



# **PSED: IS IT DEAD IN THE WATER?**

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# Public Sector Equality Duty: is it dead in the water?

## *Overview and critical analysis*

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# Overview

- Brief introduction to public sector equality duty
- Recent cases
- Is it dead in the water? Some examples

# Public sector equality duty

## s.149 Equality Act 2010

- (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.

# Public sector equality duty (cont'd)

- 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.

# Public sector equality duty (cont'd)

- (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.

# Public sector equality duty (cont'd)

- (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.

# Exceptions

- Schedule 18 Equality Act 2010
  - Age (para 1, Sch 18, Equality Act 2010)
  - Immigration (para 2, Sch 18, Equality Act 2010)
  - Judicial functions (para 1, Sch 18, Equality Act 2010)

# Origins of the duty

*“The first of the modern equality duties was found again in section 71 of the RRA [the Race Relations Act], but following amendments made to it by the Race Relations (Amendment) Act 2000 (enacting the general race equality duty). The general race equality duty in the amended section 71 of the RRA required that listed public authorities had ‘due regard’ to the need ‘to eliminate unlawful racial discrimination’ and ‘to promote equality of opportunity and good relations between persons of different racial groups’.*

*“The Race Relations (Amendment) Act 2000 and the general race equality duty within it were enacted to give effect to the recommendations in the Stephen Lawrence Inquiry Report and the inquiry's findings of ‘institutional racism’. The purpose of the general race equality duty was to create a strong, effective, and enforceable legal obligation which placed race equality at the heart of the public authority's decision making.*”

*The new duty was intended to mark a major change in the law. It represented a move from a fault-based scheme where legal liability rested only with those who could be shown to have committed one or other of the unlawful acts. Instead, the duty-bearer, the public authority, was to be required to proactively consider altering its practices and structures to meet this statutory duty. This was considered important in light of the findings of the Stephen Lawrence Inquiry.”*

Bridges, para 178 referring to Equality Law , 2nd ed (2013), para 16.06 by Karon Monaghan QC

## Process not outcome

*It is not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, having regard to the substance of the decision and the public authority's reasoning. Here it is clear that the first defendant's officers had due regard to those matters throughout. The officers were aware from the outset of AB's needs and sought to accommodate them.*

*R (AB) v Chief Constable of Hampshire [2019] EWHC 3461 (Admin)*

# *R (Hurley & ors) v Secretary of State for Business, Innovation and Skills [2012] HRLR 13*

- Challenge to increase in student loans
- Pre-Equality Act 2010 coming into force
- Failure to consider equality implications – socio-economic proxy
- Ongoing consideration
- “Administrative chaos”

# How far does this take us?

- Cf. s.19(1)(b) Human Rights Act 1998

# *R (The 3Million Ltd) v Secretary of State for the Home Department* [2021] EWHC 1159 (Admin) – how soon is too soon?

- Challenge to digital-only proof of immigration status for EUSS
- Court refused permission as scheme requiring digital-only proof was not in force until 1 July 2021

# ST (A Child) v Secretary of State for the Home Department [2021] EWHC 1085 (Admin) – a Venn diagram that's a circle

- Challenge to Home Office policy to attach conditions of no recourse to public funds (NRPF) on the grant of limited leave to remain and lawfulness of NRPF scheme
- Complied with s.149 despite more than half of NRPF conditions were imposed on nationals of countries from sub-Saharan Africa (§140)
- Unlawful for breach of duty under s.55 Borders, Citizenship and Immigration Act 2009 (children's welfare)

# Continuous duty?

- R (Sheakh) v Lambeth LBC [2021] EWHC 1745 (Admin), [2021] 6 WLUK 372 (see §§163-165)
- HHRC Ltd v Hackney BC [2021] EWHC 2440 (Admin) (see §§55-56)

# Commission on Race and Ethnic Disparities

- Concludes that the "claim the country is still institutionally racist is not borne out by the evidence"
- Where does this leave us?  
(Lammy Review 2017;  
Angiolini Report 2017)
- Voting IDs





## Kenmure Street, Glasgow



**Is the PSED dead in the water?  
Zia Nabi**



## Homelessness and Allocations

# The PSED - a powerful tool

- Enables the court to more closely scrutinise decision making
- Heightens the obligations on public authorities in formulation of policies and their implementation
- Requires to be demonstrated by evidence
- Enables macro and micro challenges
- Affects how statutory provisions are interpreted
- Although not a duty to achieve a result, it can alter the substantive outcome of a decision

# Section 149 (1) – the due regard equality duties

A public authority **must** have **due regard** to the need to

- 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
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it

# Section 149 (3) – due regard to need to advance equality of opportunity

Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

- **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic that are connected to that characteristic
- **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

# Section 149 (4) – disabled persons

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.

