

Disability Law Service

Offering free, confidential legal advice and
representation for disabled people

An Introduction to the Disability Equality Duty in the Public Sector

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What is the Disability Equality Duty?

The Disability Discrimination Act 2005 amended the Disability Discrimination Act 1995 to insert a positive equality duty in relation to public authorities. This duty, which is contained in section 49A of the Disability Discrimination Act, is known as Disability Equality Duty and aims to tackle systemic discrimination and ensure that public authorities build disability equality into everything they do.

To meet this objective the Disability Discrimination Act 2005 introduced both a General Duty and a Specific Duty.

The General Duty

The Disability Discrimination Act 2005 states that public authorities must, when carrying out their functions, have due regard to the need to:

- promote equality of opportunity between disabled people and other people;
- eliminate discrimination that is unlawful under the Disability Discrimination Act;
- eliminate harassment of disabled persons that is related to their disability;
- promote positive attitudes towards disabled people;
- encourage participation by disabled people in public life; **and**
- take steps to meet disabled people's disabilities, even where that involves treating disabled people more favourably than other people.

The Specific Duty

The Disability Discrimination Act also gives the Secretary of State the power to introduce regulations setting out more Specific Duties which may assist public authorities in meeting their General Duty.

These duties, known as the Specific Duties, are set out in the Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966).

The key aspect of the Specific Duties is the requirement for those public authorities named under the regulations to produce a Disability Equality Scheme.

Who has duties under the Disability Equality Duty?

There is no list of authorities that are covered by the General Duty. Instead section 49B states that for the General Duty a public authority:

‘includes any person certain of whose functions are functions of a public nature’.

This definition is not limited to ‘pure’ public authorities, such as County Councils or NHS Trusts, and will include private organisations that carry out some public function, such as private security companies that run prisons or are involved in the transportation of prisoners.

However private organisations carrying out public functions will only be seen as public authorities with regards to the public functions that they carry out. Section 49B(2) states that:

‘In relation to a particular act, a person is not a public authority if the nature of the act is private’.

So a private security company that runs prisons will be considered a public authority when it is involved in running prisons, or other public functions, but not when it is carrying out other private work, such as providing security guards for a building site.

There is also a power under Section 49B(3) for Statutory Instruments to be issued removing certain organisations from the need to follow the General Duty. This section has been used, for example: to remove the need for the Post Office to comply with the obligations under the General Duty.

Despite the lack of a list in the Disability Discrimination Act of public authorities to whom the General Duty applies, all of the authorities listed in Schedule 1A of the Race Relations Act 1976 [as amended] in 2000 will be covered by the General Duty. The General Duty will therefore apply for example to:

- government departments and executive agencies
- ministers
- local authorities
- governing bodies of schools, colleges and universities
- NHS Trusts and boards
- police and fire authorities
- Crown Prosecution Service.

The Specific Duties apply only to those authorities listed in the Disability Discrimination Regulations.

What is the general duty?

Under the General Duty of the Disability Equality Duty public authorities are required to adopt a proactive approach to disability and to include disability equality into all decisions and activities. This is contained as a requirement for authorities to have 'due regard' to the six parts of the General Duty.

Due regard comprises two linked elements:

- proportionality; **and**
- relevance.

This requires public authorities to give greater consideration to disability equality in relation to functions or policies that have the most effect on disabled people.

Impact Assessments

The main way that public authorities will be expected to demonstrate due regard is through carrying out impact assessments. Disability equality impact assessments are the process of assessing the impact of existing or proposed policies and practices in relation to their consequences for disability equality. Impact assessments should include looking for opportunities for positive impact that may have been missed or could have been better exploited, as well as detecting actual or potential negative impact for disabled people and looking for ways of reducing or avoiding that impact.

There is a shortage of case law across the three existing strands of the Equality Duties (race equality, disability equality and sex equality; the Sex Equality Duty was introduced by section 76A(1) of the Sex Discrimination Act 1975 [as amended] in 2006).

However since the first equality duty case, **Secretary of State for Defence v Elias [2006]**, was litigated in 2005, the case law has developed and a number of clear principles now exist. The duty of public authorities to have 'due regard' can now be seen to having a number of strands. These are as follows:

The amount of due regard

The amount of due regard needed in a particular case will depend on the extent of the possible impact. This means that in situations where a particular policy or procedure is likely to, or possibly could, have a high impact on disabled people then the public authority responsible will need to take extra care to ensure that it has due regard to the needs of disabled people.

