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## Recent developments in PSED law and practice

A housing practitioner's guide to the  
Public Sector Equality Duty

# The Webinar



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**Webinar**  
**12th May, 11am-12pm**

*Recent developments in PSED  
law and practice - A housing  
practitioner's guide to the  
Public Sector Equality Duty*

with  
**Andy Lane, Dean Underwood  
and Riccardo Calzavara**

# What are we covering?



1. A broad overview of the Public Sector Equality Duty (“PSED”).
2. Why is it important in social housing law?
3. Improving the prospects of provable compliance.
4. Questions

# Part 1 – A broad overview

Dean Underwood



The PSED  
is a duty to  
have regard  
to...

Section 149,  
Equality  
Act 2010

The need to		
<p><b><u>eliminate</u></b> discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act</p>	<p>advance <b><u>equality of opportunity</u></b> between persons who share a relevant protected characteristic and persons who do not share it</p>	<p><b><u>foster good relations</u></b> between persons who share a relevant protected characteristic and persons who do not share it</p>
	<p>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.</p>	<p>in particular, to the need to— (a)tackle prejudice, and(b)promote understanding.</p>

# The Relevant Protected Characteristics

Sections 4 & 169(7), Equality Act 2010



- Age
- **Disability**
- Gender reassignment
- Pregnancy/Maternity
- Race
- Religion/belief
- Sex
- Sexual orientation



# Due regard



*“The authorities show that the concept of “due regard” is highly sensitive to facts and context. How intense the “regard” must be to satisfy the requirements in section 149 will depend on the circumstances of the decision-making process in which the duty is engaged. What is “due regard” in one case will not necessarily be “due regard” in another. It will vary, perhaps widely, according to circumstances: for example, the subject-matter of the decision being made, the timing of that decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences, and so forth. When the decision comes at an early stage in a series of decisions, and will not fix once and for all the impacts on people with protected characteristics, the level of assessment required to qualify as “due regard” is likely to be less demanding than if the decision is final or permanent. This may especially be so if the decision is also experimental, and is itself conducive to a more robust assessment of equality impacts later in the process.”*

Judgment of the Court, R (Sheakh) v Lambeth LBC [2022] EWCA Civ 457, at §56

*“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

# Purpose/Limitation



1. The PSED “*informs the decision-making process; it does not override it*”. Lewison LJ in McMahon v Watford Borough Council; Kiefer v Hertsmere 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 [2020] H.L.R. 3 at §42(ii); Elias LJ in R (Hurley) v SS BIS [2012] EWHC 201 (Admin) at §76.



# 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. He continued in the same paragraph that "*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*"."

# Context is important



*“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.”*

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

# Recent analysis overview

R (Sofia Sheakh) v Lambeth LBC [2022] EWCA Civ 457



1. Section 149 does not require a **substantive result**.
2. It does not prescribe a **particular procedure** such as the production of an equality impact assessment.
3. It implies a duty of **reasonable enquiry**.
4. It requires a decision-maker to understand the obvious **equality impacts** of a decision before adopting a policy.
5. Courts should not engage in an **unduly legalistic investigation** of the way in which a local authority has assessed the impact of a decision on the equality needs.

Mr Justice Kerr at [10]

# Part 2 –PSED’s relevance to social housing law

Andy Lane



# Role in Social Housing cases



- Frequently raised as a defence to a possession claim
- Barely pleaded and with discrimination defences
- Common in priority need/suitability section 204 (homelessness) appeals
- Rarely succeeds as a stand-alone ground
- Usual ground in judicial review challenge to policies, especially an allocation policy

# When does the PSED need to be complied with?



- When making decisions – **e.g.**
  - Issuing a possession notice
  - Failing a starter tenancy
  - Issuing possession/injunction proceedings
  - Discretionary succession
  - Formulating policies
- When making public law decisions that may involve a relevant protected characteristic.



# Applies to local authorities & housing associations



- Where exercising a public function: R. (on the application of Weaver) v London & Quadrant Housing Trust [2010] 1 W.L.R. 363 – possession claim (rent arrears – ground 8)
- R. (on the application of McIntyre) v Gentoo Group Ltd [2010] EWHC 5 (Admin) – mutual exchange/assignment
- R. (on the application of Macleod) v Peabody Trust Governors [2016] H.L.R. 27 – mutual exchange/assignment

# The Impact of the PSED



*“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.”*

Patten LJ in Luton Community Housing Trust v Durdana [2020] H.L.R.  
27 at §19

# Some PSED/Housing cases

Last 2 years



## Possession claims

- Taylor v Slough BC [2021] H.L.R. 28
- Metropolitan Housing Trust Ltd v TM [2022] H.L.R. 16

