

Domestic Abuse Victims, the C-19 emergency and emergency accommodation

Siân Davies & Adam Boukraa
39 Essex Chambers

Equality Act 2010

- Two key obligations for public authorities in this context.
- First, the public sector equality duty (“PSED”).
- Second, the prohibition on discrimination, whether directly or indirectly.

PSED: s.149

- S.149(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.

The s.149 protected characteristics

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

The duty and domestic violence

- The PSED therefore sets out three aims in relation to protected characteristics:
 - a) Eliminating discrimination.
 - b) Advancing equality of opportunity.
 - c) Fostering good relations.
- Which is relevant to domestic violence?

Advancing equality of opportunity

- Defined in section 149(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.

Example

- Taken from the explanatory notes to the EA 2010, about equality of opportunity.
- The PSED could lead a local authority to provide funding for a black women's refuge for victims of domestic violence, with the aim of advancing equality of opportunity for women, and in particular meeting the different needs of women from different racial groups.

Complying with PSED

- Long line of case law, including cases under anti-discrimination legislation preceding the EA 2010.
- Useful summaries of the principles:
 - ***R. (Bracking) v Secretary of State for Work and Pensions*** [2013] EWCA Civ 1345
 - ***Hackney LBC v Haque*** [2017] EWCA Civ 4
- Important case in context of housing duties, particularly for vulnerability and disability:
 - ***Hotak v Southwark LBC*** [2015] UKSC 30
- See also EHRC guidance:
https://www.equalityhumanrights.com/sites/default/files/technical_guidance_on_the_psed_england.pdf

Some key principles

- Aim of the PSED: to bring equality issues into the mainstream, so that they become an essential element in public decision making.
- A matter of substance rather than of form. It involves a conscious approach and state of mind. It is not a question of ticking boxes.
- There is no special form or form of words which demonstrate compliance.

More key principles

- Not a duty to achieve a particular result. The court cannot interfere with a decision simply because it would have given greater weight to its equality implications than the decision-maker.
- Involves a duty of inquiry: it requires the decision-maker to be informed about which protected groups should be considered.
- It's not necessary to consider every conceivable group that shares a protected characteristic. The decision-maker needs to give adequate thought to the issue and will depend on the context: ***R. (on the application of Gullu) v Hillingdon LBC*** [2019] EWCA Civ 692.

PSED, DV and support

- Recognise that domestic violence is a disadvantage suffered disproportionately by women and pay careful attention to the need to remove or minimise that disadvantage.
- Recognise that women have needs that are different to others as a result of being survivors of domestic violence and pay careful attention to the need to meet them.
- For both of the above: consider how they interact with and exist alongside other protected characteristics. In particular: race and disability.

Issues to consider

- Issues for public authorities to consider under their PSED. There will be many others.
- Identification and evidence. What forms of identification, evidence or paperwork should be expected of survivors of domestic abuse?
- Communication. How can a survivor communicate with a LA that they need assistance, particularly during Covid-19?

More issues

- Links with other protected characteristics.
- E.g. what are the barriers to communication for certain BME groups and how can they be overcome? What role can specialist organisations play? What barriers are faced by disabled survivors of domestic abuse and how can they be overcome? How have these been affected by restrictions on movement during Covid-19?

Reminder: not outcome duty

- Remember that PSED doesn't say any particular outcomes need to be achieved.
- Using example from explanatory notes: PSED wouldn't oblige the local authority to fund a black women's refuge. However, it obliges it to consider how the needs of women, including black women, are different to others, and how to meet them.
- If public authorities are not taking certain actions, they can explain why and can be accountable for the equality implications.

Discrimination under the EA 2010

Key provisions

- Section 13: definition of direct discrimination.
- Section 19: definition of indirect discrimination.
- Section 29: discrimination by a person providing services to the public or a section of the public, or otherwise in the exercise of a public function, is unlawful.

Indirect discrimination

- Section 19(1): A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- Section 19(2): a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim

Indirect discrimination

- Section 19(3): The relevant protected characteristics are—
 - age;
 - disability**;
 - gender reassignment;
 - marriage and civil partnership;
 - race**;
 - religion or belief;
 - sex**;
 - sexual orientation.

Application to DV

- Simplified question.
- When deciding whether to offer accommodation and assistance, is the public body applying a policy or practice that puts women at a disadvantage compared with men, because domestic abuse survivors – most of whom are women – are less likely to be able to meet the policy or practice?
- If so, can the policy or practice be justified?
- NB: as before, there may be other relevant protected characteristics.

Case law

- Several challenges in recent years to local authority housing policies on the basis that they were indirectly discriminatory to women, including survivors of domestic abuse.
- In the context of the allocation of social housing under Pt VI of HA 1996, rather than homelessness accommodation under Pt VII.
- But they help to illustrate the principles.

Cases

- ***R. (on the application of HA) v Ealing LBC*** [2015] EWHC 2375 (Admin):
- Ealing's five-year residency requirement indirectly discriminated against survivors of domestic abuse and could not be justified.
- ***R. (on the application of C) v Islington LBC*** [2017] EWHC 1288 (Admin)
- Islington's housing allocation scheme indirectly discriminated against women and survivors of domestic abuse. But looking at the scheme overall, it could be justified as a proportionate means of achieving a legitimate aim.

Cases

- ***R. (on the application of H) v Ealing LBC*** [2017] EWCA Civ 1127:
- Ealing’s housing allocation policy, which set aside a proportion of lettings for “working households” indirectly discriminated against women as they were less likely to be in work. But looking at the scheme as a whole, it was justified.

- ***R. (on the application of Gullu) v Hillingdon LBC*** [2019] EWCA Civ 692:
- Subject to exceptions, need to be continuously living in the borough for at least ten years to qualify to join Hillingdon’s housing register. Unintentionally homeless could join the register as an exception but were placed in Band D. The policy indirectly discriminated on grounds of race and hadn’t been justified, but it was possible that it could be.

Link to Art 14

- At least in judicial review, many cases focus on Art 14 rather than the equivalent duties in EA 2010.
- In practice, little difference between obligations not to discriminate directly and indirectly under EA 2010 and Art 14. Will be case-specific reasons why emphasise or choose one over the other.
- One advantage for EA 2010 over Art 14: no need to link it to another right. It's free-standing.
- Court of Appeal has doubted whether social housing comes within Art 8 and can be linked to Art 14. See *R. (on the application of H) v Ealing LBC* [2017] EWCA Civ 1127.

Conclusion

- When deciding whether to offer accommodation and assistance, are public bodies applying any policies or practices that put domestic abuse survivors – who are mostly women – at a disadvantage compared to men? Can the same be said for other protected characteristics: e.g. race and disability? If so, can the policies or practices be justified?
- Are rigid rules and blanket policies being applied? These are much more likely to be discriminatory. There should be flexibility in decision-making.
- Complying with PSED should help to avoid discrimination and advance equality of opportunity. PSED should be a pro-active and forward-looking duty.

Conclusion

- Covid-19 has put further pressure on many public bodies. But these equality duties remain in place.
- In the particular context of domestic violence, Covid-19 makes it even more important that they're complied with pro-actively, carefully and thoughtfully.