# THE PUBLIC SECTOR EQUALITY DUTY

**The Hon. Mr Justice Sales**

**Lecture for ELBA and ALBA**

**13 December 2010**

1. The public sector equality duty is set out in Chapter 1 of Part 11 of the Equality Act 2010. Part 11 of that Act is entitled, "Advancement of Equality". Chapter 1 is headed "Public Sector Equality Duty" and contains section 149, which is the operative provision which sets out the public sector equality duty. It is proposed that the duty will be brought into force with effect from 1 April 2011. It is not to be confused with the public sector duty regarding socio-economic inequalities which is contained in section 1 of the Act, which the current government has said will not be brought into force at all.

2. The public sector equality duty in section 149 will replace and expand upon certain similar duties imposed upon public authorities which already exist. It will require public authorities to have due regard, in the exercise of their functions, to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the 2010 Act, to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and to the need to foster good relations between such groups. The relevant protected characteristics are listed as: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

3. This is a significantly wider duty than exists at present. Public authorities have been under a general duty to promote race equality since 2 April 2001. The disability equality duty was introduced on 4 December 2006 and the sex equality duty was introduced on 2 April 2007. It was the latter duty which was the foundation for the recent attempt by the Fawcett Society to challenge the

lawfulness of the emergency budget. There are currently no duties in relation to age, gender reassignment, pregnancy and maternity, religion or belief, or sexual orientation.

4. The new public sector equality duty will apply to the public authorities set out in Schedule 19 to the Act when they exercise any of their functions: section 149(1) (unless special provision is made in Schedule 19 to specify only some of their functions as functions to which the duty will apply: see section 150). In addition, the duty will apply to any person who is not a public authority but who exercises public functions, in the exercise of those functions: section 149(2). It is important at the outset to emphasise the width of the activities which may therefore be affected by the duty. As to what counts as a "public function" exercised by a person who is not a public authority, one may expect the courts to follow a line on this which is the same as that being worked out in relation to section 6(3)(b) of the Human Rights Act, where an expansive definition of a public authority is given in the context of that Act to include "any person certain of whose functions are functions of a public nature". Section 150(5) of the 2010 Act provides: "*(5) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998*." It is not an entirely straightforward line to draw. There is a power to add to the list of public authorities in Schedule 19, and a consultation is currently under way on proposals for addition to the list.

5. This public sector equality duty will bind the Crown, by virtue of section 205 of the 2010 Act, and Ministers and government departments other than the Security Service, the Secret Intelligence Service and GCHQ are listed in Schedule 19 as full public authorities. The other public authorities listed in Schedule 19 include the Armed Forces, bodies in the NHS, local government entities, the governing bodies of public educational establishments and police authorities, as well as equivalent Welsh and Scottish bodies.

**The nature of the duty**

6. It is worth taking a little time to think about the nature of the duty and to locate it in the general scheme of public law. It is not a duty which directly creates rights for individuals and requires a public authority to act in accordance with those rights. So it falls to be distinguished from, say, the operation of section 6(1) of the Human Rights Act (which requires a public authority to act compatibly with an individual's Convention rights) or the general law of tort.

7. Nor is it simply a target duty, of a kind which is effectively non-justiciable.

8. Rather, it falls to be analysed within the framework which usually governs determination of the lawfulness of discretionary action by public authorities as a matter of ordinary domestic administrative law. Here, the key question is whether a particular consideration qualifies as a mandatory relevant consideration, a mandatory irrelevant consideration or – in between those two poles – an optional consideration, to which regard may or may not be had according to the judgment of the decision-maker. Within that scheme, the public sector equality duty creates a form of mandatory relevant consideration potentially applicable across what is, in effect, the full range of functions of the bodies to which it applies. This is the path which the courts have taken in analysing the effect of the precursors to the new duty contained in the 2010 Act.

9. The applicability of the duty may be subject, I suppose, to any exclusion of the duty by the express terms of or by necessary implication from later statutes which condition the framework for decisions by public authorities in particular contexts. But I think there would probably need to be strong indications in the later statute that that really is the intention of Parliament. In light of the strong emphasis in modern public law upon good governance, the desirability of discouraging action by public authorities with capricious effects and the importance of avoiding unjustified discrimination on the range of grounds set out in the 2010 Act – where, for example, avoidance of race discrimination and sex discrimination have long been recognized as especially important in a range of domestic and international legal instruments – it seems likely that the courts will presume that

Parliament intends that a high social value should be placed upon the interests to be protected by means of the public sector equality duty, with the consequence that that duty will not readily be found to be dislodged by later statutes.

