

Public Authority Equality Duties

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January 2007

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January 18th 2007

1. There is strong evidence of continuing inequality in the UK along gender and ethnic lines and arising out of disability and of increasing segregation along ethnic and religious lines. It is beyond the scope of this seminar to go into detail but some examples are: there is a 17% pay gap between FT female workers and FT male workers. PT women workers earn 38% less than FT males, hour for hour. 42% of disabled people have experienced difficulty in accessing public services. Although 8.4 % of the population are from ethnic minorities, they are under-represented in central and local government and there is only one ethnic minority High Court Judge.
2. The new legislation which is the topic of this seminar makes two major changes to existing anti-discrimination law. (1) Anti-discrimination law is extended so that it covers many more public authorities and functions; (2) Public Authorities are required, in exercising their functions to have due regards to (i) eliminating various forms of discrimination; (ii) promoting various forms of equality.

PART I

3. I will deal first with the extension of the duty of non-discrimination. In respect of race (s. 19B RRA) this commenced April 2nd 2001), in respect of disability (s. 21B, DDA) it commenced December 4th 2006), the gender and transsexual status (s. 21A, SDA, to commence April 6th 2007) and religion or belief (s. 52 Equality Act 2006 - no commencement order yet). Sexual harassment by a public authority (s. 21A) is prohibited as well as racial harassment where the function is connected with the provision of any form of social security, healthcare or any form of social protection or any social advantage (RRA, s19B 1A).

4. The definition of a public authority is the same definition as in the Human Rights Act 1998 ie any person “certain of whose functions are functions of a public nature”. The duties apply therefore both to public authorities and to private or voluntary bodies exercising public functions.

5. Factors relevant to whether a body is a public authority are:
 - Do they have special powers?
 - Are they democratically accountable?
 - Are they publicly funded in whole or in part?
 - Are they under an obligation to act only in the public interest?
 - Do they have a statutory constitution?

6. Obvious public authorities are:
- Government departments and their executive agencies
 - Local authorities
 - Governing bodies of HE and FE Colleges and of educational establishments maintained by LEAs (including schools)
 - NHS Trusts
 - Chief Officers/ Police Authorities
 - Crown Prosecution Service
 - Courts and Tribunals (in so far as not exempted)
 - Inspection and Audit bodies
7. Expressly exempted are: the Houses of Parliament and any person exercising functions in connection with Parliamentary proceedings, the Security Service, the Secret Intelligence Service, The Government Communications HQ, any unit of the armed forces assisting GCHQ (RRA s.19B(3), DDA s21B(3), SDA, s. 21A(3), EA s. 52(3)).
8. Other bodies which are not public authorities *per se* will also be covered as regards their public functions. A company which has contracted to run a prison or a detention centre will be covered as regards its public function, but not its private function (eg providing a security guard to a supermarket). A private company which has been contracted to run a failing school will be covered as regards its public functions ie the provision of education. The DRC Code 5.5, 5.6 suggests the following tests to establish whether the function is a public one.
- Are structures closely linked with the delegating authority?
 - Is it exercising powers of a public nature directly assigned to it by

statute?

- Fact of delegation by a state body
- Fact of supervision by a State regulatory body
- Public funding
- Public interest in the functions being performed
- Motivation of public interest not profit (this last point seems to be of dubious value)

9. The EOC Code [2.60] gives the following examples of public functions:

- formulating or carrying out public policy (for example, devising policies and priorities in health, education and transport or making decisions on the allocation of public money)
- exercising regulatory or law enforcement powers (eg stop and search, arrest and detention of suspects, regulatory and enforcement powers of HM Revenue and Customs, LA licensing, tax inspection and collection, trading standards)
- exercise of statutory duty or statutory powers or discretion in some circumstances (eg refusal of leave to enter)

10. What difference do the new non-discrimination provisions make? In the main (see below), they do not change the definitions of discrimination (direct discrimination on grounds of race/sex/religion a disability-related reason, indirect discrimination, failure to make a reasonable adjustment, victimisation). However, they extend protection against discrimination in the use of state power. Previously, protection from discrimination existed only where the public authority

was an employer (or other body falling within the employment and occupation provisions) or provided education or housing or provided services which a private person could provide, but not where it was exercising state powers: *Farah v Commissioner of Police for the Metropolis* [1998] QB 65.

