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**HLPA 21 JANUARY 2015**

**THE EQUALITY ACT FOR HOUSING PRACTITIONERS**

*Jamie Burton, Doughty Street Chambers*

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**s.149 Equality Act 2010**  
**Public Sector Equality Duty**

- **149 Public sector equality duty**
- (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;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

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**s.149 Equality Act 2010**  
**Public Sector Equality Duty contd/**

- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

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**s.149 Equality Act 2010**  
**Public Sector Equality Duty contd/**

- 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.

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**s.149 Equality Act 2010**  
**Public Sector Equality Duty contd/**

- (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
- (a) tackle prejudice, and
- (b) promote understanding.

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**s.149 Equality Act 2010**  
**Public Sector Equality Duty contd/**

- 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.
- (7) The relevant protected characteristics are—
- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex; sexual orientation.

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**s.149 Equality Act 2010  
Public Sector Equality Duty contd/**

- (8) A reference to conduct that is prohibited by or under this Act includes a reference to—
- (a) a breach of an equality clause or rule;
- (b) a breach of a non-discrimination rule.
- (9) Schedule 18 (exceptions) has effect

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THE PSED CASE LAW

The legal principles applicable to the discharge of the PSED are now, comprehensively summarised in *Bracking v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] EQLR 60 [26]. In particular:

- a. *The PSED forms an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation* (*R (Elias) v. Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], per Arden LJ) (*Bracking* [26(1)]);
- b. The PSED must be "exercised in substance, with rigour, and with an open mind" (*R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), per Aikens LJ) (*Bracking* [26(5)(iii)]);

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THE PSED CASE LAW

- c. "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria" (per Davis J20 in *R (Meany) v. Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in in *R (Bailey) v. Brent LBC* [2011] EWCA Civ 1586 at [74-75]) (*Bracking* [26(6)]);
- d. The duty of "due regard" requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it (*R (Hurley & Moore) v. Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 [89]; per Elias LJ; (*Brown v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) [85], per Aikens LJ) (*Bracking* [26(8)(ii)]).

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THE PSED CASE LAW

- Further, regard must be had in discharging the PSED "to the more specific obligations which the UK has undertaken with respect to the disabled in the [UNCRPD] and which ought to inform the scope of the PSED with respect to the disabled" (*Bracking* [77] per Elias LJ; *AH v. West London Mental Health Trust* [2011] UKUT 74 (AAC) [16-17], per Carnwarth LJ21).

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DECISIONS TO EVICT

- *Barber v. Croydon LBC* [2010] HLR 26 CA
- Part of the defence was based on the precursor to s.149 EQ 2010, namely s.49A DDA
- The duty reinforced the requirement that the public authority landlord should consider, when contemplating terminating the tenancy for ASB behaviour that was said to be related to his disability, what the effect of eviction would be on him personally and give explicit consideration to alternatives to eviction (which was in any event supported by their own policies)

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DECISIONS TO EVICT CONT/

- *Barnsley MBC v Norton* [2011] HLR 46 CA
- Appeal against a possession order made against caretaker at a school who had a tenancy of accommodation tied to his employment which had come to an end. His daughter had been disabled for the purposes of s.49A DDA
- Following *Peiretti* the Court accepted that the duty applied and was not restricted to the exercise of functions that explicitly "bore on the rights of disabled people" and that the LA was under a duty to consider it when contemplating eviction. It failed in that duty.

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## DECISIONS TO EVICT CONT/

- However, the trial judge, who found that no explicit consideration had been given to the duty, decided that it would have made no difference even if it had, and ordered possession.
- The Court of Appeal did not accept that as it was “not for the court to say” what the Council would have decided had it complied with the duty.
- Furthermore, s.49A DDA did not allow a local authority landlord to simply point to its Part VII duties as a complete answer to the considerations required by the duty.

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## DECISIONS TO EVICT CONT/

- That conclusion was somewhat undermined by the fact that the possession order was not set aside because by that time a Part VII application had in fact been made and what had “become clear” as a “side-effect of the relatively active debate between Counsel and the court in the course of the hearing” was that “what is needed is that both sides should address, in a collaborative way, the need for suitable alternative accommodation to be made available, sooner rather than later” [34]

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## DECISIONS TO EVICT CONT/

- But it was at least acknowledged that “the Council can decide whether, and if so when, the possession order is to be enforced, and its decision in that respect is also one in taking which it is under the section 49A duty, or rather, now, the equivalent duty under the Equality Act 2010” [34]

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## DECISIONS TO EVICT CONT/

- Which is consistent with its comment that:
- “If the Council’s position had been that it did not have regard to the s.49A duty when commencing the proceedings because, for example, it needed to establish its right to possession first, which was not in the event accepted by Mr Norton, and that once that was accepted or proved it would then give consideration to the implications of Sam’s disability before pressing for an order for possession, that could have been a proper and rational position to take, so long as it did give such consideration at the later stage.”