10. Section 149(6) of the 2010 Act provides:

> *(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.*

This seems to have echoes of the Strasbourg caselaw under Article 14 of the ECHR, stemming in particular from the *Belgian Linguistics* case, which says that differential treatment of different groups may be justified in order to correct factual or historical inequalities between them. However, there are limits to this, since direct discrimination may be justified under the ECHR, but under the Equality Act 2010 will be completely prohibited – as it is now - in respect of certain protected characteristics, including sex and race. On the other hand, the definition of direct discrimination in section 13 of the Act exempts differential treatment on grounds of age if the treatment can be shown to be a proportionate means of achieving a legitimate aim (section 13(2)) and permits differentially favourable treatment of disabled people (section 13(3)).

**The current legislative scheme**

11. Since the 2010 Act will build upon and replace certain equality duties which already exist in the law, it is necessary to review how the courts have approached those duties in order to form an idea how they are likely to interpret and apply the new public sector equality duty.

12. The Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 all contain provisions whose aim is the progressive elimination of discrimination on particular identified grounds in the public sphere. In each case, this is done in two ways:-

(1) First, the Acts contain a provision requiring certain public authorities, in carrying out their public functions, to "have due regard to the need" to eliminate discrimination and to promote equality of opportunity between different groups. This is sometimes referred to as the "general duty". One sees immediately from the language used in each case that the relevant statute identifies this need as a mandatory relevant consideration to be taken into account when making decisions. These general duties are enforceable at the suit of aggrieved parties, principally by way of judicial review claims.

(2) Secondly, the three Acts contain a power for the Minister or Secretary of State to make orders or regulations imposing specific duties for the purpose of ensuring the better performance of the general duty. The Equality and Human Rights Commission must be consulted before such orders or regulations are made. Where such orders or regulations extend to Wales or Scotland, the Welsh or Scottish Ministers must be consulted. The specific duties used to be enforceable only by the Commission, but since the coming into force of the relevant parts of the Equality Act 2006, this limitation has been repealed. Judicial review proceedings brought by anyone with standing to do so are now possible to enforce these further duties.

13. The Equality and Human Rights Commission publishes statutory Codes of Practice and non statutory Guidance regarding the duties under each of the Acts on its website: www.equalityhumanrights.com. This will continue to be the place to look when the public sector equality duty comes into force.

14. The three existing statutes use different legislative models and text to put the general and specific duties into effect.

Race Discrimination

15. Section 71(1) of the Race Relations Act provides that, subject to certain specified limitations:-

> "*(1) Every body or other person specified … shall, in carrying out its functions, have due regard to the need—*
> *(a) to eliminate unlawful racial discrimination; and*
> *(b) to promote equality of opportunity and good relations between persons of different racial groups.*"

16. Section 71(2) of the Act gives the Minister the power to make orders imposing specific duties. Various duties have been created using this power. For example, the relevant order for the purposes of local authorities is the *Race Relations Act 1976 (Statutory Duties) Order 2001*, which requires local authorities to publish a race equality scheme and to review the functions and policies assessed as being relevant to the scheme at least every three years.

Sex Discrimination

17. Section 76A(1) of the Sex Discrimination Act provides for the general duty, again subject to certain defined limitations, in these terms:-

> "*(1) A public authority shall in carrying out its functions have due regard to the need—*
> *(a) to eliminate unlawful discrimination and harassment, and*
> *(b) to promote equality of opportunity between men and women.*

In subsection (2) we have an early model for part of the definition of a public authority which is used in the 2010 Act:

> *(2) In subsection (1)—*
> *(a) "public authority" includes any person who has functions of a public nature …,*
> *(b) "functions" means functions of a public nature …*

18. The applicability of section 149 of the 2010 Act to persons who are not on the defined list of public authorities, but who "exercise public functions" (see section 149(2)) is expressed in rather different terms from section 76A(2), but in substance appears to come to much the same thing.