11. The discrimination includes a failure to comply with the duty to make a reasonable adjustment (s. 21D(2) and 21E, DDA) . The duty arises where a practice, policy, procedure or physical feature makes it (a) impossible or unreasonably difficult for disabled persons to receive any benefit that is or may be conferred, or (b) unreasonably adverse for disabled persons to experience being subjected to any detriment to which a person may be subjected. The authority is required to take reasonable steps to change the practice, policy or procedure or, in respect of the physical feature, remove or alter it or provide a means of avoiding it or adopt a reasonable alternative method of carrying out the function. Both this discrimination and disability-related discrimination may be justified (s21D(1) and (2)) if , in the reasonable opinion of the authority: (a) non compliance is necessary in order not to endanger health and safety; (b) the disabled person is incapable of entering into an enforceable agreement or giving an informed consent; (c) excessive extra costs, having regard to resources; (d) non-compliance necessary for the protection of the rights and freedoms of others (s.21D(5)). Treatment is also justified if it is a proportionate means of achieving a legitimate aim (s.21D(5)).
- The Prison Service refuses to consider allocating a disabled detainee to a detention centre where she can access medical treatment.

They may be some argument as to whether the Prison Service is providing a service. In any case, it is a public authority and is under a duty to make a reasonable adjustment unless it can establish justification.

12. If the act is unlawful by virtue of some other provision of the relevant anti-discrimination legislation, eg employment, education, housing, the public authority provisions do not apply.

13. As well as the exemption of certain authorities (above) there are a number of other exemptions arising out of the functions exercised. As an exception to the equality principle, these exemptions are to be read narrowly. Not within scope because exempted are:

- a judicial act or an act done on the instructions, or on behalf, of someone acting in a judicial capacity
- legislative functions (making, confirming or approving legislation)
- decisions not to institute or continue criminal proceedings, or connected acts.

(s. 19C(1) RRA, s. 21C(1) DDA, s.21A(9) SDA, s52(4) EA).

14. Also exempted are acts done in pursuance of any enactment or any instrument thereunder or to comply with any condition or requirement imposed by a Minister of the Crown, a member of the Scottish Executive or the National Assembly of Wales. The statutory authority exception is confined to acts done in necessary performance of an express obligation contained in the instrument relied on: *Hampson v*

Department of Education and Science [1990] IRLR 302, HL (RRA s41, DDA s.59, SDA, s51 and 51A, EA, s.56- the last of which enacts *Hampson* and also includes legislation made by or by virtue of a Measure of the General Synod of the CofE (s.56©(v)). Any act justifiably done for the purpose of safeguarding national security is exempt (RRA (s. 42), DDA (s. 59), SDA (s52) and EA (s.63)). The exemption does not apply to acts done on grounds of race, ethnicity or national origins provisions in RRA 1(1)(B) (RRA, s.41(1A)) The statutory authority exemption in the SDA is more limited and only covers legislation passed before the SDA 1975. It does not apply at all to Part II cases and vocational training (s. 51A SDA and s51 and 51A SDA).

15. The SDA contains a number of exceptions relating to single sex services (s21A(9)).

16. The RRA, s.19C(4) exempts acts of discrimination by a relevant person on grounds of nationality or ethnic or national origins (but not 'race' or colour) in carrying out immigration functions. Such functions are those exercisable by virtue of the Immigration Acts, the SIAC Act 1997, provisions under 2(2) of the European Communities Act 1972 and any provision of Community law relating to immigration or asylum. However, the relevant person must be a Minister of the Crown acting personally or a person authorised to do so with respect to a particular case or class of case by a Minister of the Crown or, again with respect to a particular case or class of case, by any of the relevant enactments or an instrument thereunder (RRA, 19D)

