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PSED Defence and residential possession claims

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A recording of this webinar and a downloadable copy of the slides will be available on our website shortly

# The Speakers

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# Public Sector Equality Duty

## The Legislation – Equality Act 2010



### 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; (see s. 149(3))

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it (see s. 149(5)).

**(4)** The steps involved in meeting the needs of a disabled person that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

**(6)** Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

# The protected characteristics

Equality Act 2010, section 4



**Age**

**Gender  
reassignment**

**Sexual  
orientation**

**Disability**

**Marriage/  
civil  
partnership**

**Pregnancy/  
maternity**

**Sex**

**Religion/  
belief**

**Race**

# PSED & Possession claims

## and their enforcement



1. Taylor v Slough BC [2021] H.L.R. 28 – Absolute ground for possession.
2. Hertfordshire CC v Davies [2020] EWHC 838 (QB) – Permission to issue writ of possession.
3. Luton Community Housing Trust Ltd v Durdana [2020] H.L.R. 27 – Ground 17 (false statement) case.
4. **TM v Metropolitan Housing Trust Ltd [2020] EWHC 311 (QB) – Discretionary grounds for possession (ASB): CA pending.**
5. Forward v Aldwyck Housing Group Ltd [2020] 1 W.L.R. 584 – Discretionary grounds for possession (ASB).
6. LQHT v Patrick [2020] H.L.R. 3 – Absolute ground for possession.
7. Powell v Dacorum BC [2019] H.L.R. 21 – Application to stay execution of warrant of possession.

# Bracking v SSWP [2013] EWCA Civ 1345

McCombe LJ at §25



- Reviewed and set out principles, including:
  - a) The decision-maker must be aware of the PSED;
  - b) There has been a proper and conscientious focus on the statutory criteria;
  - c) Steps of compliance to be recorded;
  - d) It's a continuing, non-delegable duty;
  - e) The duty should be complied with in advance.

# Any clearer?

Mr Justice Turner



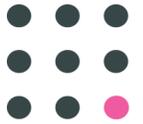
*“Issues concerning the parameters and content of the PSED and its statutory predecessors have given rise to a plethora of decided cases the abundance of which is, at least in part, attributable to the **elusively broad terms** in which it has been cast.”*



London & Quadrant Housing Trust v Patrick [2020] H.L.R. 3

# Why is the PSED still such an issue?

(Residential) Possession claims



1. Difficult to assess with certainty.
2. Confusion with proportionality/discrimination – Forward v Aldwyck Housing Group Ltd [2019] H.L.R. 20 at §39 per Cheema-Grubb J.
3. Difficulties with evidence.
4. Common defence pleading.
5. Still the subject of appeal – TM v Metropolitan Housing Trust: CA on 3 or 4 November 2021.

# DON'T



To start  
with...

# PANIC

# Corporal Jones is right

## Look at the purpose/role of the PSED



1. The PSED “*informs the decision-making process; it does not override it*”. Lewison LJ in McMahon v Watford Borough Council; Kiefer v Hertsmer Borough Council [2020] P.T.S.R. 1217 at §67.
2. The duty at issue is one of **consideration** – ‘due regard’ - not one “to achieve a result”: Turner J in London & Quadrant Housing Trust v Patrick at §42(ii); Elias LJ in R (Hurley) v SS BIS [2012] EWHC 201 (Admin) at §76.
3. “47. Similarly, I do not accept that it is necessary for the Council to have adduced evidence of a particular moment when it “sat down” and made a decision to pursue the proceedings with due regard to the PSED. The judge’s task was to consider on the basis of all the evidence whether the Council’s decision (which it clearly made, as it pursued the possession proceedings) to continue with the proceedings once it appreciated Ms Taylor’s disability was taken with due regard (as a matter of substance, rigour and with an open mind) to the PSED”: Taylor v Slough at §47.
4. “Consistently with this, s.149 does not amend the statutory powers and functions of a public authority prescribed by other legislation. So in this case it does not limit or qualify the power of a housing authority to seek possession of premises let to persons with a protected characteristic. But in deciding whether to take or continue such proceedings the authority must perform the duty of consideration which s.149 imposes on it.”: Luton CH v Durdana at §19.