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## DECISIONS TO EVICT CONT/

- So, in the same way relief is always discretionary in JR here a possession order was allowed to stand despite the decision to pursue it being flawed – expect to see many more “we shall comply with our duties” type witness statements in possession proceedings

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## DECISIONS TO EVICT CONT/

- It is worth noting that in *R (Blake) v. Waltham Forest LBC* [2014] EWHC 1027 the High Court rejected an argument that the duty had been complied with where the authority failed to determine the effect of closure of a soup kitchen on vulnerable homeless persons (who shared various PCs) because it assumed the kitchen would continue to provide a service from an alternative site. Assumptions are not good enough- the impact must be assessed by reference to what in fact would happen.

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### PROPORTIONALITY

- It is trite to say that compliance with Article 8 is for the court to determine and in particular whether the interference is (i) in accordance with the law (ii) in pursuit of a legitimate aim and (iii) necessary in a democratic society
- In *Barnsley* the Court of Appeal did not consider the challenge to the trial judge's finding that a possession would not breach Article 8 but found that "it was appropriate, in the circumstances, for the judge to make the possession order that he did."

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### TACTICAL QUESTION

- Therefore, despite the public law error it is clear that the court was entitled to find the eviction proportionate .
- Do you run a proportionality defence under s.15/35 EA 2010 where you have a decent public law challenge (on s.149 or otherwise)?
- Proportionality is always going to be hard. In *Ackerman - Livingstone v. Aster Communities Ltd* [2014] EWCA Civ 1081 the CA concluded that the test, and the court's exercise, when considering proportionality under s.15 was the same as under Article 8.

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### TACTICAL QUESTION CONTD/

- In particular Arden LJ considered there to be "no substance" in the distinction that disability discrimination looked backwards whereas Article 8 looked forward and that a precursor to considering proportionality under Article 8 was that the interference was "in accordance with the law", i.e. did not infringe EA 2010. [34]
- The CA also confirmed that the in light of the "very strong" countervailing interest of the social landlord it was only likely to be the rare case that a discrimination defence would succeed. [38]
- Again Ct very influenced by existence of Part VII duties.

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### TACTICAL QUESTION CONTD/

- It is possible where there are extreme housing needs and attempts to find suitable alternative accommodation have been flawed.
- Only Circuit Judge level but in *Lambeth LBC v. Caruana* 1LB01940 HHJ Saggerson refused to make a possession order where the LA accepted a duty to secure alternative accommodation but in the view of the Judge Lambeth:

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### TACTICAL QUESTION CONTD/

- "ha[d] not conducted a sufficient or adequate final review of the position of these two defendants, either with regard to their distinctive, if not unique, housing requirements as they stand today, or in the very recent past, or with regard to Scarlett Caruana's medical conditions, or with regard to such housing stock as may be available to the Local Authority."

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### S.149 and Part VII HA 1996

- In *Pieretti v Enfield BC* [2011] HLR 3 the CA held that the duty imposed on public authorities by s.49A of the 1995 Act applied not only to formulation of policies, but also to the application of those policies in individual cases. Two consequences:
- 1. the three stated goals require explicit consideration even though may be intrinsically dealing with vulnerable persons
- 2. Rule in *Cramp v. Hastings* modified – the burden of inquiry back on the LA where its on notice that applicant might be disabled and that the disability (or other PC) might be relevant to the issue(s) for consideration by the LA

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S.149 and Part VII HA 1996

- In *Kanu v. Southwark LBC* [2014] EWCA Civ 1085 the CA qualified this and stated that:
  - If the evidence, and inquiries, were sufficient for the purposes of the LA's decision (that no priority need) then s.149 added nothing.
  - The public sector equality duty could not extend to requiring a housing authority to secure accommodation for a disabled person in circumstances where their disability did not render them vulnerable.

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OTHER DECISIONS?

- Might s.149 effect the outcome of the LA's decision as regards:
  - S.190(2)(a) - the period of time that an intentionally homeless person, who has a priority need, might need to give him a reasonable opportunity to secure accommodation by himself?
  - The nature of the advice and assistance necessary pursuant to s.190(2)(b), s.190(3), S.192(2)?
  - The nature of the assessment under s.190(4)?
  - Whether to accommodate under s.192(3)?

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OTHER DECISIONS CONTD/?

- Whether to discharge into the PRS?
- Whether to discharge main housing duty in circumstances set out in s.193(5), (6), (7)?
- Provide accommodation pending review (s.188(3)) or s.204(4)?
- Extend the time for requesting a review (s.202(3))?
- Refer to another local authority pursuant to s.198(1)?
- Etc/

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OTHER DECISIONS CONTD/?

- Framing of their Part VI scheme and who should be a qualifying person pursuant to s.160ZA(7)
- Formulation of homelessness strategies and reviews under Homelessness Act 2002
- Fee Finders schemes
- Homelessness prevention
- Other budgetary decisions

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THE END

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21 January 2015

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