17. The RRA contains a second exemption allowing discrimination on the basis of nationality or place of residence or length of residence or presence in the UK if the act is done pursuant to legislation or authorised by a Minister of the Crown (s. 41(2)).
18. The Equality Act 2006 (s.52) contains additional exemptions: exemption of certain immigration functions to allow entry to the UK or to exclude persons on religious grounds (52(4)-(f)-(g)) and (s. 52(4)(k): relating to the curriculum of an educational establishment, admission to a school which has a religious ethos, acts of collective worship organised by an educational institution, decisions of the governing body of an educational institution which has a religious ethos, transport to and from an educational institution, decision to establish or close any educational institution and exercise by LA of its powers to promote the economic, social and environmental well-being of their area.
19. The non-discrimination duty is enforceable by the individual discriminated against as a claim for damages (and in some cases an injunction). The correct forum for damages claims is the County Court. Public funding may be available. A statutory Questionnaire¹ should be served pre-action to elicit information and probe the reasons for treatment. Judicial review may be the correct avenue in some circumstances: see *R (European Roma Rights Centre and ors) v*

¹ Long available in RRA (SI 1977/842) and SDA (SI 1975/2048) cases: Available in all DDA Part 3 cases since December 5th 2005: 2005/2703 .

Immigration Officer at Prague Airport and anor [2004] UKHL 55 [2005] AC 1. *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293 indirectly discriminatory - but damages in county court. (RRA, s.56(1) and s.57(1); DDA s. 17A(2) and s.25(1)-(2); SDA s. 65(1) and 66(1); EA s. 68(2)).

PART II:

20. The second part of this talk addresses the duty imposed on public authorities to eliminate discrimination on specified grounds and to promote certain forms of equality. The duty applies in respect of race (from April 2nd 2001); disability (commenced December 4th 2006); and gender (commencement date April 6th 2007).
21. Who is subject to the duties? In respect of the general duty, both the DDA and the SDA, define a public authority as any person “certain of whose functions are functions of a public nature” (s. 49A, 49B, DDA; and s.76A(2), SDA as amended by the EA). As with the non-discrimination provisions, the duty is therefore capable of applying to non-state bodies to the extent that they are carrying out public functions. The provision in the RRA (the first in time), on the other hand, lists the public authorities subject to the duty (Schedule 1A, RRA). Authorities may be added to or removed by statutory instrument, and have been: SI 2001/ 3457; SI 2003/3006; SI 2004/3127. The list is lengthy (and covers more than 43,000) but exhaustive.
22. The exceptions are slightly narrower to those under the non-

discrimination provisions eg the duty applies to decisions to prosecute ((DDA- any person mentioned in 21B(3); any judicial or legislative act; recruitment to armed forces) ; SDA s. 76A(3); RRA see list).

23. There are two forms of the duty: a general duty on public authorities and specific duties on some, named, public authorities. The elements of the general duty are: (1) in carrying out its functions (2) the public authority shall have due regard to; (3) various equality related purposes (which vary with each legislative provision)
24. “In carrying out its functions“: This has been referred to above under the non-discrimination duty. This will include policy development, service design and delivery, decision-making and employment, the exercise of statutory discretion, enforcement and any services and functions which have been contacted out.
25. “Due regard”:
This has two components: relevance and proportionality. The statutory Codes make it clear that having due regard means that the weight given to equality is proportionate to its relevance to a particular function. This is likely to mean focusing on functions and policies which have most effect. The authority should ask whether the policies are affecting different groups in different ways and whether functions can be carried out in a different way. The Codes also make it clear that impact is not to be addressed solely in terms of numbers of people affected (eg failure to address an impact on transsexual people because their numbers are small).

26. The equality related purposes are:

s.71 - RRA-

- the need to eliminate unlawful racial discrimination; and
- to promote equality of opportunity and good relations between persons of different groups);

s. 49A – DDA

- the need to eliminate unlawful disability discrimination; the need to eliminate harassment of disabled people;
- the need to promote equality of opportunity between disabled people and others;
- the need to take steps to take account of disabled people's disabilities even where that involves treating disabled people more favourably;
- the need to promote positive attitudes towards disabled people and
- the need to encourage participation of disabled people in public life.

s. 76A(1) and (2) SDA

- the need to eliminate unlawful (ie contrary to the SDA and Equal Pay Code) discrimination and harassment, and
- to promote equality of opportunity between men and women.

27. The duty to have due regard to elimination of discrimination involve a proactive approach going beyond reacting to litigation or complaints. The duty to have regard to the promotion of equality/ equality of

opportunity goes even further. Promotion requires a proactive approach, without the need to identify an actual or potential act of discrimination against an individual victim. It reflects recognition of entrenched social disadvantage associated with membership of a particular group resulting in continuing exclusion and social disadvantage and of structural and institutional discrimination: corporate and organisational practices which perpetuate inequality.