# Due regard

## What does this mean?

*“In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.”*

Per Dyson LJ, R (Baker) v SS CLG [2009] P.T.S.R. 809 at §31

*“Thus when considering what is due regard, the public sector landlord must weigh the factors relevant to promoting the objects of the section against any material countervailing factors. In housing cases, such countervailing factors may include, for example, the impact which the disabled person's behaviour, in so far as is material to the decision in question, is having upon others (e.g. through drug dealing or other anti-social behaviour).”*

Per Turner J, LQHT v Patrick [2020] H.L.R. 3, at §42ii

# Fact sensitive

## And contextual



1. "...what is required by the section 149 duty will inevitably vary according to the circumstances of the case" - Hotak v LB of Southwark [2016] A.C. 811 at §74 per Lord Neuberger.
2. consideration as to the enforcement of the PSED "*does not extend to the question of how much "weight" to give to the duty, or what "weight" should be given to the equality implications of a decision or action: these are matters which fall outside the PSED as a 'process' duty*": Rowley v Minister for the Cabinet Office [2021] EWHC 2108 (Admin) per Fordham J at §39.
3. In Hotak at §75 Lord Neuberger noted: "...as Elias LJ said in the Hurley case [2012] HRLR 13 , paras 77–78 it is for the decision- maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been a rigorous consideration of the duty".
4. Provided that there has been "a proper and conscientious focus on the statutory criteria", he said "the court cannot interfere ... simply because it would have given greater weight to the equality implications of the decision"."

# Lose that obsession with Bracking

McCombe LJ



*“One must be careful not to read the judgments (including the judgment in Bracking) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing.”*



Powell v Dacorum Borough Council [2019] H.L.R. 21 at §44



# Retrospective compliance

Barnsley v Norton [2012] P.T.S.R. 56 at §§ 26, 34

- *“The Court was in a position to review any attempt by the Respondent belatedly to comply with the PSED and to assess the extent to which any such purported compliance was retrofitted to suit the Respondent's litigation interests rather than being a genuine and reliable appraisal (cf R (BAPIO) v Secretary of State for the Home Department [2007] EWCA Civ 1139 per Sedley LJ at [3]).” – TM v Metropolitan Housing Trust at § 68 per Johnson J.*
- *“36. I do not accept the argument that a breach of the PSED cannot be cured, at least in the circumstances of this case, by subsequent compliance with the duty. The cases in which the importance of prospective compliance has been stressed were in the context of policies being set by public officials. As McCombe LJ noted in Powell (above), these raise different considerations to cases involving decisions to commence or pursue individual possession actions.” - Ms Kerry Jane Taylor v Slough Borough Council [2021] H.L.R. 28 at §§ 36 (and see 41)*

# Even if there is a breach

## Section 31(2A), Senior Courts Act 1981



- The Court is required to consider whether it is “*highly likely that the outcome for the [Appellant] would not have been substantially different if the conduct complained of had not occurred*”.
- The Court “...*must necessarily undertake its own objective assessment of the decision-making process, and what its results would have been if the decision-maker had not erred in law*”: R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] 1 W.L.R. 5161 § 55
- “*If Parliament had wanted in some way to “ring fence” the public sector equality duty under section 149 of the Equality Act from the reach and impact of section 31(2A), it could easily have done so by some suitable words of exception. It seems to me, however, that the reach and purpose of the added subsection (2A) is quite clear and is general, and I should not seek to cut down or limit its scope.*”: R (H) v Secretary of State for Justice [2015] EWHC 4093 (Admin), at § 322
- “*21. I would for my part decline to accept the proposition that, as a general rule, if there is a breach of the PSED, any decision taken after such breach must necessarily be quashed or set aside or even the proposition that there is only a narrow category of cases in which that consequence will not follow*”: Forward v Aldwyck per Longmore LJ.

# Luton CH v Durdana

s31(2A) may not be the end

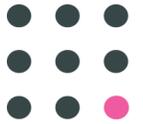


*“Although for the reasons which I have given the judge was wrong to have dismissed the claim for a breach of the PSED, had she rejected that defence, she would still have needed to consider whether it was reasonable in all the circumstances to make the order. The judge in [58] of her judgment expressed the view that it would not have been reasonable to make the order because the claimant had not complied with the PSED but she declined to carry out any appraisal of her own as to whether it would be reasonable to make the order. The consideration of reasonableness which the court is required to carry out under s.7(4) HA 1988 will undoubtedly bring into account many of the factors I have already referred to but it will be a consideration of matters as they stand now rather than in 2018 and the scope of the enquiry may be wider. In any event, it is not something which this court is equipped to carry out on the material available for the purposes of this appeal.”*



Patten LJ at § 37

# Any questions?



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**Andy Lane, Ryan Kohli and Ruchi Parekh**