

THE EQUALITY DUTIES FROM APRIL 2011

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The 'new' equality duty

1. The public sector equality duty consists of a general equality duty, which is set out in section 149 of the Equality Act 2010 itself, and specific duties which are imposed by secondary legislation. The specific duties are designed to help public authorities meet the general equality duty.
2. The new duty covers the following eight protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation (referred to as "protected groups"). The duty also covers marriage and civil partnership, but not for all aspects of the duty.
3. In summary, those subject to the equality duty must, in the exercise of their functions, have due regard to the need to:
 - Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
 - Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - Foster good relations between people who share a protected characteristic and those who do not.
4. Having due regard for advancing equality involves:
 - Removing or minimising disadvantages suffered by people due to their protected characteristics.
 - Taking steps to meet the needs of people from protected groups where these are different from the needs of other people.

- Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.
5. Meeting different needs involves taking steps to take account of disabled people's disabilities. The Act describes fostering good relations as tackling prejudice and promoting understanding between people from different groups. It states that compliance with the duty may involve treating some people more favourably than others.
 6. Public authorities also need to have due regard to the need to eliminate unlawful discrimination against someone because of their marriage or civil partnership status. This means that the first arm of the duty applies to this characteristic but that the other arms (advancing equality and fostering good relations) do not apply.
 7. The general equality duty applies to the public authorities listed in Schedule 19 of the Act. This includes many public authorities who were covered by the race, disability and gender equality duties. Examples of this include local authorities, education bodies (including schools), health bodies, police, fire and transport authorities, and government departments.
 8. The general equality duty also applies to other organisations who exercise public functions. This will include private bodies or voluntary organisations which are carrying out public functions on behalf of a public authority. The Equality Act defines a public function as a function of a public nature for the purposes of the Human Rights Act 1998. An example of this would be a private company running a prison on behalf of the government. The company would, however, only be covered by the general equality duty with regard to its public functions, but not for other work, like providing security services for a supermarket.
 9. Whether or not an organisation is exercising a function of a public nature depends on a number of factors. These include (among others) whether it is publicly funded, if it is exercising powers assigned to it by statute, or if it is taking the place of central or local government. Other factors include: if it is providing a public service, if its structures and work are closely linked with the delegating state body, and if there is a close relationship between the private body and any public authority.

Cases on the 'old' equality duties (race, gender and disability)

10. The EHRC non-statutory guidance on the new duty identifies the following principles as emerging from the old case law:
- (1) Those who exercise its functions (for example, its staff and leadership) are aware of the duty's requirements. Compliance involves 'a conscious approach and state of mind'. This means that decision-makers must be fully aware of the implications of the duty when making decisions about their policies and practices.
 - (2) The duty is complied with before and at the time that a particular policy is under consideration and a decision is taken. A public authority cannot satisfy the duty by justifying a decision after it has been taken.
 - (3) Consideration of the need to advance equality forms an integral part of the decision-making process. The duty must be exercised in such a way that it influences the final decision.
 - (4) Any third parties exercising public functions on its behalf are required to comply with the duty, and that they do so in practice. This is because the duty rests with the public authority even if they have delegated any functions to a third party.
 - (5) Regard is given to the need to advance equality when a policy is implemented and reviewed.

11. **Elias v The Secretary of State for Defence** [2005] EWHC 1435 (Admin):

"In principle it is necessary for the [decision maker] to pay attention not only to what might be termed a negative aspect of eliminating unlawful discrimination in sub-section (a), but also that positive obligations under the section found in sub-section (b), namely, to promote equality of opportunity and good relations between persons of different racial groups." [underlining added]

12. [2006] EWCA Civ 1293:

"The judge set out the requirements for the content of a Race Equality Scheme in para 92 of his judgment, and these show that the body making the scheme must therefore set out its arrangements for assessing and consulting on the likely impact of its proposed policies on the promotion of race equality.

The judge went on to make a declaration that, in the present case, the Secretary of State had not complied with his obligations ...

