 149 was that there should “be a culture of greater awareness of the existence and legal consequences of disability”. He went on to say in para 33 that the extent of the “regard” which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is “appropriate in all the circumstances”. Lord Clarke of Stone-cum-Ebony JSC suggested in argument that this was not a particularly helpful guide and I

agree with him. However, in the light of the word “due” in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment.

[75] As was made clear in a passage quoted in the *Bracking* case [2014] EqLR 60, para 60, the duty “must be exercised in ‘substance, with rigour, and with an open mind’” (per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] PTSR 1506, para 92). And, as Elias LJ said, at paras 77-78, in the *Hurley* case [2012] HRLR 374, it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that “there has been a rigorous consideration of the duty”. Provided that there has been “a proper and conscientious focus on the statutory criteria”, he said “the court cannot interfere... simply because it would have given greater weight to the equality implications of the decision”.

8. EA 2010 Parts 2-8 contain a series of different prohibitions (for example on discrimination in employment, education etc). By contrast the PSED does not prohibit any particular form of conduct. It is a requirement imposed on public authorities only to have "due regard" to particular prescribed and mandatory considerations when exercising their functions. It is not a duty that requires authorities to bring about any particular outcomes or which prohibits them taking any particular steps. Thus it may be that a public authority, having given due regard to the PSED considerations, concludes that a particular course of action does not promote equality of opportunity. That does not necessarily mean that adopting that course is thereby prohibited by EA 2010 Parts 2-8, nor (provided due regard has been given) that the public authority has breached the PSED.
9. “Due regard” as required by the PSED means “regard that is appropriate in all the circumstances” given the “context of the function that is being exercised at the time by the public authority” (*R (on the application of Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506 [82]). The authority is permitted, and indeed required by ordinary public law principles, to take account of any “relevant countervailing factors” (*Brown* [82])). Provided the authority “is clear precisely what the equality implications are when [it] puts them in the balance, and ... recognise[s] the desirability of achieving them” (*R (on the application of Hurley and another) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin, [2012] HRLR 374 [78]), it is entitled to weigh equality considerations against any other

matters that are relevant. That may include budgetary constraints, planning considerations or whatever countervailing factors are material to the particular decision.

10. Provided that the authority has “*due regard*” to the PSED considerations, the weight it attaches to them, and the weight it attaches to countervailing factors, is a matter for the authority. A public authority is not precluded by EA 2010 s 149 from deciding equality implications are outweighed, in a particular case, by countervailing considerations. The PSED does not compel a particular substantive outcome. Provided the authority’s assessment is not irrational, a court will not interfere with the balance that it has struck (*Brown* [82],) *Hurley* [78]).
11. Finally, the duty to have due regard is personal to the decision maker, is non-delegable and must be exercised in substance, with rigour and with an open mind.

Recurrent Themes

12. There are two recurrent themes in recent PSED case-law: (i) the failure of public authorities to provide proper evidence of compliance with the PSED is likely to lead to a finding of a breach of the duty; and (ii) the same is true of a failure of public authorities to provide evidence that all relevant protected characteristics have been considered. Three examples of these themes suffice.
13. In *R (Cushnie) v Secretary of State for Health* [2014] EWHC 3626 (Admin), [2015] PTSR 384 a disabled asylum seeker sought to challenge the National Health Service (Charges to Overseas Visitors) Regulations 2011. His claim in respect of the PSED succeeded despite the fact that the Secretary of State had carried out a consultation and draft and final equality impact assessments prior to the introduction of the 2011 Regulations. Singh J held that the equality impact assessments did not address the protected characteristic of disability, even though they did address other protected characteristics including race and religion. He noted that the duty had been introduced to make sure that public authorities do not inadvertently overlook the impact of their decisions on relevant groups who had been often overlooked in the past. Singh J drew an analogy with the principle that a public authority must have

regard to all relevant considerations, and noted that a failure to do so will vitiate the resulting decision.

