The Public Sector Equality Duty – Session 1

Stephanie Harrison QC, Garden Court Chambers (Chair)
Miranda Butler, Garden Court Chambers
Nicola Braganza, Garden Court Chambers
Leona Bashow, ECHR

29 June 2021

Overview of the Public Sector Equality Duty

Miranda Butler, Garden Court Chambers

29 June 2021

S149 Equality Act 2010 - PSED

Why does the PSED exist?

The broad purpose of the equality duty is to integrate consideration of equality and good relations into the day-to-day business of public authorities. If you do not consider how a function can affect different groups in different ways, it is unlikely to have the intended effect. This can contribute to greater inequality and poor outcomes. The general equality duty therefore requires organisations to consider how they could positively contribute to the advancement of equality and good relations. It requires equality considerations to be reflected into the design of policies and the delivery of services, including internal policies, and for these issues to be kept under review.

S149(1) Equality Act 2010 - PSED

(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.

S149(3) – advancing equality of opportunity

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.

s. 149(4) - Steps to take account of disabled person's disabilities

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.**

S149(5) – duty to foster good relations

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**.

S149 PSED – who does it apply to?

- **Public authorities**: s149(1)
- Persons who are not public authorities but who **exercise public functions** must, in the exercise of those functions, have due regard to the matters mentioned in subsection 149 (1): S149(2)
- **Persons specified** in Schedule 19: S150(1)
  - Public authority specified in Sched 19 respect of all of its functions: S150(3)
  - Public authority specified Sched 19 in respect of specified functions: S150(4)
- A public function is one of a public nature for the purposes of the **Human Rights Act 1998** (see section 6 HRA): S150 (5) .

S149(7) –protected characteristics

- Age (including children and young people)*
- Disability
- Gender reassignment
- Pregnancy and maternity
- Race*
- Religion or belief*
- Sex and sexual orientation

* = subject to exemption

Exemptions – Schedule 18

1 (1) Section 149**, so far as relating to age**, does not apply to the exercise of a function relating to—

(a) the provision of **education to pupils in schools**;

(b) the provision of **benefits, facilities or services to pupils in schools**;

(c) the provision of accommodation, benefits, facilities or services in **community homes**;

(d) the provision of accommodation, benefits, facilities or services pursuant to arrangements by the Secretary of State relating to the **accommodation of children under s. 82 CA 1989**.

Exemptions – Schedule 18

Immigration

2(1) In relation to the exercise of immigration and nationality functions, section 149 has effect as if subsection (1)(b) **did not apply to the protected characteristics of age, race or religion or belief**; but for that purpose "race" means race so far as relating to—

(a) **nationality**, or

(b) **ethnic or national origins**.

See Schedule 18 and the Acts listed to fall withing "Immigration and nationality functions"

See also Schedule 18 - exemption of exercise of "judicial function" ad other exemptions listed eg Parliament, devolved legislatures, General Synod of the Church of England, Security Service, Secret Intelligence Service, GCHQ, part of the armed forces.

Forum

- Public Sector Equality Duty s149 can only be raised as a public law claim (s156).
    - Duty a procedural one - *Bracking v Secretary of State for Work & Pensions* [2013] EWCA Civ 1345
- S113 (1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part (Enforcement)…

    (3) Subsection (1) does not prevent—

    (a) a claim for judicial review

PSED – key case law

Hotak v Southwark LBC [2015] UKSC 30 (see §§73 – 75)

- Approved 'valuable' Court of Appeal judgments.
- Not a duty to achieve a result but **have due regard**
- Legislative intention to build a culture of greater awareness of the existence and legal consequences of disability (and other protected characteristics)
- Weight and extent of the duty are **highly fact-sensitive** and dependent on **individual judgment**

Bracking v SSWP [2013] EWCA Civ

(1) Equality duties are an **integral and important part of mechanisms** to meet aims of anti-discrimination legislation

(2) Important **evidential** element = recording of the steps taken

(3) Duty is upon the Minister or other decision maker **personally**

(4) Minister **must assess the risk and extent of any adverse impact**/the ways in which such risk may be eliminated **before** and not merely as a "*rearguard action*"