# Section 149 (6) – may treat more favourably

Compliance with the equality duties may involve treating some persons **more favourably** than other persons as long as it does not amount to permitting conduct that would otherwise be prohibited by or under the Act

# PSED – key points (I)

- Process not result duty, but can affect result
- Applies in exercise of all functions – both when drawing up criteria and when applying them in an individual case
- Parliamentary intention that there should be a culture of greater awareness of the existence and legal consequences of protected characteristics such as disability

# PSED – key points (2)

- Must be exercised in substance, with rigour, and with an open mind
- 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 rigorous consideration of the duty
- The duty is on the decision maker personally in terms of what they knew and took into account - cannot rely on others
- Duty must be complied with before and at the time a particular policy is under consideration, as well as at the time a decision is taken

# PSED – key points (3)

- An authority must have sufficient evidence on which to base consideration of the impact of a policy or decision
- Do not have to give reasons in respect of its discharge of the duty
- BUT court has to be satisfied that there had been a rigorous consideration of the duty and that the authority has focused “very sharply” on the protected characteristic
- Duty is a continuing one, authorities may need to review policies or decisions

# Homelessness

- The determination of an application
- Whether statutorily homeless because accommodation not reasonable to continue to occupy
- Suitability of accommodation
- Intentionality – deliberateness of act
- Vulnerability
- Performance of duty
- Exercise of discretion

# The determination of an application

- Application and all stages in determination of application must have due regards to protected characteristics
- Applies to what inquiry needs to be made; what needs to be taken into account; the procedure on any review; the decision; the performance of any duty/discretion

# Statutorily homeless: section 175(3)

- 175 (3) – homeless if accommodation not reasonable for continued occupation
- 177(2) – can have regard to general housing circumstances in area

# Lomax v Gosport BC – s177(2) and PSED

Needed a sharp focus on

- whether the applicant was disabled
- the extent of her disabilities
- the likely effect of the disabilities, when taken together with any other features, on the applicant for as long as she continued to occupy the property
- her particular needs in relation to accommodation which arose from her disabilities and the extent to which her current accommodation met those needs
- a comparison between the applicant's accommodation needs and the accommodation needs of people without her particular disabilities and
- a recognition that when considering whether it was reasonable for her to continue to occupy her property the applicant might need to be treated more favourably than others without her disabilities

# Lomax v Gosport BC – s177(2) and PSED

- R.O had acted unlawfully by considering section 177(2) without sufficiently focussing on the applicant and so had failed to take account of the difference between her needs and the needs of others without her particular disabilities
- A disabled person could be treated more favourably than a person who was not disabled
- Had R.O. had regard to the PSED he would probably have reached “a very different conclusion”.

# Suitability: Hackney LBC v Haque

PSED required:

- (i) A recognition that Mr. Haque suffered from a physical or mental impairment having a substantial and long-term adverse effect on his ability to carry out normal day to day activities and had a protected characteristic.
- (ii) A focus upon the specific aspects of his impairments, to the extent relevant to the suitability issue.
- (iii) A focus upon the consequences of his impairments, in terms of the disadvantages which he might suffer in using the room as his accommodation, by comparison with persons without those impairments:
- (iv) A focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments
- (v) A recognition that his particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics
- (vi) A review of the suitability of accommodation which paid due regard to those matters.

# Suitability: Kannan v Newham LBC

Review decision finding that accommodation suitable held to be unlawful because

- Failed to display the necessary sharp focus by downplaying Mr. Kannan's problems
- Whilst R.O could consider local housing conditions, when he did so through the lens of the PSED it was not adequate simply to refer to the generality of persons who are not living in ideal conditions.
- R.O. had to consider whether any of those who were not living in ideal conditions had disabilities.