19. The wording of the general duty in the Sex Discrimination Act is different from that of the race equality duty: there is a specific reference to harassment and there is no duty to promote "*good relations*" between different genders. The formulation of the public sector equality duty adopts the reference to harassment, and is wider still, in that it refers also to the elimination of victimization. The new duty retains the reference to the need to advance equality of opportunity between the defined groups and includes reference to the need to foster good relations between those groups. For the purposes of the 2010 Act, harassment is defined in section 26 of that Act and victimisation in section 27. Harassment involves engaging in unwanted conduct in relation to a protected characteristic which has the purpose of violating a person's dignity or subjecting them to intimidation or humiliation or offence. Victimisation involves subjecting a person to a detriment where they have engaged in a protected act, such as bringing proceedings under the Equality Act or giving evidence in such proceedings.

20. Section 76B of the 1975 Act gives the Minister the power to impose specific duties. This has been done through the *Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006*. Amongst other things, this requires listed authorities to prepare and publish a gender equality schemes, keep them under review and report annually on the achievement of the aims of the scheme.

Disability Discrimination

21. Finally, in the trinity of existing statutes, we have the equality duty created by the Disability Discrimination Act. Section 49A of that Act provides, again subject to specified limitations, that-

> "*(1) Every public authority shall in carrying out its functions have due regard to—*
> *(a) the need to eliminate discrimination that is unlawful under this Act;*
> *(b) the need to eliminate harassment of disabled persons that is related to their disabilities;*
> *(c) the need to promote equality of opportunity between disabled persons and other persons;*

*(d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;*
*(e) the need to promote positive attitudes towards disabled persons; and*
*(f) the need to encourage participation by disabled persons in public life."*

22. Section 49B follows the model of the Sex Discrimination Act in relation to functions of a public nature.

23. Section 49D gives the Secretary of State the power to make regulations imposing specific duties, which power has been exercised to produce the *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005*, again imposing a duty on public authorities to draw up schemes, keep them under review and report on them.

24. The wider obligations set out in the general disability discrimination equality obligation are in substance repeated and expanded upon by section 149(3)-(5) of the 2010 Act, as follows:

*(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—*
*(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.*

*(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*.

25. One can see, therefore, the way in which the 2010 Act has taken existing provisions relevant to equality duties and developed from them a more uniform and coherent structure which has more or less uniform application across the new, expanded range of protected characteristics.

26. Section 149(9) of the 2010 Act provides that Schedule 18 shall have effect. Schedule 18 sets out exceptions from the public sector equality duty.

27. The exceptions in Schedule 18 are these:

(1) In relation to age, section 149 will not apply to the exercise of a function relating to:

(a) the provision of education to pupils in schools;

(b) the provision of benefits, facilities or services to pupils in schools;

(c) the provision of accommodation, benefits, facilities or services in community homes pursuant to section 53(1) of the Children Act 1989;

(d) the provision of accommodation, benefits, facilities or services pursuant to arrangements under section 82(5) of that Act (arrangements by the Secretary of State relating to the accommodation of children); or

(e) the provision of accommodation, benefits, facilities or services in residential establishments pursuant to section 26(1)(b) of the Children (Scotland) Act 1995;

(2) In relation to the exercise of defined immigration and asylum functions, section 149(1)(b) has effect as if did not apply to the protected characteristics of age, race (defined for this purpose as nationality or ethnic or national origins) or religion or belief;

(3) Section 149 will not apply to "*the exercise of (a) a judicial function; (b) a function exercised on behalf of, or on the instructions of, a person exercising a judicial function*";

(4) Section 149(2) will not apply to:

i. the House of Commons, the House or Lords or other specified bodies; or

ii. to the exercise of a function in connection with proceedings in the House of Commons, the House of Lords; or

iii. to the exercise of (most) functions in connection with proceedings in the Scottish Parliament or Welsh Assembly.

28. It is worth noting that the exemption for the exercise of a function in connection with proceedings in the House of Commons or the House of Lords may be of relevance in future to the sort of challenge brought by the Fawcett Society to the adoption of the emergency budget by the coalition government. In practice, a budget statement has to be approved by Parliament, since it will depend upon monies being voted in particular amounts and for particular purposes and upon the imposition of taxes by legislation.

29. On the other hand, as the cuts fall to be implemented by a range of public bodies, such as local councils and police authorities, there will be no such exemption for them. They will be obliged to consider the mandatory considerations set out in section 149. There are signs in the cases that this will be a significant and onerous obligation. In the scale of decision-making, from adoption of general policies or schemes at the most abstract level down to low level decisions - such as how

much to spend on paper clips and where to spend it - how far down the scale will the duty extend its substantive content? Will the courts expect fuller consideration, evidenced by a documentary trail, where the adoption of general policies is under consideration, and then treat individual decisions under those policies as having been covered by that consideration? Will the courts allow for more limited consideration lower down the decision-making scale, where the impact of the decision on the wider social policies which the duty exists to protect may be expected to be minimal?