It is the clear purpose of section 71 to require public bodies to whom that provision applies 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. ...”
[underlining added]

13. **BAPIO v Secretary of State for the Home Department** [2007] EWCA Civ 1139:

“... the importance of compliance with section 71 not as a rear guard action following a concluded decision, but as an essential preliminary to any such decision. Inattention to it is both unlawful and bad government. ...” [underlining added]

14. **Baker v Secretary of State for Community and Local Government** [2008] EWCA Civ 141:

“Promotion of equality of opportunity (and indeed good relations) will be assisted by, but it is not the same thing as, the elimination of race discrimination. ... The promotion of equality of opportunities concerned with issues of substantive quality and requires a more penetrating consideration than merely asking whether there has been a breach of a principle of non-discrimination. ... The duty is to have due regard to the need to promote equality of opportunity (and good relations) between the racial groups. ...” [underlining added]

“I do not accept that the failure of an inspector to make explicit reference to section 71(1) is determinative of the question whether he has performed his duty under the statute. So to hold would be to sacrifice substance to form. The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed.” [underlining added]

15. **C v SS for Justice** [2008] EWCA Civ 882

The failure to produce a race equality impact assessment prior to laying the Secure Training Centre (Amendment) Rules 2007 before Parliament was a defect in the procedure that was of substantial, and not merely technical, importance and the rule of law and the proper administration of race relations law required the Rules to be quashed. It sent out the wrong message to public bodies with responsibilities under s.71 of the 1976 Act to allow that deficit to be cured by a review only undertaken eight months after the amendments had been laid. Although one could not doubt the good faith of a civil servant, who had produced an impact assessment that showed that physical control in care had not been applied in a discriminatory manner, as a matter of principle it could not be right that a survey that should have

been produced to inform the mind of the government before it took the decision to introduce the amendments was only produced in order to attempt to validate the decision that had already been taken. The failure to produce the assessment was a defect in the procedure that was of very great substantial, and not merely technical, importance. In the circumstances, the reasons given by the judge for not quashing the amendments were mistaken and the rule of law and the proper administration of race relations required the amendments to be quashed.

16. **Chavda v Harrow LBC** [2007] EWHC Admin 3064, (2008) 11 CCLR 187

A report published after an equalities impact assessment of a proposal that a local authority restrict its adult care service to people with critical needs had failed to inform the authority's decision makers of the disability equality duty owed by the authority under the Disability Discrimination Act 1995 s.49A, and that failure rendered the decision of the authority to adopt the proposal unlawful, as the decision makers had not had proper regard to the duty owed.

17. **Kaur –v- Ealing** [2008] EWHC 2062 (Admin)

Quashing Ealing's decision to stop providing funding to the Southall Black Sisters. Emphasising: (1) the need for assessment of impact before a policy is adopted, (2) the need for the process of assessment to be recorded, and (3) the need for rigor in the assessment.

18. **Brown –v- Secretary of State for Work and Pensions** [2008] EWHC 3158 (Admin)

"89. Accordingly, we do not accept that either section 49A(1) in general, or section 49A(1)(d) in particular, imposes a statutory duty on public authorities requiring them to carry out a formal Disability Equality Impact Assessment when carrying out their functions. At the most it imposes a duty on a public authority to consider undertaking a DEIA, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability. To paraphrase the words of WB Yeats in *An Irish Airman Foresees his Death*, the public authority must balance all, and bring all to mind before it makes its decision on what it is going to do in carrying out the particular function or policy in question.

90. Subject to these qualifications, how, in practice, does the public authority fulfil its duty to have "due regard" to the identified goals that are set out in section 49A(1)? An examination of the cases to which we were referred suggests that the following general principles can be tentatively put forward. First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals: compare, in a race relations context ***R(Watkins – Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865 at paragraph 114 per Silber J.*** Thus, an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given

to them: see, in a race relations case, the remarks of Moses LJ in ***R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin)*** at paragraph 45.

91. Secondly, the “due regard” duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. On this compare, in the context of race relations: ***R(Elias) v Secretary of State for Defence [2006] 1 WLR 3213*** at para 274 per Arden LJ. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty: compare, in the race relations context, the remarks of Buxton LJ in ***R(C) v Secretary of State for Justice [2008] EWCA Civ 882*** at paragraph 49.

92. Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of “ticking boxes”. Compare, in a race relations case the remarks of Moses LJ in ***R(Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin)*** at paragraphs 24 - 25.

