

# Disability Law Service

advice and legal representation for disabled people

## An Introduction to the Public Sector Equality Duty

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# **An Introduction to the Public Sector Equality Duty**

## **Introduction**

The Equality Act 2010 introduced a new Public Sector Equality Duty. This duty came into force on 05 April 2011. It covers the previous equality areas of race, disability and sex but has also been expanded to include positive equality duties in relation to:

- Age
- Gender reassignment
- Pregnancy and maternity
- Religion or belief
- Sexual orientation

### **The purpose of the duty:**

The Public Sector Equality Duty introduces a positive obligation onto public authorities to consider equality when making decisions. To meet this objective the Equality Act introduces both a General Duty and a Specific Duty.

## **The General Duty**

The General Duty of the Public Sector Equality Duty is contained in section 149 of the Equality Act 2010. It requires public bodies to have “due regard” to the following equality aims:

- a Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the act;
- b Advance equality of opportunity between persons who share a 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.

## **Specific Duty**

In addition section 153 gives the Secretary of State the power to introduce regulations setting out more specific duties which may assist public authorities in meeting their general duty.

The Equality Act 2010 (Specific Duties) Regulations 2011 came into force on 10 September 2011.

# Who has duties under the Public Equality Duty – what is a public authority?

## **General Duty**

Section 150 states that a public authority is a person specified in schedule 19 of the EA. This sets out a long list of organisations who are automatically considered to be public authorities. This is generally limited to ‘pure public authorities’ such as, for example: Primary Care Trusts, The Greater London Authority and Fire Authorities.

Section 150 goes on to state that organisations included in this list are subject to the equality duty in everything that they do. It will include employment matters as well as exercising of public functions.

Section 149(2) also states that:

“A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).”

This definition will include private organisations that carry out some public function. However they will only be seen as public authorities in relation to those public functions. They will not be seen as public authorities with regards to other work that they carry out. For example: a private security company which runs prisons or is involved in the transportation of prisoners would be covered for this work but would not be covered when providing private services such as doormen for a nightclub.

Section 150(5) states that the public function uses a Human Rights Act approach to the definition of public function. Whether a private body is exercising 'a function of a public nature' will therefore depend on a number of factors, including:

- Whether it is publicly funded;
- It is exercising powers assigned by statute;
- It is providing a public service or taking the place or carrying out a role of government.

The Act has specifically states that both houses of parliament, the Scottish Parliament, Welsh Assembly, MI5, MI6 and GCHQ will not be considered as public authorities for the purpose of the Duty.

The Duty to have due regard is non-delegable, so where a public authority contracts another organisation to carry out a public function the public authority will continue to have duties under section 149. Although it may be that the contracted organisation will also be under a duty to have due regard.

According to the Equality and Human Rights Commission's guidance, if a public authority contracts a service to a wholly private organisation, to ensure compliance with its section 149 duties the contracting authority may be obliged to incorporate equality obligations into the contract (Guidance Volume 1 page 29).

### **Specific Duties**

The specific duties only apply to organisations listed in The Equality Act 2010 (Specific Duties) Regulations 2011.

## **What is the general duty?**

The General Duty is contained in section 149 of the Equality Act 2010. This states that:

“(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 under the act;
- b Advance equality of opportunity between persons who share a protected characteristic and persons who do not share it;
- c Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The Act goes on to clarify what is meant by having due regard to advancing equal opportunity. Under section 149(3) this is further defined to include:

- a Removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- b Taking steps to meet the needs of persons who share a protected characteristic that are different from the needs of persons who do not share it;
- c Encouraging persons who share a relevant characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

In relation to disability, it section 149(4) states that

“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.”

Likewise the duty to have due regard to foster good relations, is further defined under section 149(5) to include:

- a Tackling prejudice; **and**
- b Promoting understanding.

Section 149(6) also states that compliance with the duties in this section may involve treating some persons more favourably than others.