(5) "*exercised in substance, with rigour, and with an open mind*"… "*not .. ticking boxes*" "*no duty to make express reference*" …. "*reference to it and to the relevant criteria reduces the scope for argument.*"

Key points on the Public Sector Equality Act - Case law update

Nicola Braganza, Garden Court Chambers

29 June 2021

R (ota) Sophia Sheakh v LB Lambeth [2021] EWHC 1745 28/6/21

Facts - Orders restricting traffic in "Low Traffic Neighbourhoods“ (LTNs) to promote walking/ cycling & discourage/limit or prohibit motor vehicles. S disabled & heavily reliant on her car. Challenge re PSED & having regard to need to advance equality of opportunity

S relied re EIA no specific equality impact/inadequate & *Bracking*.
L relied on regard having been had and further assessments to follow &

Hollow v Surrey [2019] EWHC 618 [80]
"... what constitutes 'due regard', will depend on the circumstances, particularly, the stage that the decision-making process has reached, and ... the nature of the duty to have 'due regard' is shaped by the function being exercised, and not the other way round.... .“
&
R (Hurley) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 at [78]:
the concept of due regard requires a proper and conscientious focus on the statutory criteria .... the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognize the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."

Sophia Sheakh v LB Lambeth cont'd

Kerr J [147]

"What amounts to "**due regard" is fact sensitive**. If the equality objectives are properly considered and put in the balance, it is for the decision maker to decide how much weight they should carry."

"the duty is not a duty to carry out an assessment. **It is a duty to have due regard to what can be called the equality objectives**. Assessment is the tool used to create the evidence base to show performance of the duty. It is not the performance of the duty itself. There is no necessary breach of the duty where no formal assessment has been done." [148]

"it was the coronavirus epidemic and the resulting statutory guidance that led to abandonment of that conventional and leisurely approach to introducing LTNs. The Secretary of State urged local authorities to take radical and almost immediate measures to enhance walking and cycling" …

Rolling basis?

163.“..nothing in section 149 … which prevents, in an appropriate case, performance of the duty by means of a conscious decision to undertake equality assessment on a **"rolling" basis**. A decision to do that is not, as a matter of law, contrary to the pre-requisites of performance per *Bracking* at [26].

164… a decision maker who decides to proceed with [EIA] on a rolling basis, does so at their peril. The legislation and case law does not preclude rolling assessment as a matter of law; but neither do they legitimise it for all cases. The more "evolutionary" the function being exercised, the more readily a rolling assessment approach may be justified. Conversely, for a "one off" function, it is hard to see how it could be justified.

165.So that this judgment is not misunderstood, I should make it clear that I am not deciding that [EIA] on a rolling basis is always acceptable where the function being exercised is to initiate an experiment, as in the case of a decision to make an ETO. **It may or may not be on the facts, depending in each case whether such regard (if any) that was had to the equality objectives in s149(1) … was sufficient to pass the test of being "due regard" to those objectives.**”

Moore & Anor v SoS for Work and Pensions [2021] EWCA Civ 970 23/6/21

Appeal from Swift J dismissing JR re the difference in treatment between Maternity Allowance (MA) & Statutory Maternity Payment (SMP) when calculating the amount of Universal Credit (UC) payable. Argued that 2 payment types are not relevantly distinguishable but treated very differently: MA "unearned income" & deducted in full from UC <-> SMP as "earned income" & deducted from UC on a tapered basis. (Art 14 discrimination. Permission refused below on PSED, **as out of time**. Cs argued time from breach/ application of regs)

CA rejected Cs' argument: challenge was to the *process of decision making* leading to UCR 2013 themselves [44]

"This is not accordingly, one of the so-called "person specific" categories of case identified in *Badmus v SSHD [2020] EWCA Civ 657* at [63]. … Where the challenge is directed to the process of decision-making, the correct approach is as with any other process type public law challenge, to require the claimant to bring the challenge promptly within three months of the breach alleged, and to make good all application for an extension of time to bring the claim outside the relevant time limits where that arise."

