



# Housing Associations and ALMOs – a Practical Guide to the public sector equality duty

## Background

The race equality duty<sup>1</sup> was the first public sector equality duty to be introduced, and was enacted in response to recommendations made in the Macpherson inquiry report into the murder of Stephen Lawrence.<sup>2</sup> The purpose of such a duty was to address “institutional racism.” It was an opportunity to go beyond the anti-discriminatory provisions of the Race Relations Act 1976, and put in place statutory requirements for public authorities to be proactive in addressing discriminatory practices and in promoting race equality and good relations. Under the race equality duty the majority of public authorities were required to publish race equality schemes as well as have certain arrangements in place for employment monitoring. The gender and disability duties were introduced subsequently and also had prescriptive specific duties.

The public sector equality duty (PSED) was introduced under s149 of the Equality Act 2010 replacing the previous equality duties and covering a broader range of protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The Act set out the main principles of the PSED as follows:- S149

- (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

The section provides further clarity on how these requirements should be applied. (Advancing equality of opportunity and fostering good relations does not, however, apply to marriage and civil partnership). Following the introduction of the PSED there was a reluctance by the Government to introduce specific duties that involved what it considered to be too much “bureaucracy”. The specific duties that were published were therefore less prescriptive than previous ones and instead focused on the

publication of objectives and information on compliance with the duty.<sup>3</sup> Furthermore, the Government Equalities Office would not approve publication by the Equality and Human Rights Commission of statutory guidance.

With all this change in approach to the specific duties and guidance the upshot is that many of those who are subject to the duty are unclear as to what their obligations are under the duty. However if they are genuinely committed to best practice they need not be in such a quandary as there is plenty of guidance available to follow that will help them in meeting their statutory obligations as well as good practice standards.

## **Who is subject to the PSED?**

The Equality Act 2010 stipulates that a public authority is subject to the PSED; however it has to be one listed in Schedule 19 of the Act. There is also reference to a person who is not a public authority, but nevertheless is carrying out public functions being subject to the PSED when carrying out those functions,

Section 150(5) stipulates that a public function is a function of a public nature for the purpose of the Human Rights Act 1998.

## **What is the position of ALMOs and housing associations?**

All ALMOs and housing associations, whether carrying out public functions or not, are bound by the anti-discrimination provisions of the Equality Act 2010. In the case of Weaver<sup>4</sup> it was stated that a housing association was carrying out a public function when allocating and managing social housing. The association was therefore required to respect tenants' human rights. ALMOs and housing associations are therefore also subject to the PSED. In its publication "Human Rights at Home-a guide for public authorities,"<sup>5</sup> the EHRC outlines the obligations of social housing providers under the Human Rights Act 1998. It refers to Article 6, the right to a fair trial, Article 8 which includes the right to respect for a home and Article 14, the right to enjoy Convention rights without discrimination, as the rights which are particularly relevant to social housing providers. It also refers to allocation, termination and eviction as being the main public functions carried out by housing associations that would be subject to the HRA. Furthermore it also refers to the PSED also applying to the public functions of these providers.

EHRC guidance advises that even if a housing association is unsure whether it is exercising public functions for the purposes of human rights legislation it is advisable for it to comply with the Convention rights. Likewise if an ALMO or housing association is unsure about certain of its functions being subject to the PSED it could nevertheless comply with the duty.

ALMOs and housing associations should also be aware of the Equality and Diversity Strategy of the Homes and Communities Agency which has set out its own equality objectives, and considers how they may work collaboratively on any shared objectives<sup>6</sup>.

## **Case law**

Since the introduction of the race, gender and disability equality duties a lot of case law has been developed, particularly regarding the interpretation of the meaning of the "general duty" and how the concept of "due regard" should be applied. Many of the principles established in the courts relating to the previous duties have been applied to cases under the PSED.

In the case of *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, much of the case law is outlined including, in particular, what are often referred to as the “Brown Principles”. This outline has been referred to in subsequent cases.

1. 26(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
2. An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
3. The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.
4. A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].
5. These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
  - i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
  - ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
  - iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
  - iv) The duty is non-delegable; and
  - v) Is a continuing one.
  - vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.
6. "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)
7. Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

8. Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [\[2012\] EWHC 201 \(Admin\)](#) (Divisional Court) as follows:

(i) At paragraphs [77-78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise 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. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89-90]

"[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [\[1977\] AC 1014](#) and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]):

'...the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'

## **Review of the PSED**

Following the introduction of the PSED, it was not long before the government decided to conduct a review following the Red Tape Challenge, its rationale being that there had been complaints about the process being too bureaucratic; even with less prescriptive specific duties.<sup>7</sup> It said that it would look at whether the PSED was "operating as intended." It found that there was general support for the principles underlying the PSED, although there was some uncertainty as to how it should be implemented. However it concluded that it was too early to make any changes so would review it again in 2016 when the PSED has been in place for 5 years.

EHRC in its response to the review report stated that one way of reducing bureaucracy would be to approve statutory guidance so that authorities can be clear what is required to comply with the duty. However the Government Equalities Office have continued to refuse to arrange the approval of such a publication.

## Summary and conclusion

ALMOs and housing associations should accept that they are likely to be covered by the PSED and should apply it in their policies and practices. There is now a lot of case law and guidance that can be followed to assist with compliance and best practice. In any case the duties and the steps that are required to comply with the PSED make good business sense in terms of organisational planning and delivery. For example to consult widely, to carry out some form of equality analysis to ensure that your services meet the needs of the whole community or the particular community you are serving makes good sense and it does not have to be carried out in an overly bureaucratic manner.

## End Notes

- <sup>1</sup> Race Relations Act 1976 was amended by the Race Relations (Amendment) Act 2000; s71(1) set out the race equality duty
- <sup>2</sup> The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny-1999
- <sup>3</sup> The Equality Act 2010 (Statutory Duties) Regulations 2011
- <sup>4</sup> R(Weaver) v London Quadrant Housing Trust [2009] EWCA Civ 587; [2010] 1 WLR 363; [2009] HLR40 , CA
- <sup>5</sup> EHRC:-Human rights at Home:-Guidance for social housing providers: March 2011
- <sup>6</sup> Homes and Communities Agency-Equality and Diversity Strategy 2012-2015
- <sup>7</sup> GEO Review of the Public Sector Equality Duty: Report of the Independent Steering Group: 6 September 2013

## Further information

Equality and Human Rights Commission guidance on public sector equality duty

<http://www.equalityhumanrights.com/private-and-public-sector-guidance/public-sector-providers/public-sector-equality-duty/guidance>

HDN resources

<http://www.housingdiversitynetwork.co.uk/resources>

Chartered Institute for Housing-How to undertake an equality analysis

<http://www.housingdiversitynetwork.co.uk/wp-content/uploads/How-to-undertake-an-equality-analysis.pdf>

Homes and Communities Agency-Equality and Diversity Strategy 2012-2015

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/363008/equality\\_and\\_diversity\\_strategy\\_151112.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363008/equality_and_diversity_strategy_151112.pdf)

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