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THE SOCIO-ECONOMIC DUTY IN WALES

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What is this new duty?

A reminder of the public sector equality duty ('PSED')



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- Section 149 of the Equality Act 2010 states (insofar as is relevant):
 - “(1) A public authority must, in the exercise of its functions, **have due regard** to the need to—
 - ...
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it...
 - (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.
 - ...
 - (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.” [emphasis added]

What is this new duty?

A reminder of the PSED



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- Section 150 and Schedule 19(2) contain the list of public authorities who are subject to the duty and they include the Welsh Ministers, Health Boards / Trusts, Community Health Councils, County Councils, Fire and Rescue Authorities, National Park Authorities, Governing Bodies of Educational Establishments, Higher Education Funding Council, General Teaching Council, Chief Inspector, Qualifications Wales, Welsh Revenue Authority, Auditor General, Public Services Ombudsman, Social Care Wales, Arts Council, National Museum, National Library, Sports Council, Welsh Language Commissioner, Commissioner for Older People, Children's Commissioner, Wales Audit Office.

What is this new duty?

What does due regard mean in s149?



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- *London Borough of Hackney v Haque* [2017] EWCA Civ 4, [2017] PTSR 769 per Briggs LJ:

“21. The relevant underlying principles are as follows. First, the aim of the PSED (as of other equality duties) is to bring equality issues into the main-stream, so that they become an **essential element in public decision making**: see per Elias LJ in *Hurley* at paragraph 70, per Arden LJ in *Elias* at paragraph 274, and per Sedley LJ in *BAPIO* at paragraphs 2-3. In *Bracking*, at paragraph 59, McCombe LJ said:

“It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.”

That was a case about formulation of policy, but the underlying principle applies equally to public authority decision-making of any kind.

22. Secondly, the duty is a matter of substance rather than of form. It requires that the decision maker be aware of the duty to **have due regard to the relevant matters**: see per Aikens LJ in *Brown* at paragraph 91:

“It involves a conscious approach and state of mind.”

See also per Pill LJ in *Bailey* at paragraph 74-75. **The duty must be exercised in substance, with rigour and with an open mind.** It is not a question of ticking boxes: see per Aikens LJ in *Brown* at paragraph 92 and per Dyson LJ in *Baker* at paragraph 37:

“The question in every case is **whether the decision-maker has in substance had due regard to the relevant statutory needs**. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty as being performed, so too a failure to refer expressly to the statute does not of itself show that the duty has not been performed.”

What is this new duty?

What does due regard mean in s149?



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“23. Third, the concept of due regard is to be distinguished from a requirement to give the PSED considerations specific weight. **It is not a duty to achieve a particular result**: see per Dyson LJ in *Baker* at paragraph 31 and per Aikens LJ in *Brown* at paragraph 81. In *Hurley*, Elias LJ said this at paragraph 78:

“The concept of “due regard” requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker.” [emphasis added]

- *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 per McCombe LJ at § 25(4):

“A Minister must assess the risk and extent of any adverse impact and **the ways in which such risk may be eliminated** before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision”.

What is the new duty?

Section 1 of the Equality Act 2010



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Public sector duty regarding socio-economic inequalities

- “(1) An authority to which this section applies must, when making decisions of a **strategic nature** about **how to exercise its functions**, have **due regard** to the **desirability** of exercising them in a way that is designed to **reduce the inequalities of outcome** which result from **socio-economic disadvantage**.

- (2) In deciding how to fulfil a duty to which it is subject under subsection (1), an authority must take into account **any guidance** issued by a Minister of the Crown.

- ...

- (6) The reference to inequalities in subsection (1) does not include any inequalities experienced by a person as a result of being a person subject to immigration control within the meaning given by section 115(9) of the Immigration and Asylum Act 1999.”

What is the new duty?

Section 3 of the Equality Act 2010



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“Enforcement

A failure in respect of a performance of a duty under section 1 does not confer a cause of action at private law.”

That does not prevent a judicial review.

What is the new duty?

The s1 duty is very different from the PSED



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What is the new duty?

When does it apply?



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- § 23 of the explanatory notes to the Act states:

“This section requires specified public bodies, when making strategic decisions **such as deciding priorities and setting objectives**, to consider how their decisions might help to reduce the inequalities associated with socio-economic disadvantage. Such inequalities could include inequalities in education, health, housing, crime rates, or other matters associated with socioeconomic disadvantage. It will be for public bodies subject to the duty to determine which socio-economic inequalities they are in a position to influence.”

- § 27 gives some examples of when the duty will be engaged:

- “The Department of Health decides to improve the provision of primary care services. They find evidence that people suffering socio-economic disadvantage are less likely to access such services during working hours, due to their conditions of employment. The Department therefore advises that such services should be available at other times of the day.
- The duty could lead a local education authority, when conducting a strategic review of its school applications process, to analyse the impact of its campaign to inform parents about the applications process, looking particularly at different neighbourhoods. If the results suggest that parents in more deprived areas are less likely to access or make use of the information provided, the authority could decide to carry out additional work in those neighbourhoods in future campaigns, to ensure that children from deprived areas have a better chance of securing a place at their school of choice.”