R (ota) The 3Million Ltd v SSHD [2021] EWHC 1159 5/5/21

C - organisation campaigning for EU citizens living in the UK. Permission refused on renewal re **HO's policy of digital-only proof of immigration status** for EU citizens granted leave to remain in the UK under EU Settlement Scheme (EUSS).

Held - JR premature as SoS's decision to implement the policy was not until 1/7/21 – until then immigration status could be verified by physical evidence, overall scheme was subject to modification. Any potential ID could not fairly be decided. (Linden J)

Case could be characterised "as a continuing process of decision-making." "decision had not yet taken effect and the overall scheme was subject to modification. The PSED argument was "highly artificial and did not have a realistic prospect of success".

"Until 1 July 2021, it continues to be permissible to verify immigration status by the presentation of physical evidence and, **until then, it is open to the Defendant to discharge any additional duty under section 149 of the 2010 Act in relation to this aspect** of the scheme." [32-34]

R (ota) Blundell & Day v SoS Work & Pensions [2021] EWHC 608 17/3/21

Kerr J - Policy **for making deductions from Cs Universal Credit to pay fines** imposed under the criminal law amounted to SoS unlawfully fettering discretion to decide, where necessary in individual cases, how much to deduct. Policy adopted a rigid formula with no scope for the exercise of discretion, as required under the Fines (Deductions from Income Support) Regs 1992.

Facts - From 10/19, SoS reduced maximum deduction to 30% of the standard allowance. Policy to take deductions at the maximum level, subject to cap of 30%. No provision for reducing deductions due to financial hardship. An individual with financial hardship could apply to fines officers & magistrates' court to remove the deductions from benefits order & enter into direct arrangements with the court. Court had no power to maintain the deduction and alter the rate of deduction.

SoS failed to conduct an EIA when she changed her policy in 10/19 (she accepted). But highly likely if she had, the policy would still have been adopted. There had been a failure to perform the PSED, but the court was obliged to refuse relief [131-134]under the Senior Courts Act 1981 Pt II s.31(2A) [131-134]

See also - Gathercole v Suffolk CC [2020] EWCA 1179 9/9/20

CC failed to have regard to PSED in granting **planning permission for a new primary school** – re the effect of aircraft noise from a nearby airfield on children with protected characteristics. The environmental statement showed the design did not take account of the needs of such students. Not picked up in the planning officer's report, nothing in that report or the subsequent decision.

BUT - highly likely "if not inevitable" that the planning decision would have been no different.
"Good example of" 31 (2A) type case - relief refused [38-45].

" ...following the guidance in [55] – [56] of *Goring* , this court should undertake its own objective assessment of the decision-making process."

"8. It is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31 (2A) . The **provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached),** the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic."

Turani v SSHD [2021] EWCA Civ 348 15/3/21

S29 (6) EqA (prohibition on unlawful discrimination) applied to the exclusion of Palestinian refugees from **the Vulnerable Persons Resettlement Scheme**, even though the refugees were outside the UK.
PSED did not have **territorial application** to persons or matters outside the UK.

Facts - Appellants, Palestinian refugees, fled from Syria to Lebanon, appealed against the dismissal of JR of SSHD Vulnerable Persons Resettlement Scheme and its materially identical replacement, the UK Resettlement Scheme. The scheme applied only to refugees referred by UNHCR. As Palestinian refugees, they were registered with UNRWA (UN Relief & Works Agency). UNHCR had no mandate over Palestinian refugees registered with UNRWA. HC held scheme not indirectly discriminatory on race as o/s territorial scope of the legislation & justified. **PSED applied to the decision to establish the scheme and been breach of duty.**

Turani v SSHD cont'd – Territorial reach

Appeal dismissed, cross-appeal allowed.

(S29 did not ordinarily extend o/s UK.)

PSED applied to the formulation of a policy wherever its impact was, but the **real question was whether the duty extended** to having due regard for promoting equality in respect of persons or matters **outside the UK** when formulating that policy.