30. I think one can expect development of the law along these two axes, but it is very difficult to draw hard and fast lines. The relevant functions to which the duty will apply are entirely general. The very abstract formulation of the duty, which is to "have due regard" to certain matters, should also be noted. What is "due regard"? The statute does not give us much information about that, other than again in very general terms in section 149(3). The practical effect of the combination of a very wide range of application for the duty across all public functions and a very abstract formulation of what has to be done means that the burden of spelling out the practical content of the duty devolves upon the courts. As a statement of the obvious, context will be very important. Until the case law develops, public bodies will be vulnerable to challenges, uncertain as to what the duty requires from them in given circumstances. There may also be a tendency for defensive practices to develop, as public authorities over–compensate against the risk of challenge, which may gum up decision-making procedures with over-elaborate processes. The role for the courts in seeking to set out sensible and coherent application of the duty, so that it fosters rather than undermines good administration, will be to spell out a notion of proportionality between the significance of the decision to be taken and the notice to which the public authority is subject that the decision may have significant impacts upon one or more of the social values set out in section 149, on the one hand, and, on the other hand, the extent of the effort required by the authority to inform itself about the situation and degree of consideration required to be given to those matters in that particular context.

31. Finally, so far as concerns the structure of Part 11 of the 2010 Act, sections 153 to 155 create a power for a Minister of the Crown or the Scottish Ministers or the Welsh Ministers to make regulations to impose specific duties on public authorities. This again follows the pattern in the trinity of existing statutes, and we may expect similar specific duties to be created.

32. The Government has recently consulted on proposals for draft regulations for the specific duties and the list of public bodies that will be subject to the general and specific duties[1]. The proposed specific duties in the draft regulations include requiring a public authority to establish and publish equality objectives for itself and to publish information about its performance of the duty under section 149(1) of the Act.

33. On 4 October 2010 the Equality and Human Rights Commission issued "*Using the equality duties to make fair financial decisions: A guide for decision-makers to assessing the equality impact of proposed changes*"[2]. Note that this is guidance and the Commission has not yet issued a new draft Code of Practice. The guidance explains what the law requires now and how that will change in April 2011, sets out practical guidance on how to complete an Equality Impact Assessment, explains the benefits of doing so and gives examples.

34. So much for the nuts and bolts of the law in the 2010 Act and regulations to be made under it. What guidance can we glean from the decided cases on the existing legislation for the operation of the new public sector equality duty in practice? I suggest that they support the analysis I have proposed, and show that the duty will be treated as a mandatory relevant consideration for public decision-makers and accordingly as a duty which has real substance. They also show the beginnings of the working out of a doctrine of proportionality between notice of identified need and the extent of consideration required by public authorities to satisfy the due regard test.

[1] http://www.equalities.gov.uk/news/specific_duties_consultation.aspx.
[2] http://www.equalityhumanrights.com/uploaded_files/PSD/using_the_equality_duty_to_make_fair_financial_decisions_final.pdf.

**The leading cases**

35. In *R (Elias) v Secretary of State for Defence* [2005] IRLR 788, a British citizen born in Hong Kong applied for judicial review of the Secretary of State's decision that she was not entitled to compensation for her internment in a Japanese POW camp. She claimed that she would have been eligible for payment under the scheme if it had not been for what she maintained was the racially discriminatory condition that either she, or one or more of her parents or grandparents, had been born in the UK. She also claimed that in setting up the scheme the Secretary of State had failed to comply with his duty under section 71 of the Race Relations Act. It is worth quoting the relevant passage in the judgment of Elias J at a little length. Dealing with Defendant's submission and evidence that he had had sufficient regard to the need to eliminate discrimination, the judge said:

> "*… it seems to me that these comments of Mr McKane merely identify the stance being adopted in these proceedings. It is nowhere suggested that there was any careful attempt to assess whether the scheme raised issues relating to racial equality, although the possibility was raised; nor was there any attempt to assess the extent of any adverse impact, nor other possible ways of eliminating or minimising such impact. I accept that even after considering these matters the minister may have adopted precisely the same scheme, but he would then have done so after having due regard to the obligations under the section.*
>
> *Given the obvious discriminatory effect of this scheme, I do not see how in this case the Secretary of State could possibly have properly considered the potentially discriminatory nature of this scheme and assumed that there was no issue which needed at least to be addressed. Furthermore, if there is uncertainty about it, further consideration of the potentially discriminatory effects will be necessary … if section 71 is not addressed until the minister has first concluded that a policy does in fact demonstrate unlawful discrimination, it loses its value.*
>
> *[Counsel for the Minister] also suggested that in any event there has been a careful consideration now, in the course of this litigation, and therefore it was not necessary for the court to do anything about any earlier breach. I do not accept that … the purpose of this section is to ensure that the body subject to the duty pays due regard at the time the policy is being considered – that is, when the relevant function is being exercised - and not when it has become the subject of challenge. Moreover … there will be in many cases a tendency, perhaps subconscious, to make the assessment*

*whether discrimination might arise with an eye on the outcome of the litigation. That will not produce the same unbiased analysis as might occur if consideration is given to the section 71 factors at the proper time.*

*There are two further matters I should mention. The first relates to the duty in subsection (b). I accept of course that in principle it is necessary for the Secretary of State to pay attention not only to what might be termed the negative aspect of eliminating unlawful discrimination in subsection (a), but also the positive obligations under the section found in subsection (b), namely, to promote equality of opportunity and good relations between persons of different racial groups. Mr Pannick contended that in a letter to the Claimant from the Secretary of State, when responding to an alleged breach of section 71, he did not refer to this obligation at all. Similarly in the Summary Grounds for Contesting the Claim, there was no apparent recognition that the subsection was relevant.*

*I do not think that there is any merit in this particular argument. In my opinion the obligations imposed by subsection (b) had no real relevance in this case. At any event, to the extent that they did, this was only insofar as they are entailed within subsection (a).*

*The aim of the scheme was to distribute money, and the obligation in relation to this scheme was to eliminate unlawful racial discrimination. This was not intended to be a scheme directed to promoting equality of opportunity or good relations between persons of different racial groups. I think it quite unrealistic to think that the Secretary of State should have made specific reference to the obligation under sub section (b), or that his failure to do so demonstrates that he does not properly understand the nature of his duties under this section."*

36. The reasoning suggests that the relevant duty (in that case under s. 71(1)(a)) requires an inquisitive approach into the effects of the decision in question and that this consideration needs to be given to the duty before the decision is taken.

37. There was an appeal to the Court of Appeal [2006] 1 WLR 3213, but not on the section 71 issue. However, Arden LJ went out of her way to say:-

"*It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was*

*not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play. I express the hope that those in government will note this point for the future."*

38. These judgments set a pattern which has been followed since then, with the courts emphasising the significant substance of the relevant equality duties and the need for evidence by public decision-makers to show that proper consideration has been given to the mandatory factors identified by the duty at the time the decision was made. The points were emphasised, for example, by Stanley Burnton J in *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2007] EWHC 199 (change in the Immigration Rules and guidance applying to foreign postgraduate doctors and dentists, intended to make it more difficult for foreign postgraduate doctors and dentists to obtain leave to enter or remain in the UK for the purposes of postgraduate training). The judgment on that point was not challenged in the appeals which followed. The importance of clear evidence to show proper consideration of the relevant factors had taken place was underlined once again in *R (EHRC) v Secretary of State for Justice*, [2010] EWHC 147 (Admin), (2010) EqLR 59.

39. In *R (Baker and others) v Secretary of State for Communities and Local Government* [2008] LGR 239, the appellant Irish travellers appealed to the Court of Appeal against a decision of the Administrative Court ((2007) EWHC 2370 (Admin)) upholding a planning inspector's refusal of planning permission to the appellants to pitch caravans on a site in the green belt. In refusing planning permission the inspector concluded that the considerations in their favour did not outweigh the harm to the green belt because there was no critical need for any of them to be on that particular site. The appellants claimed, amongst other things, that the inspector had acted in breach of section 71(1)(b) of the Race Relations Act by failing to have due regard to the need to promote equality of opportunity between persons of different racial groups. Her decision did not expressly refer to the duty.