# Intentionality

- A person becomes homeless intentionally if (a) he **deliberately** does or fails to do anything (b) in consequence of which (c) he ceases to occupy accommodation (d) which is available for his occupation and (e) **which it would be reasonable for him to continue to occupy**: section 191(1) HA 1996
- An act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate: section 191(2) HA 1996

# Intentionality

- *Pieretti v Enfield LBC* – wrong to say that R.O. should only consider disability if it was obvious. R.O. had failed to make further enquiry where there was a real possibility that applicant was disabled where this was relevant to whether he acted deliberately and in good faith.
- *Ibrahim v Westminster CC* [2021] EWHC 2616 - PSED did as a matter of substance require each of the relevant decision-makers to maintain a sharp focus on the Claimant's mental health and consequent protected characteristic of disability as it affected the question of whether it would have been reasonable for her to remain at the accommodation; and in particular on the sub-issue of subjective reasonableness

# Vulnerability - McMahon v Watford BC

## [2020] HLR 29

- The greater the overlap between the particular statutory duty under consideration and the PSED, the more likely it is that in performing the statutory duty the authority will also have complied with the PSED even if it is not expressly mentioned.
- In the case of a vulnerability assessment, there is substantial overlap between the requirements of the homelessness code and the PSED.
- What the reviewing officer must consider is whether a person is vulnerable as a result of “mental illness or handicap or physical disability”. It is difficult to see how that task can be performed without a sharp focus on the extent of the illness, handicap or physical disability; and its effect on the person’s ability to deal with the consequences of homelessness
- What matters is the substance of the assessment not its form.

# Performance of duty

Shortage of accommodation – where authority adopted a queuing approach to the securing of suitable accommodation, this failed to have due regard to the PSED by failing to recognise that an applicant may need to be treated more favourably than others without asserted disabilities. *R (Elkundi) v Birmingham CC* [2021]

# Discretion

- Interim accommodation
- What period should an intentionally person be accommodated under section 190 (2) HA 1996?
- Should a referral be made to another local housing authority under section 198 HA 1996?

# Homelessness Strategy

- S.1 Homelessness Act 2002 a housing authority is under a duty to formulate a homelessness strategy and to take the strategy into account in the exercise of its functions
- S.2 Homelessness Act 2002 a housing authority is required to carry out a homelessness review of the levels, and likely future levels, of homelessness in its district. One of the purposes of the review is to secure that accommodation is or **will be** available for people in its district who are or may become homeless.
- S. 3(1)(b) Homelessness Act 2002 a housing authority is under a duty to formulate a homelessness strategy to inter alia secure that sufficient accommodation is **and will be** available for people in its district who are or may become homeless

# Homelessness Strategy

- Relevance of PSED to drafting of the strategy
- How are disabled persons treated by the strategy? – Does it mention them or the EqA?
- What attention paid to procurement of stock?
- How is effect of strategy on disabled persons kept under review?

# Allocations

## ***R (H) v Ealing London Borough Council [2017]***

- The Council's Working Households Priority allocations scheme discriminated inter alia against disabled persons who were less likely to be able to satisfy its requirements of needing to be in work to be eligible for an allocation than non-disabled persons.
- There had been an initial failure to comply with section 149(1) EqA 2010 by failing to provide a proper equality impact assessment. There was no analysis of the number of non-working disabled people who had been overtaken or were at risk of being overtaken by working people lower down the same priority band or on a lower band.

# Allocations

## ***R (Ward & Others) v Hillingdon LBC* [2019] EWCA Civ 692**

- Compliance with the public sector equality duty involved a duty of inquiry. In formulating a policy it was not incumbent on a policy maker to assess the potential indirect discriminatory effect on every conceivable group that shared a protected characteristic. By 2016 when a court challenge had been made, the authority ought to at least have considered the position of the protected group and its failure to do so was a breach of the public sector equality duty.

# Allocations

## **Nur v Birmingham CC [2021] EWHC 1138**

- The EIA could not be criticised for not having foreseen every single problem arising from the interaction of different policy decisions.
- The Council never reviewed how the policy was working in practice and they did not undertake any analysis to see how the scheme was impacting on those with protected characteristics at any point after 20 April 2017 when the policy became live.
- The Council had been operating a scheme for the past 4 years without knowing whether, in practice, the scheme achieved the objectives which were set out when the scheme was launched or had unintended consequences which impacted adversely on groups of Birmingham residents with protected characteristics.

# Allocations

## **Nur v Birmingham CC [2021] EWHC 1138**

- One of the purposes of the PSED is to ensure that unintended discrimination is identified by a public body before it results in individuals with protected characteristics from suffering adverse outcomes.
- Accepted by the Council that this made it very difficult for it to demonstrate that it had discharged its Public Sector Equality Duty because it simply did not have any reliable information to enable Council officers or members to know how the scheme was working and whether the scheme was, in practice, impacting adversely on any group of Birmingham residents with protected characteristics.
- The Council had been operating a scheme for the past 4 years without knowing whether, in practice, the scheme achieved the objectives which were set out when the scheme was launched or had unintended consequences which impacted adversely on groups of Birmingham residents with protected characteristics.



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**Q&A**