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The Public Sector Equality Duty: Changes and Challenges

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Section 149 Equality Act 2010

A public authority must, in the exercise of its functions, have "due regard" to the need to:

- eliminate discrimination, harassment and victimisation
- advance equality of opportunity between those who share a relevant protected characteristic and those who do not

foster good relations between those who share a relevant protected characteristic and those who do not

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The need to advance equality of opportunity

- removing disadvantages
- Meeting the needs of those who share a disadvantage that are different from those who do not share it
- Particular emphasis on disability

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The need to foster good relations


- Tackle prejudice
- Promote understanding

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Which protected characteristics?


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

•le Not: Marriage and civil partnership

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Who are public authorities? What are public functions?

- Public authorities listed in Schedule 19 in respect of all of their functions
- Non-public authorities who exercise “public functions” (S.149 ERA 1996) , namely functions “of a public nature for the purposes of the Human Rights Act 1998”.
- HRA 1998 makes reference to but does not define functions of a public nature.
- Possible examples?

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What does compliance require?

- Not a duty to achieve results
- Instead it is a duty to have “due regard” to the need to achieve these goals

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What is “due regard”

- “The regard that is appropriate in all of the circumstances”
- Includes the importance of the areas of life of the disadvantaged group as compared with countervailing factors that are relevant to the function that the decision maker is performing
- Risk and extent of any adverse impact must be considered, together with ways of eliminating such risk
- Mere “consideration” not enough – there must be an analysis of the relevant materials with the statutory considerations in mind.

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But.....

- Ultimately what weight to be given to the various factors is for the decision maker to decide.
- Subject only to the “no reasonable authority” test

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The *Brown* Principles

- Decision makers must be aware of the duty
- Duty must be fulfilled at the time the decision is taken
- Duty must be exercised with rigour and with an open mind
- Good practice to refer to the duty specifically
- Non delegable duty
- Continuing duty
- Proper records should be kept

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ECHR GUIDANCE

- <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>

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SPECIFIC DUTIES

- Certain listed public authorities
- Annual publication of information demonstrating compliance
- Published objectives every four years

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HOW TO ENSURE COMPLIANCE?

- No private law rights (although non-compliance may be of evidential value in indirect discrimination claims)
- Judicial review – complex and costly + limited basis of challenge
- Even if successful, a reconsideration of the decision may lead to the same result

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ASSESSMENT AND COMPLIANCE NOTICES BY THE ECHR

- Assessment by the EHRC
- Report of findings
- Make recommendations
- Court may have “due regard” of such findings, although not conclusive
- Compliance notice
- May be backed up by a court order

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REVIEW OF THE PUBLIC SECTOR EQUALITY DUTY – REPORT OF THE INDEPENDENT STEERING GROUP

- Review the effectiveness of the PSED
- Report published 6 September 2013
- Overall conclusion was that it was “too early” to make a final judgment
- Should be reconsidered in three years time

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REVIEW OF THE PUBLIC SECTOR EQUALITY DUTY – REPORT OF THE INDEPENDENT STEERING GROUP

- Lack of certainty leading to public bodies being overly risk adverse
- Too much “box ticking”
- Impossible to do a cost-benefit analysis

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REVIEW OF THE PUBLIC SECTOR EQUALITY DUTY – REPORT OF THE INDEPENDENT STEERING GROUP

- Not achieving aims
- Unofficial hierarchy of protected characteristics
- Lack of concrete evidence of improvements in outcomes
- Too much paperwork

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REVIEW OF THE PUBLIC SECTOR EQUALITY DUTY – REPORT OF THE INDEPENDENT STEERING GROUP

- Recommendations for the EHRC
 - Clearer Guidance
 - Collaboration with sector regulators
 - Collaboration with information commissioner
- Recommendations for public bodies
 - Less “gold plating”
 - Reduction on burdens placed on small employers, esp in procurement

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REVIEW OF THE PUBLIC SECTOR EQUALITY DUTY – REPORT OF THE INDEPENDENT STEERING GROUP

- Recommendations for Contractors
 - Make use of cabinet office “mystery shopper”
- Recommendations for Government
 - Disagreement about specific duties but the Chair considered that they should be removed or modified
 - Quicker and more proportionate ways of resolving disputes than JRs
 - Review the duty in three years time

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RESPONSE TO THE REPORT OF THE INDEPENDENT STEERING GROUP

- Concerns over recommendations that “gold plating” should be removed and the emphasis on “minimal compliance”
- Limited evidential basis
- Failure to recommend a statutory code
- Concern that “proportionate” guidance should not mean non-compliance

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PSED IN THE CONTEXT OF UNISON'S JR OF TRIBUNAL FEES

- **High Court – 22 October 2013**
- **Judgment awaited**
- **Grounds of challenge include failure to comply with PSED when deciding to introduce fees**
- **EHRC acting as intervener**
- **Watch this space**

Thank you

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