More favourable treatment is not restricted to disabled people but includes other protected groups. However, considering there is an existing duty under sections 20 and 21 of the Act for public authorities to make reasonable adjustments for disabled people, it is likely that it will have the greatest impact on disabled people.



To assist in interpreting these duties the Equality and Human Rights Commission have published five pieces of non-binding guidance for public authorities. These are as follows:

- The essential guide to the public sector equality duty (Vol. 1 of 5)
- Equality analysis and the equality duty - A guide for public authorities (Vol. 2 of 5)
- Engagement and the equality duty - A guide for public authorities (Vol. 3 of 5)
- Equality objectives and the equality duty - A guide for public authorities (Vol. 4 of 5)
- Equality information and the equality duty - A guide for public authorities (Vol. 5 of 5)

**Warning**

The above guidance was issued in January 2011 and was based on the draft specific duties. As the specific duties were later changed and the new duties only introduced last month, this guidance is not fully up-to-date. However, it will still be useful in setting out the requirements of the general duty and the steps that can be taken to meet that duty.

The Equality and Human Rights Commission are also due to publish a Code of Practice to supplement the Duty. Under

section 15(4) of the Equality Act 2006 failure of a public authority to comply with the Code of Practice will be admissible in any legal proceedings and where any provision of the Code appears to a court to be relevant it must take that provision into account.

## Due regard in practice

Through the enforcement of the previous equality duties the Courts have set out a number of principles regarding due regard which will continue to apply to the new public sector duty.

The general principles of what due regard means in practice were set out by the High Court in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158. These are:

### **Awareness of and consideration of Equality aims**

The duty can be seen as a need for public authorities to think about the three aims and to proactively pursue these aims. As Aikens LJ stated in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), due regard requires a “conscious approach and state of mind” (at para 91).

The duty to have due regard requires that, at the very minimum, public authorities consider their duties under section 149 when considering, introducing or changing a policy or taking a decision that may impact on protected groups.

This is a mandatory requirement, see *R (Lunt) v Liverpool CC* [2009] EWHC 2356 (Admin), para 62, and failure of a public authority to do so will render the decision unlawful.

An incomplete or erroneous appreciation of the duties will mean that due regard has not been given to them (see *R (Chavda) v London Borough of Harrow* [2007] EWHC 3064).

The need to consider its equality duties does not however necessarily mean that the public authority must make express or specific reference to these duties provided it can show that in substance it has done so.

However it will be for the authority to show that it has complied with the duty. An authority that does not keep a record runs the risk of the Court drawing an inference that it has not complied with the duty.

## **Before and at the time of the decision**

Due regard must be performed before and at the time that a policy is being considered. Attempts to justify a decision after it has been made will not discharge the duty.

## **Substance and rigour**

The duty must be carried out in substance, with rigour and with an open mind. It should not be a 'tick box' exercise.

## **Who must discharge the duty?**

The Courts have also made it clear that, when an institution has an obligation under one of the duties then it and it alone must discharge it. In *R (Eisai) v National Institute for Clinical Excellence & Others* [2007] NICE had issued guidance for Alzheimer's disease inhibitor drugs which included speech and language tests that could be seen as discriminating against people from ethnic minorities or with learning difficulties.

NICE argued that it was not in breach of the Race and Disability Equality duties because doctors using the guidance could use their common sense to remove any potentially discriminatory effects of the guidance. However, on this point

the Judge stated that this was inadequate. She stated that, rather than relying on others to eliminate the risk of discrimination, NICE should have looked at what they could do to promote equal opportunity and to reduce the discriminatory effects of their guidance.

The Courts have also indicated that discharging the duty falls to the primary decision maker and so it will not be sufficient for a committee making a decision to be told that an officer has carried out an assessment.

Where a task is to be outsourced by a public authority then the EHRC guidance states that ownership by the decision maker must be maintained (EHRC Guidance, Volume 2 page 11).