14. In *R (Winder) v Sandwell Metropolitan Borough Council* [2014] EWHC 2617 the High Court considered a Judicial Review of a Council Tax Reduction Scheme operated by Sandwell MBC. Hickinbottom J held that Sandwell's counsel "could not make bricks without straw; or, ... a defence without evidence". He held that "there is simply no evidence that the Council conducted any assessment at all of the race or gender impact of the residence requirement at or before it adopted the 2013-4 CTR Scheme; and scant evidence that it did so prior to the 2014-15 Scheme. I do not consider that the evidence that there is is sufficient to show that the Council grappled at all with the effects of the requirement on those with the identified protected characteristic."
15. Similarly in *R (Fakih) v Secretary of State for the Home Department* [2014] UKUT 513 (IAC) Judge O'Connor sitting in the Upper Tribunal held that the Secretary of State had failed to provide evidence that demonstrated that there had been a rigorous consideration of the PSED, and refused to draw an inference that the Secretary of State had considered the relevant matters in circumstances in which he held "it is reasonable to expect the [Secretary of State] to have produced clear evidence to this effect."

International Obligations

16. Two recent cases have considered the interrelationship between PSED and the UK's international obligations.
17. In *R (Aspinall) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin), Andrews J had to consider the impact of the United Nations Convention on Rights of Persons with Disabilities ("UNCRPD") on the PSED. The EHRC argued that a decision maker must not only have due regard to international obligations including the UNCRPD, but must also consider whether the relevant matter constituted a regressive measure within UNCRPD, and if so must give rigorous consideration to alternatives to avoid the measure.

18. Andrews J rejected this submission, holding at [40] that “[t]he duty to have due regard encompasses the need to have due regard to the UK’s obligations under international law if and to the extent that they are relevant; but the UNCRPD does not affect the nature or extent of the duty, still less the way in which the court will approach the question whether the duty has been discharged.”
19. In *Aspinall*, there appears to have been no consideration of the fact that the UNCRPD has been incorporated into EU law by way of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009 (SI 2009/1181). This provides that as at 8 July 2009 UNCRPD is an EU Treaty within section 1(2) of the European Communities Act 1972. Accordingly, UNCRPD has legal effect in England and Wales as a result of s.2 of the European Communities Act 1972, and is therefore a source of substantive domestic rights.
20. Had the UNCRPD point been raised as a separate ground of review, rather than via the PSED, it is likely that any failure by the Minister to comply with Articles 4, 19 and 31 of UNCRPD would have provided a more compelling and ‘hard-edged’ ground for judicial review. Rather than establishing that the Minister had considered all of the relevant provisions of the UNCRPD, and had had due regard to them, the Secretary of State would have needed to satisfy the court that the Minister’s actions did not put the UK in breach of its obligations under the UNCRPD.
21. Further, had the court’s attention been drawn to the fact that UNCRPD is not a mere unincorporated international treaty but forms part of EU (and therefore domestic) law, it seems likely that Andrews J would have reached a different conclusion about the effect of UNCRPD on the PSED. In *Aspinall* she approached the interpretation of UNCRPD at [37] on the basis that it was an unincorporated treaty, and on the basis that its interpretation is not justiciable by the English courts. Her view at [38] was that the Minister did not have to consider whether his decision would put the UK in breach of its international obligations. Further, she held at [40] that UNCRPD does not affect the nature or extent of PSED, still less the way in which the court will approach the question whether the duty has been discharged. At [46] she held that Article 31 of UNCRPD was of no assistance in interpreting s.149 of the Equality Act 2010.

22. Had Andrews J understood that the UNCPRD is an EU Treaty, it seems likely that she would *not* have formed the view that UNCPRD does not affect the nature or extent of PSED, since s.149 of the Equality Act 2010 would need to be interpreted in a manner consistent with EU Law. Further, it seems likely that she would have concluded that the Minister *did* have to consider whether his decision would contravene UNCPRD as an EU Treaty when having due regard to the appropriate matters under s.149 of the Equality Act 2010. As such, going forward in any PSED cases concerning the protected characteristic of disability, the Secretary of State would be well advised to consider compliance with UNCPRD when considering PSED.
23. Whilst many of the obligations under UNCPRD can be characterised as ‘aspirational’, some of the obligations are defined in concrete terms and will require hard evidence that they have been complied with. Such obligations would include Article 31 which is as follows:
- Article 31 - Statistics and data collection
1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:
 - a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;
 - b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.
 2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.
 3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.
24. In *R (Mohammed Rafi Hottak and AL) v The Secretary of State for Foreign and Commonwealth Affairs and The Secretary of State for Defence* [2015] EWHC 1953, [2015] IRLR 827, a claim brought by Afghan nationals who served as interpreters with the British Forces in Afghanistan, the High Court (LJ Burnett and Irwin J) had to consider the territorial scope of the Equality Act 2010.