Nothing in the express words of s.149(1)(b) suggested that Plt intended to extend territorial reach to o/s the UK. Further, requiring a public authority to have regard to the equality needs of those outside the jurisdiction & whose equality of opportunity it would have limited scope to influence was not implicit in the statutory scheme & make it incoherent. The judge's criticisms of *Hottak (Divisional Court)* and *Hoareau* were correct, *Hottak (DC)* and *Hoareau* disapproved (paras 100-105) (re not considering the normal presumption against extraterritoriality)

R (ota Motherhood Plan) v HM Treasury [2021] EWHC 309 17/2/21

Watch this space …

MP aka Pregnant then Screwed, campaigns for rights of women and mothers, challenge re SEISS.

Failed challenge to the **Self Employment Income Support Scheme**, introduced by the Chancellor to provide payments for the s/e, who had lost income due to the pandemic that indirectly discriminatory to s/e women who had taken leave due to maternity or pregnancy within the 2016-2019 tax years - used to calculate the amount of payment that they could claim. Court also found no breach of the PSED.

Payments under the scheme based on average trading profits (ATP) of the individual's business over the preceding three full tax years, namely 2016-2019. C argued no EIA pre deciding that approach.

Appeal pending.

Pregnant then Screwed *cont'd*

Whipple J - S149 required public authority to have due regard to the need to eliminate discrimination and promote equality of opportunity.

The duty was procedural and was not a duty to achieve any particular result.

A court should not go further than to identify whether the essential questions had been conscientiously considered and that any conclusions reached were not irrational, *R. (on the application of British Medical Association) v Secretary of State for Health and Social Care [2020] EWHC 64 (Admin), [2020] Pens. L.R. 10, [2020] 1 WLUK 69* applied. The general equality implications as well as the particular position of mothers who had recently taken maternity leave had been properly and conscientiously considered. D had had regard to the plight of women who had recently been on maternity leave [paras 86-88, 91].

R (ota United Trade Action Group Ltd) v Transport for London) [2021] EWHC 309 20/1/21

Another appeal pending …

Cs – trade bodies representing hackney carriage industry.

Lang J - Re **London Streetspace plan** & interim guidance, temporary traffic management order (TMO) – held the Mayor of London and Transport for London failed to have regard to relevant considerations. In making the plan, the guidance and the related transport management order, proper regard was not given to the PSED, the legitimate expectation of hackney carriage drivers to travel on London's roads and to use bus lanes was breached, and the drivers were treated irrationally.

The proposals to prevent or restrict vehicular access widely across London's streets had potentially adverse impacts upon people with protected characteristic

United Trade Action Group, Licensed Taxi Drivers Association Ltd cont'd

There should have been a conscientious assessment of the risk and extent of any adverse impact and how that could be eliminated before adopting the proposals, *Bracking* applied.
Once the plan was announced, it was embedded in the guidance which was issued without the duty being applied.
An equality impact assessment was published before the TMO. It did not meet the required standard of a "rigorous" and "conscientious" assessment, conducted with an open mind (paras 175, 177-193, 195).

"193. In my judgment, the EqIA did not meet the required standard of a "rigorous" and "conscientious" assessment, conducted with an open mind. The mitigation entries (save for impact 13), and the implementation/explanation entries were **perfunctory or non-existent, and failed to grapple with the serious negative impacts and high level of residual risks which emerged from the assessment.** The residual risk assessment was inconsistent and irrationally understated the risks. **Most worryingly of all, the EqIA read as if its purpose was to justify the decision already taken.**"

PSED in possession proceedings …

Taylor v Slough BC [2020]EWHC 3520 21/12/20

LA pursued possession proceedings against a tenant in breach of its PSED by failing to take account of her disabled status (bi-polar diagnosis) but subsequently cured the breach, on learning of the disability, by complying with the duty in substance and with rigour, notwithstanding that no formal assessment was carried out [para 30-32; cure of breach [34-42, 46-47, 49-50]. Secure tenant appealed order for possession.

Importance of prospective compliance had been decided in the context of policies being set by public officials, which raised different considerations to those involving decisions to commence or pursue individual possession actions, *R (ota Kaur V Ealing LBC* [2008] EWHC 2062 considered.