93. However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have “due regard” to the needs set out in the section is not determinative of whether the duty under the statute has been performed: see the judgment of Dyson LJ in ***Baker*** at paragraph 36. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where section 49A(1) is in play. “In that way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced”: ***Baker*** at paragraph 38.

94. Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non – delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have “due regard” to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the “due regard” duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its “due regard” duty. Compare the remarks of Dobbs J in ***R (Eisai Limited) v National Instituted for Health and Clinical Excellence [2007] EWHC 1941 (Admin)*** at paragraphs 92 and 95.

95. Fifthly, (and obviously), the duty is a continuing one.

96. Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record -

keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1): see the remarks of Stanley Burnton J in *R(Bapio Action Limited) v Secretary of State for the Home Department [2007] EWHC 199 (Admin)* at paragraph 69, those of Dobbs J in *R(Eisai Ltd) v NICE (supra)* at 92 and 94, and those of Moses LJ in *Kaur and Shah (supra)* at paragraph 25.”

19. **E –v- Governing Body of JFS** [2008] EWHC 1535/1536

“206. There is an unqualified duty to comply with section 71, albeit, as Dyson LJ pointed out in *R (Baker and others) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141* at para [31], the duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups, it is a duty to have due regard to the need to achieve these goals. The object of section 71, according to Ms Rose, and I agree, is to ensure that the potential racial impact of a decision is *always* taken into account by public authorities as a mandatory relevant consideration.”

“211. I can accept that section 71 is not engaged in a situation where no question of racial discrimination is capable of arising or where it is manifest that no such question in fact arises.”

“213. Proper compliance with section 71 requires the relevant public body to have regard to – to direct its mind to – both the requirement in section 71(1)(a) and the requirement in section 71(1)(b), in other words it must direct its mind both to the need to eliminate unlawful racial discrimination and to the need to promote equality of opportunity and good race relations. The second of these requirements is significant as showing that it is not enough, if the section 71 duty is to be complied with, merely to be able to point to the existence of a non-discrimination policy – and that is really, as it seems to me, as far as paragraph 1.2(b) of JFS’s Race Equality Policy goes. Proper compliance with section 71 requires that appropriate consideration has been given to the need to achieve statutory goals whose achievement will almost inevitably, given the use of the words “eliminate” and “promote”, involve the taking of *active* steps.

213. **Meany –v- Harlow** [2009] EWHC 559 (Admin)

“72. First, the statutes require that the public body has "due regard" to the specified matters; and what is "due" depends on what is proper and appropriate to the circumstances of the case. Therefore, if a challenge is made, the question of due regard requires a review by the court.”

“It is true that, as Baker and Brown make clear, how much weight is to be given to the countervailing factors is a matter for the decision maker. But that does not

abrogate the obligation on the decision maker in substance first to have regard to the statutory criteria on discrimination.”

84. ... general regard to issues of equality is not the same as having specific regard, by way of conscious approach, to the statutory criteria.”

20. **Domb –v- Hammersmith & Fulham** [2008] EWHC 3277 (Admin)

“83. [one] criticism in this case is the failure of the Council to put the PEIA before the Cabinet. Whilst there is not a duty on the Council to do so, if it does not do so it must then make sure that the key aspects of the PEIA are included in the report to Cabinet.”

[2009] EWCA (Civ) 941

“52.there is no statutory duty to carry out a formal impact assessment; that the duty is to have due regard, not to achieve results or to refer in terms to the duty; that due regard does not exclude paying regard to countervailing factors, but is “the regard that is appropriate in all the circumstances”; that the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind; and that it is a non-delegable duty.” [underlining added]

“62.necessary for a local authority to be able to demonstrate, as a matter of its duty to have due regard to the need to promote disability equality that it had considered, in substance and with the necessary vigour, whether it could by any means avoid a decision which was plainly going to have a negative impact on the users of existing services.”

79. Members are heavily reliant on officers for advice in taking these decisions. That makes it doubly important for officers not simply to tell members what they want to hear but to be rigorous in both inquiring and reporting to them.....

80. But these lose significance against the backdrop of a predetermined budget cut. The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court.”