40. The challenge failed. Dyson LJ, with whom the other members of the Court agreed, accepted section 71's "importance as a national tool for securing race equality in the broadest sense". But he continued:

> "*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. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have due regard to it. What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.*
> …
> *I do not accept that the failure of an inspector to make explicit reference to section 71(1) is determinative of the question whether he has performed his duty under the statute. So to hold would be to sacrifice substance to form …*
> *The question in every case is whether the decision-maker has in substance had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has not been performed …*
>
> *Nevertheless, although a reference to section 71(1) may not be sufficient to show that the duty has been performed, in my judgment it is good practice for an Inspector (and indeed any decision-maker who is subject to the duty) to make reference to the provision (and any relevant material, including the relevant parts of the Code of Practice and Circular) in all cases where section 71(1) is in play.*
> …"

41. The Court adopted a more generous approach to the decision maker than in other cases, being prepared to accept that she had complied with the section 71 duty even though no specific mention was made of it. The emphasis upon substance over form is likely to be of importance, particularly if the courts are to avoid

imposing disproportionate obligations upon public authorities as one moves down the scale of decision-making from adoption of general policies to individual decisions.

42. But in *R (E) v Jewish Free School* [2008] ELR 445, on a point decided at first instance which did not arise on the appeals in that case, Munby J distinguished Dyson LJ's judgment on the facts of the case, holding that there had been insufficient distinct consideration by the school of the need to eliminate race discrimination under section 71(1)(a) of the Race Relations Act. On the other hand, where the impact of an individual decision on race equality is minimal, the courts are prepared to say that there is no requirement for any consideration: an example is *R (Primrose) v Secretary of State for Justice* [2008] EWHC 1625 (Admin) (a Scot imprisoned in England was ineligible for Home Detention Curfew because his home was in Scotland and there was no cross-border arrangement to allow the scheme to be put into effect in Scotland). This line of authority seems to me, then, to reflect the sort of idea of proportionality between the relevant equality issues at stake and the degree of consideration required by the decision-maker which I have mentioned, based on the language of "due regard" now used in section 149 of the 2010 Act.

43. The point is supported by the judgment of the Divisional Court in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158, in which the claimant alleged unsuccessfully that the Department for Business, Enterprise and Regulatory Reform and the Department for Work and Pensions had failed in their duties under section 49A of the Disability Discrimination Act in formulating the post office closure programme: see especially paras. [84]-[89]. The Court went on to suggest "*that the following general principles can be tentatively put forward*" at paras. 90ff:

> *90 … First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals: compare, in a race relations context R(Watkins – Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865 at paragraph 114 per Silber J. Thus, an*

*incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them: see, in a race relations case, the remarks of Moses LJ in R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin) at paragraph 45.*

*91 Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. …*

*92 Thirdly, the 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". …*

*93 However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have "due regard" to the needs set out in the section is not determinative of whether the duty under the statute has been performed: see the judgment of Dyson LJ in Baker at paragraph 36. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where section 49A(1) is in play. …*

*94 Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non – delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty. …*

*95 Fifthly, (and obviously), the duty is a continuing one.*

*96 Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record — keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1) …*"

44. These guidelines, and those in *Baker*, were approved by the Court of Appeal in *R (Domb) v London Borough of Hammersmith and Fulham* [2009] B.L.G.R. 843, a case concerning a local authority's decision to introduce charges for adult community care services. On the facts it was found that the local authority had had "due regard" to the relevant factors set out in existing discrimination legislation.

45. The Court confirmed that the equality duties are non-delegable, but nevertheless went on to find that it was acceptable that no specific consideration of the race and sex equality duties had been undertaken by the Councillor decision-makers, but had been undertaken only at officer level, where it had been concluded that introduction of charges would not involve any disproportionate impact.

46. Another important theme to be derived from *Baker* is that, when applying the "due regard" test, and weighing up whether action is required, the public authority is to have regard to such countervailing factors as are relevant to the function that the decision-maker is performing, and that the weight to be given to the countervailing factors is a matter for the public authority: see paras. [31] and [34] of the judgment. In that respect, provided the public authority has indeed taken all relevant factors into account, it is a *Wednesbury* type standard of review which is applied. This theme also has been carried through into the subsequent caselaw, for example in *Brown* (see paras. [34], [82] and [106]), in *R (Harris) v London Borough of Haringey* [2010] EWCA Civ 141, at para. [40], and in *R (Equality & Human Rights Commission) v Secretary of State for Justice* [2010] EWHC 147, at para. [65]. This approach is likely to be adopted to the new public sector equality duty as well. In this way, the courts apply the equality duties within the standard administrative law framework for evaluation of the lawfulness of action by public authorities.