What is the new duty?

When does it apply?



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- *R (Williams) v Caerphilly County Council* [2020] EWCA Civ 296, [2020] PTSR 1130. At first instance, Swift J held in relation to the Welsh Improvement Duty:
 - “20. ...The first point is the way in which the section 2(1) duty is formulated. **It is not – for example, in the manner of the public sector equality duty under section 149(1) of the Equality Act 2010 – expressed in terms of an obligation to have regard to prescribed considerations whenever a decision is taken.** Rather, it is an obligation to ‘make arrangements to secure continuous improvement in the exercise of functions’. This suggests that the section requires relevant authorities to put in place free-standing measures to improve decision-making processes by reference to the criteria listed at section 2(2) of the 2009 Measure. These arrangements are distinct from what a relevant authority might do in the exercise of its ordinary substantive functions; the section 2 arrangements are intended to improve the way in which those other functions are used...
 - 21. None of this is to say that the section 2 duty is not enforceable through judicial proceedings. However, it does indicate that section 2 is aimed at matters which are in their nature arrangements for the improvement of the exercise of functions; **this is something discrete from a relevant authority’s ‘ordinary’ executive decision-making.**”

What is the new duty?

When does it apply?



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- The Court of Appeal mostly agreed. Males LJ stated:

“68. While the language of section 2 is somewhat nebulous, it is at least clear in my judgment that it operates at a **fairly high level**. It is concerned, not with the making of improvements, but rather with the making of arrangements intended to secure the achievement of improvements in the exercise of an authority’s functions. Further, I would accept Mr Goudie’s submission that **the section is concerned with the exercise of the authority’s functions generally** and that, in this respect, the contrast with the language of section 3 is relevant. I would not accept that section 2 is concerned only with measures which are intended to improve an authority’s decision making processes, although that is a good example of the kind of measure on which the section is primarily focused.

...

70. Even if a measure or decision can be characterised as the adoption of a strategy, or as a “high level” decision, that does not necessarily mean that it is subject to the section 2 duty.”

- However, it must be said that the examples given in the explanatory notes to the act, which will be an aid to interpretation where the language used is ambiguous, are at a lower level of decision making than decisions about performance of functions generally. Therefore, it may be that *Williams* does not assist with the interpretation of section 1.

What is the new duty?

Who does it apply to?



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- It is anticipated that the regulations when passed by the Welsh Ministers will include the following public authorities: The Welsh ministers, local authorities, local health boards / trusts / special health authorities, fire and rescue authorities, national park authorities, Welsh revenue authority.
- That is a much smaller list than those subject to the PSED. In particular, it will not apply to Qualifications Wales, Social Care Wales, the Children's Commissioner or the Commissioner for Older People.
- The guidance mentioned in the next slide identifies the reason for this as being that it is "*intended to apply only to high level strategic bodies taking key decisions*".

Guidance

What does the Welsh Government say about the duty?



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- Currently non-statutory guidance, published on 1 April 2020 “*A more equal Wales – preparing for the commencement of the socio-economic duty*”.
- This guidance will be consulted upon and formalised into statutory guidance – see the statement of the Deputy Minister on 11 March 2020.
- The duty will come into force on 31 March 2021.
- The guidance states on p5:

“In summary, the statutory requirement of the duty places a legal responsibility on relevant bodies when they are taking strategic decisions to have due regard to the need to reduce the inequalities of outcome resulting from socio-economic disadvantage.”

- The guidance identifies definitions of key terms which it states **will** be used in the statutory guidance.
- It defines strategic decisions as:

“In general, strategic decisions will be those which effect how the relevant public body fulfils its intended statutory purpose (its functions in regards to the set of powers and duties that it uses to perform its remit) over a significant period of time and will not include routine ‘day to day’ decisions.”

Guidance

What does WG say about the duty?



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- It defines due regard as:

“Giving weight to a particular issue in proportion to its relevance.”

- It then sets out a number of questions to be considered when complying with the due regard duty. It may be that these questions are inadequate. In particular, they do not lead a public authority into identifying and implementing mitigation.
- It defines socio-economic disadvantage as:

“Living in less favourable social and economic circumstances than others in the same society.”

- That definition does not assist with identifying the socio-economic considerations. It adds:

“Poverty is often hidden in smaller communities – the cost of living and accessibility of transport, education and employment can impact more negatively on rural populations. Research has found that rural areas are at a higher risk of deprivation if access to services are included as a measure of poverty.”

Guidance

What does the WG say about the duty?



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- It defines inequalities of outcome as:

“Inequality of outcome relates to any measurable differences in outcome between those who have experienced socio-economic disadvantage and the rest of the population.”

Conclusions

Future considerations



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- The statutory guidance would do well to:
 - Identify typical socio-economic considerations in the context of strategic decisions;
 - Identify what is meant by strategic decisions and the level of decision making that engages the duty.