

## The Public Sector Equality Duty and 'due regard'

Section 149 of The Equality Act 2010 says that public bodies, when carrying out their functions, must have due regard to three needs. These are the needs to:

- eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and people who do not share it; and
- foster good relations between people who share a protected characteristic and people who do not share it.

To help voluntary and community sector (VCS) organisations use the Equality Duty to support their users, we have put together these examples of how 'due regard' has been defined in the courts in a number of cases since 2007.

### What does 'due regard mean?

**What the court said:** Due regard is '...more than simply giving consideration' and 'it is important that Councillors should be aware of the special duties the Council owes to the disabled before they take decisions. It is not enough to accept that the Council has a good disability record and assume that somehow the message would have got across'.<sup>1</sup>

**What it means:** This means that decision makers should consciously consider the duties and their impact on the decisions to be taken.

**What the court said:** Due regard is '...regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority. There must therefore be a proper regard for all the goals set out in [s 149]. At the same time, the public authority must also pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider'.<sup>2</sup>

**What it means:** This means that a public body should consider each of the aims of the Equality Duty and then whether and how they should be applied to the decision that is being made. The public authority must take other relevant considerations into account also.

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<sup>1</sup> [R \(Chavda\) v Harrow LBC \[2007\] EWCA 3064 \(Admin\)](#)

<sup>2</sup> [R \(Brown\) v Secretary of State for Work and Pensions \[2008\] EWCA 3158 \(Admin\)](#), para 82.

**What the court said:** Due regard is ‘...exercising a conscious approach and state of mind’.<sup>3</sup>

**What it means:** This means that the public body should be aware of and consider the Equality Duty when they reach decisions.

**What the court said:** ‘[T]he 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”’.<sup>4</sup>

**What it means:** This means that the public body should specifically consider the effect of each of the aims of the Equality Duty and how they should be applied. It is not a matter of considering the duty and then immediately dismissing it without properly considering the potential effects. Nor will it be sufficient to note that a decision may have a detrimental effect if the public body does not go on to consider whether the decision should be changed in order to reduce or remove any adverse effects.

**What the court said:** The Equality Duty cannot be a ‘...rearguard action following a concluded decision’ but rather an ‘essential preliminary to such decision, inattention to which is both unlawful and bad government’.<sup>5</sup>

**What it means:** The Equality Duty should be considered at the time the decision is taken.

**What the court said:** ‘...if the relevance of the important duties imposed by the Act had been adequately drawn to the attention of the decision-makers there would have been a written record of it’.<sup>6</sup>

**What it means:** This means that recording the process of consideration and how decisions were reached will help public bodies demonstrate they considered the aims of the Equality Duty.

**What the court said:** ‘In a case where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high’.<sup>7</sup>

**What it means:** This means that when a decision clearly affects a considerable number of people with protected characteristics public bodies must give particularly careful consideration to their Equality Duty.

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<sup>3</sup> [R \(Brown\) v Secretary of State for Work and Pensions \[2008\] EWCA 3158 \(Admin\)](#), para 91.

<sup>4</sup> [R \(Brown\) v Secretary of State for Work and Pensions \[2008\] EWCA 3158 \(Admin\)](#), para 92.

<sup>5</sup> [R \(BAPIO Action Ltd\) v Secretary of State for the Home Department \[2007\] EWCA 1139](#), para 3.

<sup>6</sup> [R \(Chavda\) v Harrow LBC \[2007\] EWCA 3064 \(Admin\)](#), para 40.

<sup>7</sup> [Hajrula v London Councils, \[2011\] EWHC 861 \(Admin\) \[2011\] EWHC 861 \(Admin\); \[2011\] EWHC 151 \(QB\)](#)

**What the court said:** 'There are also almost any number of equality strands which can overlap in a case such as this, and the obligation to have due regard to the needs listed in s149 can be met by a proportionate analysis of them, that is those which appeared on this level of examination to be the significant effects; that did not require the pursuit of all that could arise in theory or to a marginal degree. Nor did they have to be pursued in order to show that they were not significant' and 'If there is no reality behind the suggestion that there was a real potential for indirect discrimination, there is no want of due regard in not analysing it'.<sup>8</sup>

**What it means:** This means that public bodies do not have to consider everything they can possibly think of related to equality, nor do they have to consider matters that are unlikely to happen.

**What the court said:** Having due regard to the need to take steps to take account of a person's disabilities, even where that involved treating disabled people more favourably than other people 'does not impose any duty to take such steps where circumstances do not render such favourable treatment feasible or appropriate'.<sup>9</sup>

**What it means:** This means that so long as a public body does consider its Equality Duty it does not have to take any action if it considers that it is not appropriate.

**What the court said:** 'Accordingly, we do not accept that either s 49A(1) in general [the old disability equality duty], or s 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'.<sup>10</sup>

**What it means:** This means that public bodies do not have to produce formal impact assessments.

**What the court said:** It will consider 'whether as a matter of substance there has been compliance; it is not a tick box exercise. At the same time the courts must ensure that they do not micro-manage the exercise'.<sup>11</sup>

**What it means:** The Courts will not require that every possible piece of evidence is examined.

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<sup>8</sup> [Margaret Bailey and others v Brent Council \[2011\] EWCA Civ 1586](#)

<sup>9</sup> [R \(on the application of IA\) v The Secretary of State for Communities and Local Government and another \[2011\] EWCA Civ 1253](#), para 96.

<sup>10</sup> [Brown –v- Secretary of State for Work and Pensions and Secretary of State for Business Enterprise and Regulatory Reform and others \[2008\] EWHC 3158 \(Admin\)](#), Lord Justice Aikens at para 89.

<sup>11</sup> [R \(Greenwich Community Law Centre\) v London Borough of Greenwich \[2012\] EWCA Civ 496](#), Elias LJ at para 30.

**What the court said:** ‘In my judgment, it is important to emphasise that the section 71(1) 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 distinction is vital...’<sup>12</sup>

**What it means:** The duty only requires public bodies to consider the aims set out in the legislation.

Further information about cases that have interpreted the meaning and implications of the Equality Duty is available on the [Public Sector Equality Duty section](#) of the EDF website.

The information in this leaflet is provided as general guidance for VCS organisations and does not constitute legal advice.

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<sup>12</sup> [Baker v Secretary of State for Communities and Local Government \[2008\] EWCA Civ 141](#), Dyson LJ, at para 31.