### **Continuing duty**

The duty is also a continuing one, so for example where new information became available as to the impact of a decision by the LSC they were required to have further due regard and consider whether any amendment was necessary even though they had previously carried out their duties under the DED (Public Interest Lawyers v Legal Services Commission [2010] EWHC 3277 (Admin)).

## **Well documented and transparent**

For public authorities covered by the Specific Equality Duty this is likely to include a duty to publish information to demonstrate its compliance with the general duty and the on persons affected by its policies and procedures.

For authorities not covered by the Specific Duty there is no formal requirement that the process of due regard be recorded. However the case law has shown that it is a matter of good practice to document compliance.

Provided that an authority can show that they did carry out their duties in substance they will not be penalised for a failure to keep records. However an authority that does not keep a record runs the risk of the Court drawing an inference that it has not complied with the duty.

As Moses LJ stated in R (Kaur and Shah) v Ealing LBC [2008] EWHC 2062 (Admin):

“The process of assessments should be recorded .... Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage.”

## Gathering information:

The gathering of information is a necessary component of all rational decision making and it has long been a principle of public law that a failure to obtain information may render the decision or policy unlawful (See *Secretary of State for Education v Tameside MBC* [1977] AC 1014).

In addition it is likely that a public body's failure to obtain relevant information could lead to it proceeding under a mistaken belief. See for example the case of *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin), where the Court found that a decision to restrict taxi licenses to London style black cabs was made on a mistaken belief as to the extent that this affected disabled people and quashed this decision.

The EHRC Guidance suggests five steps to help authorities plan the collection and publication of information:

- a to consider what equality information they have;
- b to collate and publish the information;
- c to 'identify any information gaps';
- d to take steps to fill any information gaps, including by engagement (consultation) with stakeholders; **and**

- e Where it is not possible to fill information gaps in the short term, publish your plans and timescale for filling them.

Failure to gather information may impact on individual cases as well as on policy decisions, for example in the case of *Pieretti v Enfield BC* [2010] EWCA Civ 2204 a reviewing officer's failed to make enquiries into whether a person was disabled when considering whether he was intentionally homeless was seen to be a breach of the DED.

### **Engagement (consultation):**

Whilst the previous equality duties contained various requirements to consult and involve people from different protected groups, the new duty uses the term 'engagement'. Engagement is a broad term which covers a range of different activities, from formal public consultations to direct engagement with people from protected groups in designing and delivering services.

According to the EHRC's guidance, engagement may help public authorities in:

- Identifying particular needs, patterns of disadvantage and poor relations between groups



- Understanding the reasons for disadvantage, low participation rates and poor relations
- Designing initiatives to meet these needs and overcome these barriers
- Identifying opportunities to promote equality and foster good relations
- Helping to fill gaps in equality information
- Determining priorities
- Identifying the relevance of functions to equality
- Analysing the equality impact of particular programmes, policies or proposals
- Monitoring and evaluating initiatives, policies and programmes
- Checking the quality, relevance and comprehensiveness of your information.

Although there is no specific requirement under the general duty for public authorities to engage with the public, as we have seen, the general duty to have due regard requires public authorities to have an adequate evidence base for its decision-making. Engagement is therefore seen as a process that can assist with developing that evidence base.

In addition a failure to carry out engagement or consultation can lead to a decision being declared unlawful on the grounds

of rationality or proportionality, because the authority could not have given due regard without obtaining further information, or on grounds of procedural fairness, where for example the public authority has created a legitimate expectation that it would consult.

### **Mitigation:**

Public authorities will generally be expected to show how they have attempted to mitigate or reduce any negative effects of their policies.

However in the recent case of R (JG and MB) v Lancashire County Council [2011] EWHC 2295 (Admin) the court stated that the council did not need to show that its plans for mitigation would necessarily work.