28. The general duty does not give rise to a duty owed to individuals but it is enforceable as a public law right through judicial review. Equality law practitioners will therefore need to be familiar with the grounds for judicial review and what may amount to illegality, irrationality or procedural impropriety. . A plain case arises where the public body has not even considered its duty (such as in the *Elias* case- see below). Other grounds of challenge will arise where the public body has failed to take into account relevant matters and/or taken into account irrelevant matters. Whether the authority has breached its duty may depend upon the information available to it and on guidance (including statutory guidance).

29. A review may be brought by any body accepted by the court as having sufficient standing (eg unions in *AMICUS JR* [2004] EWHC 860). An individual having sufficient standing may bring judicial review proceedings, but if an actual victim, they are likely to be required to bring an action in the County Court, at least to obtain damages: see *Elias*.

30. In *Elias*, the claimant succeeded in establishing a breach of s.71 where no consideration was given to any of the s.71 matters in putting the relevant Scheme into place. The Government's argument that it could establish non-discrimination after the event was rejected, Elias J pointing out [#100] the positive obligations of promotion as well as the negative duties of elimination of racial discrimination.

31. An example of compliance and of potential challenge is:

- A local authority as employer decides to carry out an equal pay review. This covers data on every aspect of recruitment, pay and progression, including childcare available. This serves to identify whether there are pay disparities which cannot be identified as on grounds other than sex. A local education authority as education provider might decide to look at ways of reducing occupational segregation which is one of the causes of unequal pay. This duty is not limited to the employer or the educator: a public authority, local or central, will need to ascertain the pay impact of its decisions or policies. These would be ways of complying with the duty. A school which has no control over pay levels wrongly assumes that it does not have to consider the gender impact of the allocation of Teaching and Learning Responsibilities (because these have pay implications).

32. Although the duty falls directly upon the public sector, it will impact upon the private sector through public sector procurement.

- The Crown Prosecution Service requires all barristers

Chambers that it instructs to have equal opportunities training.
So does the legal department of a local authority.

- A local authority decides to withdraw a contract from a club which it is satisfied has live links with a racist regime abroad. It can now clearly justify its actions by the need to promote good race relations, subject to public procurement rules: cf *Wheeler v Leicester City Council* [1985] 3 WLR 334.

33. Further guidance is given by the statutory Commission in their Codes: www.cre.gov.uk; www.drc-gb.org; www.eoc.org.uk.

34. The specific duty is both more limited in the bodies it applies to and more specific (the clue's in the name). In essence, in all cases, it consists of publishing an Equality Scheme setting out specified information about how the authority intends to fulfil its general duty. A key component of the duty is the requirement to gather information after involvement of relevant individuals and organizations (the extent of this duty varies according to the legislation).

35. As regards race, the specific duties are imposed by means of the RRA 1976 (Statutory Duties) Order 2001/3458 and 2004/ 3125. See for Scotland, the SI 2002/62. The Race Equality Scheme must state (i) which functions are considered relevant functions; (ii) how it intends to fulfil its general and specific duties. The Scheme must set out the authority's arrangements for (i) assessing and consulting on the likely impact of its proposed policies on the promotion of race equality; monitoring policies for any adverse impact, publishing the results of

assessments and monitoring, ensuring public access to information and services which it provides and training staff in connection with the general and specific duties. (SI 2001/3458 Article 2). The steps must be identified but the Order does not require them to be carried out.

36. SI 2001/ 3458 Article 4 and 5 sets out requirements for bodies in the employment and education sector. Schools and colleges and university required to prepare and maintain a Race Equality Policy; assess impact of policies (pupils, students, staff, parents of different racial groups). As regards employment, there is an obligation to monitor staff in post/ applicants for employment, training. Those who benefit or who suffer a detriment from performance assessments., are involved in grievance procedures or are the subject of disciplinary procedures or cease to be employed by that employer. (Art 4 and 5).