21. **Isaacs –v- Secretary of State for Communities (etc)** [2009] EWHC (Admin) 557

“53. ...The classic situation where the Section 71 obligation bites is where some policy is in the course of being considered. The duty, to put it loosely, to have regard

to race relations implications is very important. But where a policy has been adopted whose very purpose is designed to address these problems, compliance with Section 71 is, in my judgment, in general automatically achieved by the application or implementation of the very policies which are adopted to achieve that purpose.

54. Of course, there may in some cases be additional problems over and above those which the policy is directed to ameliorate, and which will need specific consideration. But that is not this case. In my judgment the inspector was having regard to the requirements of Section 71 by seeking properly to apply the policies which had those very considerations in mind.” [underlining added]

22. **Harris – v- Haringey** : [2010] EWCA Civ 703

Challenge to the grant of planning permission for demolition of buildings containing shops and homes predominantly occupied by members of BME communities. Haringey had argued (and the judge in the JR accepted) that the race equality duty had been discharged through applying the UDP which, itself, considered race issues (in effect, seeking to extend the logic of Baker and Isaacs, above). Held:

“39. ... The case is distinguishable from *Baker* and *Isaacs* where policies had been adopted in a Circular whose very purpose was to address the issues addressed in section 71(1). It cannot be said that the policies cited in this case were focused on specific considerations raised by section 71. The council policies to which reference has been made may be admirable in terms of proposing assistance for ethnic minority communities, and it can be assumed that they are, but they do not address specifically the requirements imposed upon the council by section 71(1). “

23. **Boyejo –v- Barnett LBC and Smith v Portsmouth CC** [2009] EWHC (Admin) 755

“56. I do not accept the submission of Barnet that the claimants must show an absence of due regard in the *Wednesbury* sense of unreasonableness. In *R (Meany & Others) v Harlow District Council* [2009] EWHC 559 (Admin) Davis J considered the duty in the context of a decision by a local authority to advertise an invitation to tender for its welfare rights and advice services. At paragraph 72 Davis J said:

‘Mr Holbrook submitted that Mr Wolfe either had to show that no regard was had to the statutory criteria or that the decision was irrational. Since Mr Wolfe disclaimed the latter, he was, said Mr Holbrook, left with the former. I do not agree with that submission of Mr Holbrook for two reasons. First, the statutes require that the public body had ‘due regard’ to the specified matters; and what is ‘due’ depends on what is proper and appropriate to the circumstances of the case. Therefore, if a challenge is made, the question of due regard requires a review by the court. It is not simply a question of determining whether no regard at all was had to the statutory criteria. Second, if the submission of Mr Holbrook were right it would be contrary to

the authorities, which indicate that a tick box approach may not necessarily in any given case give a complete answer. It is true that, as *Baker* and *Brown* make clear, how much weight is to be given to the countervailing factors is a matter for the decision maker. But that does not abrogate the obligation on the decision maker in substance first to have regard to the statutory criteria on discrimination.’

57. In my judgment the *Wednesbury* test applies to the consideration of the countervailing factors there referred to, but not to the question of whether the necessary due regard has been had.”

24. **Pieretti –v- Enfield** [2010] EWCA Civ 1104 (12 October 2010)

The appellant claimed that he and his wife were (or, upon eviction, would be for the purposes of section 193 Housing act 1996) homeless and eligible for assistance, that they had a priority need for accommodation and that they were not homeless intentionally or (to be strictly accurate) that Enfield should not be satisfied that they *were* homeless intentionally. He argued that process engaged the disability equality duty. Enfield said not: (1) the duty only applied to the formulation of policies not to individual decisions; (2) the Housing Act provides a comprehensive scheme which deals with disability issues exhaustively; (3) the decision-making in play was not in event discharge of a function.

CA roundly rejected all three of Enfield’s points.

But what of the fact that the appellant had not said his wife was disabled? CA considered whether the officer failed “to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled in a sense relevant [to the discharge of the duty]” – to do so was a breach of the duty.

25. **Rahman –v- Birmingham CC** [2011] EWHC 944 (Admin)

Challenge to a decision by Birmingham CC to cut funding to a legal advice centre, approving, in particular, the summary of case law and analysis in *Boyejo*.

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MATRIX

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