### **Due regard required for each equality aim:**

It is not sufficient for a public authority to talk generally about the impact of a policy or to state that they have considered their obligations under the General Duty.

It must be demonstrated that due regard is given to each of the equality aims in respect of each of the protected groups likely to

be affected by a decision. Failure to do so can lead to the decision being quashed. For example in *R (Boyejo) v Barnet LBC* [2009] EWHC 3261 (Admin) a breach of the DED was found to have taken place because it was not clear that due regard was had to the need to take account of disabled persons' disabilities.

### **Taking appropriate and proportionate action:**

The duty to have due regard requires more than simply taking the equality aims into consideration. It also requires public authorities to take positive such steps as are reasonable in the circumstances.

The EHRC's guidance makes it clear that an authority must take such steps as are proportionate given the relevance of the decision or policy to the equality aims and the resources of the organisation. What steps will be necessary will depend on the context. Where a decision will clearly have very little impact it may be possible for a public authority to show that they have gone through a proper decision making process. In contrast, where a policy is likely to have significant impact then more substantive action will be required.

In order for public authorities to take appropriate and proportionate action, they will first need to assess the relevance of the policy or decision. A policy will be relevant if it will or may have an adverse impact upon a particular group or if it provides an opportunity to advance equality of opportunity or to foster good relations.

There is no set procedure for determining relevance and this will again depend on the specific circumstances. In some cases public authorities may have sufficient information to assess relevance. In others it may be necessary for them to obtain further information on the possible impact.

### **Equality analysis:**

After a public authority has assessed relevance and gathered information they will then be expected to carry out equality analysis. This is a process that was previously referred to as impact assessment under the previous equality duties.

According to the EHRC Guidance, the change in terminology is intended to focus more attention on the quality of the analysis than on the production of a document. The focus will therefore be on substance rather than form.

The general duty does not specify how public authorities should carry out equality analysis and it is up to each organisation to choose the most effective approach for them. However the existing case law and the new guidance provide some help in identifying the likely extent of this duty.

In most cases under the previous equality duties a failure to conduct an impact assessment was held to be in breach of the general duty unless the public authority could demonstrate that it had complied with the duty to have due regard in some other way. This appears consistent with the idea that equality analysis will be necessary where it would be a proportionate response to the relevance of the policy or decision and the size of, and resources available to, the authority.

Equality analysis should therefore include consideration of the three equality aims as well as the different aspects of those aims and must include consideration of whether any detrimental impact can be mitigated and positive impact advanced.

### **Consideration of other options:**

If following their information gathering and analysis exercises a public authority determines that a policy is likely to have an

impact on equality they will be required to consider whether some change is necessary to reduce any negative impact or increase positive impact.

If the authority does not actively consider changing its policy in these circumstances it will act in breach of the general duty.

There is however no need for public bodies to consider options that are no longer available. So for example in the case of *R (Domb) v LB Hammersmith and Fulham* [2009] EWCA Civ 941 it was held there was no need for a local authority to consider whether it could avoid making a decision to levy charges for non-residential home care services because it had in effect tied its own hands by reason of decisions previously taken in its budget.

However as the EHRC Guidance states, even where a budget has previously been cut either by the authority or by some other body, there will often be other measures that can be taken to mitigate the effects of those cuts (see EHRC Guidance volume 3).

Although public authorities will be expected to consider options there is no duty for them to adopt a more equality friendly decision if there are other factors which outweigh them. It can

still decide to continue with a policy despite adverse effect provided that it does not unlawfully discriminate.

Provided that the authority has taken into account all relevant considerations the Courts will generally be reluctant to intervene in the decision making process itself unless. As Aikens LJ explained in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158:

“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”

### **McDonald v Royal Borough of Kensington and Chelsea**

In the recent case of *McDonald* [2011] UKSC 33, the Supreme Court dismissed an equality duty argument that Kensington and Chelsea had not had appropriate due regard to the equality aims when making a decision to remove nighttime care from Mrs McDonald. The Supreme Court suggested that there may not be a need for express reference to the equality duties where an authority is achieving function which expressly direct their attention to the needs of disabled people.