25. The interpreters claimed that the government's policies on financial benefits and relocation for interpreters was unlawful discrimination contrary to s.29(6) (Part 3) and s.39 (Part 5) of the Equality Act 2010, and that the Secretary of State had failed to comply with the PSED.
26. Although the Employment Tribunal has exclusive jurisdiction to deal with complaints under Part 5 (Work) of the Equality Act 2010 and the County Court has exclusive jurisdiction in relation to Part 3(subject to the territorial jurisdiction issue), the Claimants brought their claims in the High Court by way of Judicial Review. It is not known whether the Secretary of State sought to resist this.
27. In order to decide the discrimination issue, the High Court had to consider the territorial impact of the Equality Act 2010. The Equality Act 2010, unlike the previous discrimination legislation,¹ is silent as to its territorial scope.
28. Part 5 (Work) of the Equality Act 2010 has been held to apply to employment relationships when there is a sufficiently close link between the employment relationship and Great Britain. This approach echoes the approach taken by the courts to questions of territorial jurisdiction in claims of unfair dismissal (see Lawson and ors v Serco Ltd and ors [2006] ICR 250 and Ravat v Halliburton Manufacturing and Services [2012] UKSC 1).
29. The Divisional Court in Hottak, applied the Lawson v Serco approach. The Divisional Court held that the Claimants were neither expatriate workers nor peripatetic workers, and noted that the Claimants had no physical contact or connection with Great Britain at all. As such, the Divisional Court held that the Claimants had a closer connection with Afghanistan and Afghan law, and their contracts were governed by English law. Accordingly, given its conclusion that the territorial scope of s.39 of the Equality Act 2010 is no wider than that of the Employment Rights Act 1996, the Divisional Court held that s.39 of the Equality Act 2010 could have no application to the Claimant's circumstances.

¹ For example s.19(2)(b) of the Disability Discrimination Act 1995 provided that "a person is a 'provider of services' if he is concerned with the provision, in the United Kingdom, of services to the public or a section of the public", the Equality Act 2010 contains no such definition.

30. The Divisional Court then considered the territorial effect of Part 3 of the Equality Act 2010. In doing so, the Divisional Court does not appear to have been made aware of two decisions (albeit at Circuit Judge level) in which the *Lawson v Serco* approach had been applied to Part 3 of the Equality Act 2010 (see *Campbell v Thomas Cook Tour Operations Ltd (No.2)* [2014] EqLR 655, and *Campbell v Thomas Cook Tour Operations Limited* [2014] WLR (D) 454).
31. In any event, the Divisional Court held at [49] that Parliament cannot have intended that a claim which is outside the territorial reach of Part 5 to be within the territorial reach of Part 3. As such, even if the Divisional Court had been made aware of the two decisions, this is unlikely to have had any effect on its overall conclusions.
32. In so finding, Lord Justice Burnett noted at [48] that the court had queried whether s.29(6) (the prohibition on discrimination on those exercising public functions):
- ‘governed the activities of the Foreign Office abroad, foreign policy in general and (for example) the distribution of aid by the Department for International Development. **It does not appear that there is any clear answer.**’ (emphasis added)
33. In relation to the PSED, Burnett LJ held at [60] that if neither s 39(2) (Part 5) nor 29(6) (Part 3) of the Equality Act 2010 Act was in play in these proceedings, then s 149(1)(a) had no relevance. However he accepted the Claimants’ argument that neither s.149(1)(b) and (c) had any territorial limitation.
34. At [60] Burnett LJ held that:
- ‘The scheme of s 149 is to apply the PSED by reference to the functions of the relevant body. **In the formulation of policy it does not matter, in my view, that the policy may have an impact wholly or partly outside Great Britain. The territorial limitations implicit in s 149(1)(a) follow the application of the substantive parts of the act but otherwise there are no territorial limitations.**
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- [61] It follows that, in the formulation of the Afghan Policy, the Defendants should have had due regard to the matters identified in s 149(1)(b) and (c) of the 2010 Act.’ (emphasis added)
35. Burnett LJ’s interpretation of s.149 of the Equality Act 2010 would appear to be a sound one. The matters in s.149(1)(a) are defined as conduct which is prohibited under