## Homelessness

- McMahon v Watford BC/Kiefer v Hertsmere BC [2020] P.T.S.R. 1217
- R. (on the application of Imam) v Croydon LBC [2021] H.L.R. 44 (see CA judgment at [2022] EWCA Civ 601)
- R. (on the application of Elkundi) v Birmingham City Council [2021] 1 W.L.R. 403 (CA judgment as above)
- R. (on the application of Ibrahim) v Westminster City Council [2022] H.L.R. 13
- Biden v Waverley BC [2022] EWCA Civ 442

## Allocation Policies

- R. (on the application of Z) v Hackney LBC [2020] UKSC 40
- R. (on the application of Nur) v Birmingham City Council [2021] H.L.R. 23

## Applications

- Hertfordshire CC v Davies [2020] EWHC 838 (QB)

# TM v Metropolitan Housing Trust [2022]

## H.L.R. 16



- Not a change in court's approach to the PSED in possession claims
- Very much therefore a case on its facts
- Confirmed that late compliance can remedy/cure a breach
- Also confirmed that “highly likely” response to breach not confined to trivial procedural failings
- Stressed difficulty of late compliance in the witness box

# Pragmatism



- Breach may not be fatal: Longmore LJ in Aldwyck Housing Group Ltd v Forward [2020] 1 WLR 584 at §25:

*“Rather than acting as some sort of mentor the court should, in deciding the consequence of a breach of PSED, look closely at the facts of the particular case and, if on the facts it is highly likely that the decision would not have been substantially different if the breach of duty had not occurred, there will (subject to any other relevant considerations) be no need to quash the decision. If, however, it is not highly likely, a quashing order may be made.”*

- Context is crucial: McCombe LJ in Powell v Dacorum BC [2019] H.L.R. 21 at §44
- Lack of knowledge of section 149 may not be fatal: McMahon v Watford Borough Council [2020] P.T.S.R. 1217 at §51:

*“I note that in Durdana [2020] EWCA Civ 445 at [25] Patten LJ said that although it was theoretically possible for the duty to be complied with in ignorance of what it consists of, “such cases are likely to be rare”. I do not consider that we need to adjudicate between Lord Neuberger PSC and Patten LJ; not least because in neither of our cases was the reviewing officer unaware of the PSED. The answer may well lie in the focused nature of a vulnerability assessment of a particular individual (as in Kanu ) compared with a decision whether or not to take proceedings for possession based on a pre-existing policy (as in Durdana ). This a point which Judge Bloom made in the judgment under appeal in Durdana . As she put it, in a vulnerability assessment “the whole focus is on the extent of the disability and the consequences of the same.””*

- It's not a duty to achieve a particular result: Elias LJ in R (Hurley) v SS BIS [2012] EWHC 201 (Admin) at §76

# Part 3 - Encouraging compliance

Riccardo Calzavara





# PSED Requirement



“The PSED requires the assessment to be carried out with an open mind (see above), and it is good practice for a decision maker to keep records demonstrating consideration of the duty, as proper record-keeping encourages those carrying out the relevant function to undertake their disability equality duties conscientiously (*Brown* at [96], *Bracking* at [26(5)(vi)]). And even though the reasonableness and proportionality of continuing to seek possession may be an appropriate way of characterising the ultimate decision to be made, that is not the same as saying that all that is needed is a proportionality assessment; what is needed is the open-minded conscientious inquiry referred to in the authorities (*Luton Community Housing Ltd v Durdana* [2020] EWCA Civ 445 at [27] per Patten LJ).”

Nugee LJ in Metropolitan Housing Trust Ltd v TM [2022] H.L.R. 16 at 38

# Information needed/advisable



- Relevant policies
- Equality Impact Assessments (though not essential for decisions)
- Internal data – e.g. tenancy application, transfer request, etc
- 3<sup>rd</sup> party – e.g. GP, Police, CMHT

“In the meantime, before requesting the warrant and before the making of the closure order, the Council (through its Anti-Social Behaviour Officer, Mrs Kim Ashworth) sought to contact Mr Powell, but without success. She also contacted the local Community Mental Health Team and a drugs and alcohol support organisation called "CRI Spectrum" in Hemel Hempstead; she was told by each of them that Mr Powell was not registered with them or known to them. Mrs Ashworth also tried on a number of occasions to obtain information from Mr Powell's general medical practitioner, but she had no success there either.”

**Dacorum BC v Powell**

# For policies



- More detail than individual decisions.
- Review 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.

Bracking v SSWP [2013] EWCA Civ 1345 - McCombe LJ

# Summary & Conclusion



1. Be aware of tenant's/household's particular issues / difficulties.
2. In possession/injunction cases, consider alternatives.
3. Liaise with relevant bodies / individuals.
4. Apply policies.
5. Keep a 'paper trail'.
6. Be alive to changing circumstances / information – review and re-review!
7. Don't panic!

# Any questions?