For example: a decision to remove or reduce Council funding for a shop-mobility scheme is likely to have a large impact on disabled people. The Council should take extra care to ensure that it has taken due regard to the needs of disabled people in making that decision.

The time for due regard

The time for public authorities to have due regard is before making any policy decision.

However, although there is a need to have due regard during the policy making stage, the duty to have due regard is not then automatically discharged once and for all. Sometimes a decision will have such an obvious impact on disabled people that the decision maker will need to review the affects themselves before making a final decision.

Structured due regard

In **R (Eisai) v National Institute for Clinical Excellence & Others [2007]**, a case concerning criteria for the prescription of drugs to delay the effects of Alzheimer's, the Alzheimer's Society argued that due regard would normally involve carrying out an impact assessment. The Judge's, Dobbs J, attention was drawn to the relevant statutory codes including the Disability Equality Duty code of practice provided by the Disability Rights Commission (now the Equality and Human Rights

Commission). The Judge then set out what as a minimum NICE should have done in way of due regard:

1. At a general level ensuring that account is taken of equality legislation when a decision is made.
2. Where there is a risk of discrimination asking what could be done to eliminate that risk and then addressing those points.
3. Where there are actual discriminatory effects, ensuring that thought has been given to the steps necessary to put those who would be adversely affected in the same position as those who would not.
4. Where there is indirect discrimination and the public body nevertheless considers that this may be justified and incapable of being eliminated entirely, it must properly test whether the decision pursues a legitimate aim and is proportionate.

Although the Judge did not specifically mention the need to follow statutory codes, the exercise that she referred to is almost indistinguishable from the impact assessments recommended by the Disability Rights Commission.

In R (Kaur & Shah) v London Borough of Ealing [2008], a Race Equality Duty case concerning a decision to reduce funding for the Southall Black Sisters, it was also considered that a failure to follow the Statutory Code issued by the Commission for Racial Equality and a failure to explain this amounted to an unlawful breach.

Transparency and documentation

The Courts have also stated that the process of assessment should be recorded. As Moses LJ stated in the case of Kaur:

‘The process of assessments should be recorded Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage.... But a record will not aid those authorities guilty of treating advance assessment as a mere exercise in the formulaic machinery. The process of assessment is not satisfied by ticking boxes. The impact assessment must be undertaken as a matter of substance and with rigor’.

Who must discharge the duty?

The Courts have also made it clear that, when an institution has an obligation under one of the duties then it and it alone must discharge it. In **R (Eisai) v National Institute for Clinical Excellence & Others [2007]** NICE had issued guidance for Alzheimer's disease inhibitor drugs which included speech and language tests that could be seen as discriminating against people from ethnic minorities or with learning difficulties.

NICE argued that it was not in breach of the Race and Disability Equality duties because doctors using the guidance could use their common sense to remove any potentially discriminatory effects of the guidance. However on this point the Judge stated that this was inadequate. She stated that, rather than relying on others to eliminate the risk of discrimination, NICE should have looked at what it could do to promote equal opportunity and to reduce the discriminatory effects of its guidance.

The Courts have also indicated that discharging the duty falls to the primary decision maker and so it will

not be sufficient for a committee making a decision to be told that an officer has carried out an assessment. This point was discussed in **R (Chavda) v Harrow LBC [2007]** where Harrow had made a decision to restrict adult care services to people with critical needs only.

The Judge stated that there was no evidence that the legal duty under the Disability Equality Duty and its implications were drawn to the attention of the decision-makers. The Judge also stated that the decision-makers should have been informed not just of the disability related issues but of the particular obligations that the Disability Equality Duty imposes. It was not enough to refer in the attached summary to 'potential conflict with the DDA' as this would not give a busy councillor any idea of the serious duties imposed by the Disability Equality Duty.

What aspects of a public authority's work are subject to the general duty?

The requirement to have due regard to the needs of disabled people applies to both new and old policies

(described in the Code of Practice as the 'back catalogue'). All new policies, including reviews of and changes to existing policies, will have to be screened and have impact assessments carried out to ensure that the authority has given due regard to disability equality. In parallel with this, authorities also have to prioritise and schedule for impact assessment their existing policies and practices.

The term policy and practices should be understood to include the full range of functions, activities and decisions for which the organisation is responsible, essentially everything that the authority does.