the Act, and therefore must be subject to the territorial limitations of the Equality Act 2010. By way of contrast, there is no such limitation on s.149(1)(b) or (c), and nor is there any geographical limitation on the place where the relevant functions must be exercised.

36. Although the Divisional Court held that the Secretary of State had failed to have due regard to the PSED, it held that it would not be appropriate to quash the Afghan Scheme and that a declaration would be an appropriate remedy.
37. Permission to appeal has now been granted on three grounds; which include the PSED issue (see [2015] EWCA Civ 63). Although the issue may be one of public interest, given the clear conclusions of the Divisional Court as set out above that the employment relationships with the interpreters had no close connection to Great Britain, it is difficult to see how the appeal could succeed.

Costs and Relief

38. Two recent cases have considered the impact of s. 31(2A) of the Senior Courts Act 1981 on PSED cases.
39. That section, which has effect from 13 April 2015, is as follows:
 - [(2A) The High Court –
 - (a) must refuse to grant relief on an application for judicial review, and
 - (b) may not make an award under subsection (4) on such an application, 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.
 - (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
 - (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.]
40. In *R (Hawke & Hawke) v Secretary of State for Justice* [2015] EWHC 3599 Holman J had to consider the application of s. 31(2A) of the Senior Courts Act 1981 to a claim in which all of the Claimants' grounds for judicial review had been dismissed, save for their PSED claim which was successful.

41. Holman J held that 'relief' in s. 31(2A) must include a declaration, and that the effect of the section was to preclude him from granting a declaration in circumstances in which he had held that the outcome of the case would have been the same even if the PSED had been complied with.

42. In response to an argument by the Claimant's counsel that the PSED would be 'emasculated' if s. 31(2A) was interpreted as preventing the court from granting declaratory relief, Holman J held at [60] that:

"The added provisions in section 31 are recently enacted and appear to me to be entirely general and unqualified in their reach and impact, subject to subsection (2B). If Parliament had wanted in some way to "ring fence" the public sector equality duty under section 149 of the Equality Act from the reach and impact of section 31(2A), it could easily have done so by some suitable words of exception. It seems to me, however, that the reach and purpose of the added subsection (2A) is quite clear and is general, and I should not seek to cut down or limit its scope'.

43. At [63] Holman J considered whether it would be appropriate to disregard the requirements in s. 2A for reasons of exceptional public interest. However, he held that it was not. He held that whilst PSED is important 'it is only one of hundreds if not thousands of statutory duties upon the whole spectrum of public authorities'. He held that '[t]here is nothing in fact in section 149 to elevate the public sector equality duty to some specially prestigious position above many other no less important statutory duties upon public authorities'.

44. This issue was also considered in *R (Mark Logan) v London Borough of Havering* [2015] EWHC 3193, where Blake J held at [58] that s. 31(2A) did not prevent him from giving a declaratory judgment.

45. He held obiter at [55] that:

'any consideration of whether the outcome was highly likely to have been substantially the same even if due regard had been had to the PSED should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker. Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded. Indeed, it would undermine the efficacy of judicial review as an instrument to ensure that the rule of law

applies to decision making by public authorities by deterring claimants from bringing a case or the court from granting permission by a declaration by a decision maker who has failed to obey the law to the effect that obedience would have made no difference.'

46. Finally, in *R (Hunt) v North Somerset Council* [2015] UKSC 51 the Supreme Court considered whether a Claimant who had succeeded in his PSED claim but had not been granted declaratory relief should be awarded a proportion of his costs.

47. Lord Toulson, with whom the rest of the court agreed, held at [16] that:

'If a party who has been given leave to bring a judicial review claim succeeds in establishing after fully contested proceedings that the defendant acted unlawfully, some good reason would have to be shown why he should not recover his reasonable costs.'