37. Public authorities required to publish a Disability Equality Scheme are listed in the Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005 SI 2005/2966 (in Scotland Disability Discrimination (Public Authorities)(Statutory Duties)(Scotland) 2005 SI 2005/565. This must have been done by December 6th 2006, with the exception of governing bodies of primary schools and maintained special schools - which must do so by December 3rd 2007. The Scheme must state:

- (i) steps the authority will take towards fulfilment of their general duty;
- (ii) the ways in which disabled people have been involved in its development;

- (iii) the authority's methods for assessing the impact or likely impact of their policies and practices on equality for disabled people;
- (iv) the authority's arrangements for gathering information about the effect of their policies and practices on disabled people in employment (including recruitment, development and retention), education, service provision and public functions more generally and making use of such information in complying with the general duty.

Under the DDA, the steps declared must be taken, within 3 years of publication.

38. S. 5/ 6 of SI 2005/2966 requires every Secretary of State listed in Schedule, the Welsh Assembly and the Scottish Ministers to publish a report giving an overview of progress in their sector and giving proposals for co-ordination within that sector or nation.

39. As to the specific gender equality duties (s.76B and 76C), these are provided for by The Sex Discrimination Act 1975 (Public Authorities)(Statutory Duties)Order 2006/ 2930 (in force April 6th 2007). A listed authority is required to publish a Gender Equality Scheme by April 30th 2007 (2(1)); to consult its employees, service users and others (including trade unions) who appear to it to have an interest in the way it carries out its functions (2(2)); in preparing the Scheme, to take into account any information it has gathered of the kind described in 6(a) and any other information it considers to be relevant to the way to the performance of its section 76A(91) duty and its duties under this Order. Article 2(4) requires the authority to set out the

overall objectives identified by it as necessary to perform its 76A(1) duty and its duties under this Order.

40. Notably, Article 2(5) requires the authority, when formulating its objectives, to consider the need to have objectives that address the causes of any differences between the pay of men and women that are related to their sex.

41. Article 2(6) requires the authority to ensure that its Scheme sets out the actions which it has taken or intends to take to - (a) gather information on the effect of its policies and practices on men and women and in particular - (i) the extent to which they promote equality between its male and female staff, and (ii) the extent to which its services/ functions take account of the needs of men and women; (b) make use of such information and any other information the authority considers to be relevant, to assist it in the performance of its section 76A(1) duty, its duties under this Order and in particular its regular review of - (i) the effectiveness of the actions identified for the purposes of sub-paragraph (e), and (ii) its arrangements for the preparation of subsequent schemes. © assess the (likely) impact of its policies and practices on equality between women and men. (d) consult relevant employees, service users and others (including trade unions) and (e) achieve the objectives set out for purposes of paragraph 4. Article 2(3) requires the identified steps to be put into effect within 3 years. The Scheme must be reviewed every 3 years.

42. If a body under a specific duty does not comply with that duty

adequately or at all (eg by not publishing a Scheme or by not identifying steps), the relevant Commission (and from a date to be fixed, probably October, in 2007, the Commission for Equality and Human Rights) has enforcement powers. The CEHR will also be able to enforce the general duty. Enforcement will be by means of compliance notices and action in the High Court or Court of Session (general duty) or County Court or Sheriff Court (specific duty). Section 32(11) of the EA 2006 states that legal proceedings in relation to [a specific duty] may be brought by the Commission [though compliance notices] and may not be brought in any other way. The specific duty is not directly enforceable by individuals or by organisations, although they can complain to the Commission.

43. However, the Schemes can be useful in the following ways:

- They are relevant information in non-discrimination proceedings, whether by a public authority or educational establishment or an employer, and may be requested in the relevant statutory Questionnaire or under the Freedom of Information Act (if there is no individual who may have been discriminated against)². The statistical information gathered may be particularly useful;
- They are relevant documents in a judicial review for failure to comply with the general duty;

44. The new duties to promote equality have been criticised by some as

² A refusal to supply information may be challenged through an Application to the Information Commissioner and ultimately by judicial review.

process driven. They will depend upon positive action in the relevant public authorities, which may be a triumph of hope over experience. However, it may also be said that litigation by individuals (the traditional method of enforcement of equality) requires an individual able and willing to litigate, takes a toll upon that individual, has a variable knock-on effect (often dependent upon the publicity obtained) and often produces compensation rather than the equality sought (deserved promotion, appointment to a job, access to a service). Judicial review by relevant groups may be needed to encourage the more reluctant public authorities and equality lawyers will need to be or to become familiar with public law principles. Properly complied with, these duties may have a considerable, positive, impact.