Many policies will be obvious, such as university admission criteria, however others will be less obvious. The following should all be considered as examples of policies:

- procurement strategy and procedures
- employee terms and conditions
- opening hours for a service
- complaints procedures
- entitlement conditions for benefits or services
- eligibility criteria for promotion

- an organisation's estate strategy
- rules covering entitlement to and payment of expenses
- relocation plans
- communication strategies
- budget setting decisions and criteria for resource allocation
- standard methods used for providing information to staff.

In the context of carrying out impact assessments policies will include a number of fairly mundane day to day decisions taken by people at a relatively low level. However these policies still have the potential to impact positively or negatively on disabled people.

The duty to have due regard also applies to the many unwritten policies that will exist within a public authority.

What is the specific duty?

The Specific Duties require each of the public authorities listed to:

- publish a Disability Equality Scheme showing how it intends to fulfil its General Duty and its Specific Duties;
- involve disabled people in the development of its scheme; **and**
- review the scheme at least every three years.

The Disability Equality Scheme should include a statement of:

- how disabled people have been involved in developing the scheme;
- the steps which the authority will take to fulfil its General Duty (the action plan);
- arrangements for gathering information about performance of the public body on disability equality;
- arrangements for assessing the impact of the activities of the body in disability equality and improving these when necessary (impact assessments); **and**

- arrangements for making use of the information gathered in relation to reviewing the effectiveness of its action plan and preparing subsequent Disability Equality Schemes.

A public authority must also:

- take the steps set out in its action plan;
- put into effect its arrangements for gathering and making use of information; **and**
- publish an annual report which includes a summary of the steps it has taken to involve disabled people in the development of the scheme, the result of information gathering and the use it has made of such information.

There are also duties placed on certain Secretaries of State, Scottish Ministers and Welsh Assembly Ministers to report on progress towards equality of opportunity within their sphere and to put forward proposals for better co-ordination of action to bring about further progress towards equality of opportunity.

Enforcement

General Duty

If a public authority does not comply with the General Duty its actions or failure to act can be challenged by means of a judicial review in the High Court. A claim for judicial review could be made by any person or group of people with an interest in the matter.

There are a number of potential remedies available under a claim for judicial review. These are as follows:

- Quashing order – an order to cancel out a decision which has been made by a public authority;
- Prohibiting order – an order preventing an authority from carrying out an action;
- Mandatory order – an order to force a public authority to take a certain action;
- Declaration – a judgement clarifying the rights and obligations of the parties but without making an order;
- Injunction – an order to stop a public authority from acting unlawfully; **and**
- Damages – financial compensation. This is only available where there would be either a recognisable

breach of public law such as contract or tort, or a breach of Human Rights or European Law.

Until recently there was some concern that although the courts were willing to make orders declaring that there had been a breach of a positive equality duty they had been less prepared to issue a quashing order. In the Eisai case discussed above the Judge was prepared to allow the defendant to come up with a solution to the racial and disability discrimination in its guidelines. This meant, in the view of the judge, that a quashing order was unnecessary.

Fortunately the Courts now appear more willing to take a harder line on remedies than before and the normal course will be to quash a decision or action that fails to have due regard unless it would make no real difference.

Specific Duties

If a public authority does not comply with its Specific Duties it could face enforcement action by the Equality and Human Rights Commission under section 49E of the Disability Discrimination Act. This section empowers the Equality and Human Rights Commission to serve a compliance notice on the authority.

This compliance notice will state that the authority must meet its duties and tell the Equality and Human Rights Commission within 28 days what it has done or is doing to comply. The Equality and Human Rights Commission can also ask, in its compliance notice, for the public authority to give it written information showing that it has met its duty.

If the public authority which has been served a compliance notice fails to provide the Equality and Human Rights Commission with any information required by the notice the Commission can apply to a county court for an order requiring the authority to furnish the information required by the notice.

If three months after a compliance notice has been served the Commission considers that the authority has still not met one or more of its Specific Duties then the Commission can apply to the county court for an order requiring the authority to comply with the duty.

The failure of a public authority to carry out a Disability Equality Scheme or to follow its Scheme can also be used as evidence to support a claim against the public authority

either for breach of the General Duty or for discrimination under the Disability Discrimination Act itself.

It is likely to be more difficult for a public authority to justify discrimination where there has been a failure to follow the Specific Duties or to follow its own Disability Equality Scheme.

Further information

If you would like more information on the Disability Equality Duty, or to discuss possible discrimination, please contact the Disability Law Service:

The Disability Law Service

The Disability Law Service is a registered charity offering free confidential legal advice to disabled people. It can offer advice in the following areas of law: employment, community care, education, consumer/contract, welfare benefits.

Disability Law Service

39-45 Cavell Street

London E1 2BP

Telephone: **020 7791 9800**

Fax: **020 7791 9802**

Email: **advice@dls.org.uk**

Website: **www.dls.org.uk**

Equality and Human Rights Commission

The Equality and Human Rights Commission is a national organisation set up by the Government to monitor and tackle discrimination. It operates a telephone helpline for people with discrimination problems. The Equality and Human Rights Commission also publishes many useful guides and leaflets, which can be obtained via their helpline. In some cases, the Equality and Human Rights Commission will advise and represent people who have discrimination claims.

Equality and Human Rights Commission England

Equality and Human Rights Commission Helpline

Freepost RRLG-GHUX-CTR

Arndale House

Arndale Centre

Manchester M4 3EQ

Telephone: **0845 604 6610**

Minicom: **0845 604 6620**

Fax: **0845 604 6630**

Website: **www.equalityhumanrights.com**

Opening times: Monday, Tuesday, Thursday, Friday 9am–5pm; Wednesday 9am–8pm (last call taken at 7:45pm)

Equality and Human Rights Commission Wales

Equality and Human Rights Commission Helpline Wales

Freepost RRLR-UEYB-UYZL

3rd Floor

3 Callaghan Square

Cardiff CF10 5BT

Telephone: **0845 604 8810**

Minicom: **0845 604 8820**

Fax: **0845 604 8830**

Website: **www.equalityhumanrights.com**

Opening times: Monday, Tuesday, Thursday, Friday 9am–5pm; Wednesday 9am–8pm (last call taken at 7:45pm)

Equality and Human Rights Commission Scotland

Equality and Human Rights Commission Helpline Scotland

Freepost RRLL-GYLB-UJTA

The Optima Building

58 Robertson Street

Glasgow G2 8DU

Telephone: **0845 604 5510**

Minicom: **0845 604 5520**

Fax: **0845 604 5530**

Website: **www.equalityhumanrights.com**

Opening times: Monday, Tuesday, Thursday, Friday 9am–5pm; Wednesday 9am–8pm (last call taken at 7:45pm)

Northern Ireland Human Rights Commission

Temple Court

39 North Street

Belfast

Northern Ireland BT1 1NA

Telephone: **0845 602 7211**

Minicom: **028 9024 9066**

Fax: **02890 247 844**

Website: **www.nihrc.org**

Opening times: Monday and Thursday 9am–1pm

Community Legal Advice

Community Legal Advice can give contact details of solicitors and other organisations which can advise and assist you, subject to eligibility, under the free Legal Help Scheme.

Community Legal Advice

Telephone: **0845 345 4345**

Website: **www.communitylegaladvice.org.uk**

Opening times: Monday – Friday 9am–6.30pm

The Law Centres Federation

The Law Centres Federation can provide details of local Law Centres which can give legal advice and assistance.

The Law Centres Federation

293-299 Kentish Town Road
London NW5 2TJ

Telephone: **020 7387 8570**

Website: **www.lawcentres.org.uk**

National Association of Citizens Advice Bureaux

The National Association of Citizens Advice Bureaux (NACAB) can provide details of local Citizens Advice Bureaux (CAB) which can give legal advice and assistance.

National Association of Citizens Advice Bureaux

Myddleton House
115-123 Pentonville Road
London N1 9LZ

Telephone: **020 7833 2181**

Fax: **020 7833 4371**

Website: **www.nacab.org.uk**

The Law Society

The Law Society can provide details of solicitors in your local area who can advise on discrimination cases.

The Law Society

The Law Society's Hall

113 Chancery Lane

London WC2A 1PL

Telephone: **020 7242 1222**

Website: **www.lawsociety.org.uk**

Legal Disclaimer

Although great care has been taken in the compilation and preparation of this work to ensure accuracy, DLS cannot accept responsibility for any errors or omissions. All information provided is for education/informative purposes and is not a substitute for professional advice. Any organisations, telephone numbers and links to external web-sites have been carefully selected but are provided without any endorsement of the content of those sites.

For further advice on these matters please contact:

The Disability Law Service

Telephone: **020 7791 9800**

Minicom: **020 7791 9801**

Fax: **020 7791 9802**

Email: advice@dls.org.uk

Or write to us at: 39 – 45 Cavell Street, London E1 2BP

Community
Legal Service



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