Taylor cont'd - subsequent cure of breach

Possibility of a PSED breach at an early stage in possession proceedings being cured by subsequent compliance at a later stage was specifically approved – see

Barnsley v Norton [2011] EWCA Civ 834
Powell v Dacorum BC [2019] EWCA Civ 23
Forward v Aldwyck Housing Group Ltd [2019] EWCA Civ 1334

Subject to the proviso that the public authority had complied with the duty in substance, with rigour and an open mind, and that a subsequent purported compliance was not tainted by the incentive not to depart from a decision already made.

PSED in education and beyond … no duplication needed

ZK v Redbridge LBC [2020]EWCA 1597 1/12/20

LA not acted illegally or irrationally in adopting a "decentralised" model of specialist educational support for children with visual impairments in mainstream schools, whereby individual schools recruited and employed a specialist teaching assistant if and when they had a child attending with a particular need.

See approach in *R (ota McDonald) v Kensington & Chelsea LBC* [2011] UKSC 33 that "in *any* case" where a public body **discharging its functions under legislation expressly directed at the needs of a protected group**, it might be unnecessary to refer expressly to the PSED or to infer from an omission to do so a failure to have regard to PSED. LA made arrangements under s.42 of the Children and Families Act 2014 to secure special educational provision for pupils with SEND. No error in the judge's reliance on the very purpose of those arrangements. Sufficient to meet PSED, *McDonald* followed (para.84).

R (ota Bridges) v Chief Constable of South Wales [2020] EWCA Civ 1058 11/8/20

Facts: -
Pilot project by SWP on automated facial recognition (AFR) technology, processing facial biometric data of members of the public. Surveillance cameras used to capture digital images of people, which were then processed and compared with images of those on police watchlists. If no match made, the image was immediately & automatically deleted.

Held (appeal allowed in part): –
Use of AFR technology interference was not "in accordance with the law" ECHR Art 8(2) ("binary question"): no clear guidance on where technology used & who could be put on a watchlist.
A data protection impact assessment was inadequate & not compliant with the Data Protection Act 2018 s64(3).

Breach of PSED as SWP had not taken reasonable steps to investigate whether the technology had a racial or gender bias.

Bridges cont'd

CA - Court below was wrong to find that the force had done all it reasonably could, *Bracking* followed.

Public concern about the relationship between the police and BAME communities had not diminished since Stephen Lawrence Inquiry Report.

"The reason why the PSED is so important is that **it requires a public authority to give thought to the potential impact of a new policy which may appear to it to be neutral but which may turn out in fact to have a disproportionate impact on certain sections of the population**."

The police force had never investigated whether AFR had an unacceptable bias on grounds of race or gender."

The fact that the technology was being piloted made no difference to the duty [paras 167, 173-175, 179-182, 191, 198-200].

Bridges cont'd

"180. The importance of the PSED was emphasised in *R (Elias) v Secretary of State for Defence* [2006] EWCA 1293 at [274], where Arden LJ (as she then was) said:

"It is the clear purpose of section 71 [the predecessor to section 149] to require public bodies … to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. **This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.** …"

[emphasis added]

Bridges cont'd – what if no evidence to show need for concern?

"181. We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex.

82. We also acknowledge that, as the Divisional Court found, there was no evidence before it that there is any reason to think that the particular AFR technology used in this case did have any bias on racial or gender grounds. **That, however, it seems to us, was to put the cart before the horse.** The whole purpose of the positive duty (as opposed to the negative duties in the Equality Act 2010) is to ensure that **a public authority does not inadvertently overlook information which it should take into account**.

[emphasis added]

And is a "trial process" an answer? – NO!

200. Finally, we would note that the Divisional Court placed emphasis on the fact that SWP continue to review events against the section 149(1) criteria. It said that this is the approach required by the **PSED in the context of a trial process**. With respect, we do not regard that proposition to be correct in law. The PSED does not differ according to whether something is a trial process or not. **If anything, it could be said that, before or during the course of a trial, it is all the more important for a public authority to acquire relevant information in order to conform to the PSED and, in particular, to avoid indirect discrimination on racial or gender grounds.**

[emphasis added]

Thank you.

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw