

CONFERENCE

The Equality Act 2010 in Public Law Challenges

session at

Public Law in 2025:
One Day Symposium

with Kelvin Rutledge KC and
Tara O'Leary



cornerstone

barristers



EQUALITY ACT 2010 IN PUBLIC LAW CHALLENGES

Kelvin Rutledge KC:

- Indirect discrimination
- PSED



Tara O'Leary:

- Claims for damages for discrimination
- *For Women Scotland v Scottish Ministers* [2025] UKSC 16

Equality Act 2010



Indirect discrimination and the PSED



Kelvin Rutledge KC

29 September 2025

Equality Act 2010, Part 3, Services & Public Functions

S.29(2) “A service-provider (A) must not, in providing the service, discriminate against a person (B)—

- (a) as to the terms on which A provides the service to B;
- (b) by terminating the provision of the service to B;
- (c) by subjecting B to any other detriment.”



Indirect discrimination, ss. 19 & 23



S.19(1) “A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

S.23(1) “On a comparison of cases for the purposes of section ... 19 there must be no material difference between the circumstances relating to each case.”

Indirect discrimination cont.





The latest case



R. (on the application of Begum) v Tower Hamlets LBC [2025] EWCA Civ 1049

- Use of homelessness 'information database' – does it discriminate against women applicants?
- Definition of PCP [42]-[44]
- Use of statistical evidence [56]-[60]
- Causation [64]-[65]



Public Sector Equality Duty, s.149



S.149 “(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.”

PSED principles

PSED requires a public authority to give the equality needs which are listed in s.149 the regard which is 'due' in the particular context.

It does not dictate a particular result.

It does not require an elaborate structure of secondary decision-making every time a public authority makes any decision which might engage the listed equality needs, however remotely.

The court is not concerned with formulaic box-ticking, but with the question whether, in substance, the public authority has complied with section 149.

A public authority can comply with s.149 even if the decision-maker does not refer to s.149.

Hotak v Southwark LBC [2016] AC 811; [*Hackney LBC v Hague* \[2017\] P.T.S.R. 769](#); [*R. \(on the application of End Violence Against Women Coalition\) v DPP*, \[2021\] 1 W.L.R. 5829](#)

PSED developing principles

The overlapping principle

- *McDonald v Kensington and Chelsea RLBC* [2011] UKSC 33
- *c/f Pieretti v Enfield LBC* [2011] P.T.S.R 565

'Rolling compliance'

- *R(Sheakh) v Lambeth LBC* [2021] EWHC 1745 (Admin)



Claims for damages for discrimination



Tara O'Leary

29 September 2025

Recent briefs



- Non-functioning hearing loop in council chamber
- Exemptions for disabled persons to low traffic neighbourhoods
- Letters & emails in inaccessible format (due to visual impairment)
- Repeated misgendering by front line employees
- Lengthy unsuitable temporary accommodation in hotel for disabled homeless person under Part VII HA 1996
- Refusal to accept applicant was “homeless” following fire in tower block
- Application for ASB injunction against tenant lacking capacity
- Adult Social Care funding cuts allegedly triggering evictions from supported accommodation
- Delay carrying out repairs and decanting family with disabled children from social tenancy afflicted by mould and damp

Johnston v Financial Ombudsman Service

[2025] EWCA Civ 551

- Alleged failure by FOS to make reasonable adjustments when handling complaints from Claimant regarding his mortgage
- Claims dismissed as FOS benefits from statutory immunity – appeals failed
- Claimant unable to show he had lacked mental capacity to conduct litigation at the time of hearings
- Is failure to advertise possibility of requesting reasonable adjustments itself a failure to make reasonable adjustments?



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Which Part of EA 2010 is engaged?

- **Part 3: Services and Public Functions**
- Part 4: Premises
- Part 5: Work
- Part 6: Education
- Part 7: Associations
- Part 8: Ancillary prohibited conduct –
 - **NB** section 111 instructing, causing or inducing discrimination
 - Section 109 liability of employers and principals

Code of practice for services, public functions and associations

- *Part 3 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against when using any service provided publicly or privately, whether that service is for payment or not.*
- *This does not necessarily mean that service providers should treat everybody in exactly the same way; in some circumstances a service provider will need to provide services in a different way to meet the needs of people for example, positive action, single sex services and disabled people so that they can receive the same standard of service as far as this is possible.*
- **NB** Presently under review following two rounds of public consultation



Judicial review - jurisdiction

- Permitted by s.113(e)(a) Equality Act 2010
- Cannot include substantive claims for damages:
 - *Hamnett v Essex CC* [2017] EWCA Civ 6
 - *Adesotu v Lewisham LBC* [2019] EWCA Civ 1405
- Time limit: 3 months or promptly - CPR 54.5(1)
- Permission test: s.31(3) Senior Courts Act 1981
- Remedies: s.31 SCA 1981. Note relief refused if 'highly likely' outcome would have been the same even if breach did not take place: s.31(2A)

Claims for damages for discrimination

- Jurisdiction reserved to the County Court: s.114(1)(a) Equality Act 2010
- Breach of PSED not actionable in damages: s.156
- No permission test – only CPR 3 strike out / CPR 24 summary judgment
- Time limit: s118(1) – 6 months starting with the date of the act to which the claim relates but
 - (i) Calculation allows for continuing acts: s.118(6)-(7)
 - (ii) Discretion to extend time if “just and equitable”: s.118(1)(b)

Claims for damages for discrimination

- Remedies: s.119(2) – any remedy which could be granted by the High Court on judicial review
- S.119(4): **an award of damages may include compensation for injured feelings** (whether or not it includes compensation on any other basis)
- *Vento Guidelines* for 2025 suggest awards between £1,200 - £60,700
- *Rosebery Housing Association v Williams* (2021) EW Misc 22 (CC) – award of £27,400 for disability discrimination which consisted of pursuing an application for ASB injunction to trial





Costs in the County Court



- Usual rule remains that costs follow the event: CPR 44
- However the usual costs rules will apply following track allocation for example:
 - Small claims: costs for parties who have behaved unreasonably (only) CPR 27.14(2)(g)
 - Part II of CPR 3: costs budgeting on the multi-track
- Costs rules for litigants in person: CPR 46.5
- Consultation on costs protection for discrimination claims – closed November 2024
 - Whether costs protection should be extended to discrimination claims in the civil courts
 - Do costs in fast-track and multi-track cases hinder access to justice by disincentivising claimants from bringing claims which have merit?