47. The general disability equality duty was considered by Mr Justice Langstaff in *R. (MS) v Oldham MBC* [2010] EWHC 802 (Admin) in the context of a local authority's assessment of a child's special needs. He commented at paragraph 20:

> "*what is not specifically required is that the public authority should evidence the fact that it has paid due regard in exercising its functions to the matters set out (a) to (f) [in section 49A]. There may be occasions when it is obvious that it should do so. There may be others where it is not so obvious. One case in which it was plainly obvious was that of JL itself. In such a case an audit trail may be necessary evidentially to satisfy a court that the due regard has indeed been paid. But I would deprecate any statement of principle which required a court in any case involving a disabled claimant seeking provision from a local authority to the effect that the local authority would have to minute and record in part of its paperwork the fact that it had regard to each or any of the six specific matters set out in section 49A . If it were to do so it would risk reducing to a mantra what ought to be a matter of central substance in the local authority's behaviour. That does not mean that a court may not enquire into the matter, and where it looks at first blush as though the local authority may not have had regard to such matters the court would plainly be helped by such documentation as there is: but it does not require, in my view, another tick box to be ticked for the sake of it, nor for wording to be adopted purely in defence of potential but unfounded claims for review.*"

48. He concluded that on the facts in the case that reference to the Disability Discrimination Act added nothing of substance to consideration of the main claim framed under the Chronically Sick and Disabled Persons Act. This judgment again shows a sensitivity on the part of the courts to focus on the substance of the consideration given to a particular issue and to avoid an interpretation of the equality duty which would impose an unnecessarily burdensome and ultimately mechanical approach on a public authority. This is likely to be an approach which carries through into the expanded public sector equality duty.

49. However, the dangers for a public authority which does not specifically advert to the relevant duty when taking a decision are illustrated by the Court of Appeal decision in *R (Harris) v Haringey LBC* [2010] EWCA Civ 703, (2010) EqLR 98, at [38]-[40]. In that case the appellant appealed against the grant of planning permission for redevelopment of a site which was currently used for an indoor market and residential properties. Sixty four per cent of traders in the market were Latin American or Spanish speaking and the predominant occupation of homes and business units were by members of the black and ethnic minority communities. The decision was unpopular with these groups and this was

recognised in the local authority report. However, the consideration of issues in the report was framed only by reference to planning considerations, and the court found that this discussion was too tangential and remote from the issues required to be addressed under the race equality duty.

50. With the expansion of the relevant factors under the new public sector equality duty, it may be that the risk for a public authority which proceeds without adverting to the duty becomes greater. However, this needs to be balanced against the other important theme in the cases, that compliance with the duty is a question of what constitutes "due regard" for the relevant factors which are in issue, and that – particularly when one is dealing with individual decisions - where it is not reasonably clear that one or other of the defined factors is affected by the decision to be made, there may be no need to refer to or deal with it; and also that the extent of consideration required to be given to such factors may vary depending upon how direct and significant the impact of the decision in question may be upon the interests to which regard should be had. It may also vary depending on the extent to which the public authority is put on notice that a relevant issue under the equality duty arises and may therefore require investigation and inquiry by the authority in order to comply with its duty, as the decision of the Court of Appeal in *Pieretti v Enfield LBC* [2010] EWCA Civ 1104 illustrates. In that case, the Court found that the disability equality duty applied to a local authority when considering a homelessness application, where the authority was put on notice that it was a real possibility that the homeless applicant was disabled and that that disability might have led to failure to his pay rent.

**Conclusion**

51. The new public sector equality duty rationalises and homogenises the previous law in this area, and expands upon it. It will also require the courts to develop the case law regarding what constitutes having "due regard" to the relevant factors across a very wide range of situations, from adoption of general policies through to decisions in individual cases. It will be for the courts to try to hold a reasonable

balance between an interpretation of the duty which promotes good administration and one which imposes excessive burdens on public authorities and so undermines that objective. However, the courts will be judging matters after the event, where the context of the individual case is already specified by the particular facts which the court has to consider. For public authorities trying to adapt to these equality duties in the present, in advance of assessment by the court and against such an abstract standard as the "due regard" standard, it is likely that the prudent course will be to move where possible towards a routinised form of consideration of such duties. The new duty will therefore increase the pressures on public authorities to introduce some form of procedural mechanism in their decision-making processes to ensure that the various limbs of the new duty are taken properly into account.