## What is the specific duty?

Under the specific duty named authorities will be required to undertake the following steps to further equality:

- Publish one or more objectives it thinks it should achieve in relation to its duties under the General Duty;
- Publish information to demonstrate its compliance with the general duty;
- Publish information relating to persons who share a relevant protected characteristic who are its employees or other persons affected by its policies and practices.

The new specific duty represents a significant change from the previous duties which contained far more prescriptive approach as to what public authorities would need to do to comply with the general duty.

Whilst the Government states that this is to ensure that public bodies are free to act on equality without unnecessary burdens and bureaucracy, this is a worrying approach.

As experience has shown progression of equality does not happen without rigorous endeavour, measurement and



checking which is assisted by a prescribed process for public authorities to follow.

## Challenging decisions

If a public authority has made or is about to make a decision which you believe may be in breach of the public sector equality duty then there are a number of things you can do:

### **Raise your concerns at the time**

If a consultation is ongoing then you should feed into this process and state your concerns about any negative impact the decision would have on disabled people. Although there may be a temptation not to say anything and then challenge the decision later in reality the courts will not look kindly on any legal challenge if you have not previously tried to raise your concerns.

### **Ask for information**

You are entitled to ask the public authority for copies of information regarding the decision. This can include information such as:

- A copy of their impact assessment;
- The decision or policy you wish to challenge;
- Minutes of meetings;
- Consultation documents and results;
- Other relevant documents, this may include financial information and details of steps taken to mitigate negative impact.

Once you have this information it will help you, or your legal adviser, to decide whether or not the public authority has had due regard to the equality aims and whether the decision can be challenged.

### **Act quickly!!!**

Claims for Judicial Review need to be made as soon as possible. At the latest you will need to make your claim within three months minus one day of the date of the decision.

Following the decision in R (Domb) v LB Hammersmith and Fulham [2009] EWCA Civ 941 it appears that the correct time to challenge a decision in relation to budget cuts is likely to be within three months of the date of the budget rather than when the policies come into effect.

# Enforcement

## General Duty

If a public authority does not comply with the general duty its actions or failure to act can be challenged by means of a judicial review in the High Court.

As previously stated, claims for Judicial Review need to be made as soon as possible. At the latest you will need to make your claim within three months minus one day of the date of the decision.

A claim for judicial review could be made by a person or a group of people with an interest in the matter.

There are a number of potential remedies available under judicial review. These are:

- quashing order
- prohibiting order
- mandatory order
- declaration
- injunction
- damages

## **When to take a claim:**

There are very strict time limits for claims of judicial review. Claims need to be made as soon as possible but in any case within three months minus one day from the decision complained of.

## **Funding a case:**

Claims for Judicial Review are very expensive. The average case costs approximately £20,000 to take. There is also a substantial risk of costs being awarded against an unsuccessful claimant.

It is therefore very helpful if the disabled person can secure external funding for their case. The main forms of funding of equality duty cases are:

- The Equality and Human Rights Commission – fund a few “high profile” cases. They tend to focus on setting precedents and strategically significant cases;
- Legal Services Commission – only available where the person is on a low income and with few assets. Will only take cases where the prospects of success are more than

50%. Cases must also pass a cost benefit test or have a wider public interest;

- After the event insurance – it is possible to obtain insurance policies to cover the cost of taking legal action. The insurance premium will usually be “self insured” so that the Claimant does not need to pay even if they lose.

### **Specific Duties**

If a public authority does not comply with its specific duties it could face enforcement action by the Equality and Human Rights Commission.

The failure of a public authority to comply with its duties under the specific duty or to meet its required objectives can also be used as evidence to support a claim against the public authority either for breach of the General Duty or for discrimination under the Act itself.

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