For Women Scotland v Scottish Ministers [2025] UKSC 16

Tara O'Leary

29 September 2025

The protected characteristic of sex

11 Sex

In relation to the protected characteristic of sex –

- (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;*
- (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.*

212 General Interpretation

“man” means a male of any age

“woman” means a female of any age



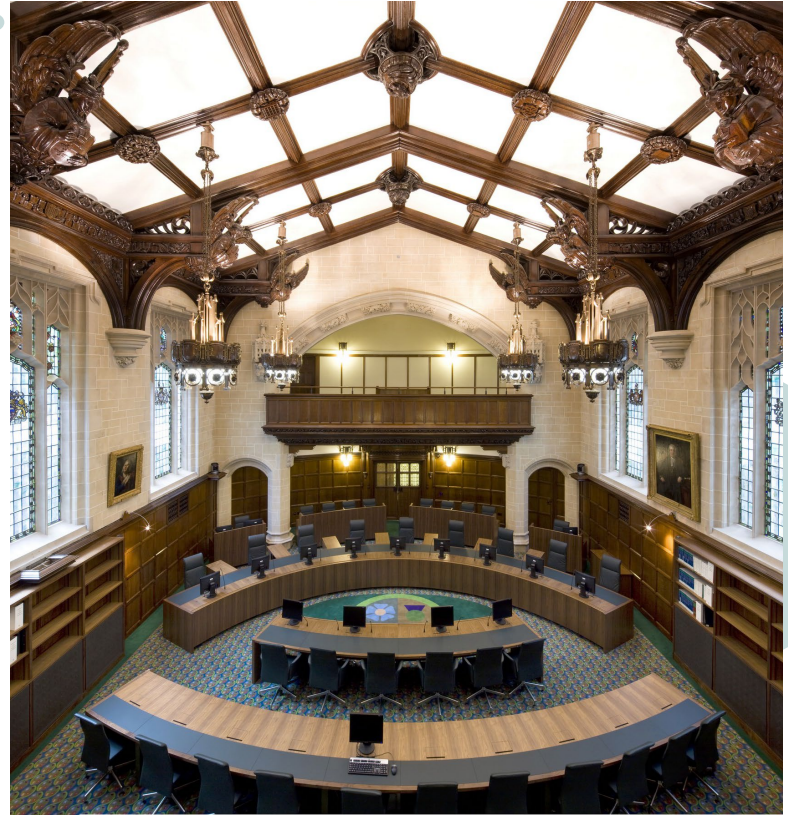
The question



- What is the meaning of “sex” in s.11 of the Equality Act 2010?
- Does “woman” in that context include transgender women with a Gender Recognition Certificate issued under the Gender Recognition Act 2004?
- In other words, does the EA 10 need to be read in light of the GRA 2004?
- Context: statutory guidance from Scottish Ministers said “women” included trans women with a GRC
- Purpose of guidance was to improve gender representation on public boards via statutory creation of ‘gender representation targets’

The answer

- No: “woman” does not include trans woman with a GRC
- EA 10 “trumped” the GRA 2004 – history including Sex Discrimination Act 1975
- “Sex” in the EA 10 is binary – corresponds to biological characteristics rather than gender as a social construct
- “Woman” and “man” bear same meaning across all sections of the EA 10 – importance of consistency





What does this mean?



- Ruling on a narrow point of statutory interpretation: not on policy for trans rights
- The Guidance (*i.e.* which was found to be unlawful) only applied in any event to trans people with a GRC: sex of all other trans people remains as registered at the time of birth
- Trans people continue to benefit from protection under:
 - Protected characteristic of gender reassignment - s.7 EA 10
 - Also sex, *e.g.* if trans woman suffers sex discrimination because perceived to be a woman
- It is lawful to provide single-sex services if certain conditions are met: s.31(10) and Schedule 3 paras. 27 and 28 EA 10
- **NB** But is it mandatory to do so – or discriminatory not to do so?

Baroness Hale, *the Guardian*, 18 September 2025

“The supreme court dealt with it as a pure question of statutory construction,” Hale says, “and reached the conclusion that the Equality Act trumped the Gender Recognition Act. Now, the Equality Act allows for single-sex services, either separate but equal or separate and different. It allows for them, it doesn’t mandate them. So there’s nothing in that judgment that says anything about same-sex services. It doesn’t say anything about public toilets, changing rooms, hospital wards. But it has been taken to mean something that I don’t think it does mean.”

EHRC Guidance

Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions –

April 2022 and currently under review

Interim update on the practical implications of the UK Supreme Court judgment – 25 April 2025 (9 days later)

*It is not compulsory for **services** that are open to the public to be provided on a single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act. **However, it could be indirect sex discrimination against women if the only provision is mixed-sex.***

Code of Practice for Services, Public Functions and Associations

- Current version published in 2011
- Public consultation for major review in 2024 – further consultation April 2025 following UKSC decision
- Draft updated Code shared with Minister for Women & Equalities 5 September 2025

Thank you



Kelvin Rutledge KC



Tara O'Leary

