

**The public law lawyer's anti-discrimination toolkit:
the statutes, conventions and cases you should always have to hand**

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1. The Equality Act 2010

- History
 - Weak, then stronger, statutory protection against discrimination on race and gender grounds, then promotion of equal pay between men and women.
 - Establishment of statutory enforcement bodies.
 - Extended protection e.g. disability, sexual orientation.
 - [Lawrence](#), leading to a meaningful public sector equality duty, monitoring obligations and prohibition of discrimination in public functions.
- Scope
 - Prohibits discrimination in private law contexts such as premises, employment, partnerships, association and provision of goods and services.
 - Plus, critically, social housing, education and, by s29(6), *“(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation”* and (7) *“[a] duty to make reasonable adjustments applies to... (a) a service-provider ... (b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.”*
 - Note sched 22 allows some differential treatment which would otherwise be unlawful where that is *“required by law”*. A direct attack on legislation may need to be mounted under the Human Rights Act 1998.
- Protected characteristics
 - Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (including *“(a) colour, (b) nationality, (c) ethnic or national origins”*, see s9(1)), religion or belief, sex and sexual orientation.
 - Note, there are variations in degree of protection afforded, e.g. direct the PSED does not cover all forms of age-related discrimination in respect of children

- Direct discrimination

- S13(1) “[a] person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”
- Direct discrimination on most grounds cannot be justified under the 2010 Act (the position is different under e.g. the Human Rights Act 1998). Direct age discrimination is lawful if it is “a proportionate means of achieving a legitimate aim”. Most positive discrimination in favour of disabled people is lawful. Direct discrimination on grounds of marriage and civil partnership in employment protects only those in one of those forms of relationship.

E.g. the Jewish school admission case, [R \(E\) v Governing Body of JFS \[2009\] UKSC 15](#).

- Indirect discrimination

- S19 provides:

“(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.

(2) For the purposes of subsection (1), 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.”

- “[P]rovision, criterion or practice” is to be broadly construed: [Secretary of State for Trade and Industry v Rutherford \(No.2\) \[2006\] UKHL 19](#) per Lord Walker at §§46–47. It may include a forward-looking decision to implement a new policy.
- “[D]isadvantage” is to be broadly construed too. It includes denial of an opportunity or choice, deterrence, rejection or exclusion. The disadvantaged person does not have to experience actual loss, economic or otherwise. It is enough that they could reasonably say that they would have preferred to be treated differently. See [R v Birmingham City Council, ex parte EOC \[1989\] AC 1155](#), at 1193–4. The Court is entitled to take a broad approach, and find that indirect discrimination is liable to affect a significant number of BME individuals without statistical proof being available. It is sufficient that the provision in question is by its nature liable to be discriminatory:

[Secretary of State for Work and Pensions v Bobezes \[2005\] EWCA Civ 111](#). Statistics can, however, be helpful.

- Justification for indirect discrimination
 - Where a PCP has been shown to put persons with a protected characteristic at a particular disadvantage, it will be unlawful unless the defendant is able to show that its application is a proportionate means of meeting a legitimate aim.
 - A strict proportionality test applies where a defendant seeks to justify indirect race discrimination, see [R \(Elias\) v Secretary of State for Defence \[2006\] EWCA Civ 1293, \[2006\] 1 WLR 3213](#), where Mummery LJ (for the Court of Appeal) expressed the test in the following terms at §165: “A three-stage test is applicable to determine whether the birth link criteria are proportionate to the aim to be achieved... First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?” In [Huang v Secretary of State for the Home Department \[2007\] UKHL 11, \[2007\] 2 AC 167](#), Lord Bingham (for the Appellate Committee) noted at §19 that the proportionality analysis also requires the court to balance the interests of society with those of individuals and groups, which is “an aspect which should never be overlooked or discounted... The severity and consequences of the interference will call for careful assessment at this stage”.
 - The saving or avoidance of costs cannot, without more, amount to the achieving of a legitimate aim, see [Ministry of Justice v O’Brien \[2013\] UKSC 6, \[2013\] 1 WLR 522](#) at §44 and §69.
 - Nor can an aim to discriminate be legitimate.

E.g. the internment camp survivors’ case, [Elias](#), and the faith school transport case [R \(Diocese of Menevia and others\) v City and County of Swansea Council \[2015\] EWHC 1436 \(Admin\)](#).

- Adjustments
 - S20 “[t]he duty comprises the following three requirements”:
 - “(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
 - (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
 - (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation

to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.”

- A failure to comply with any one of the reasonable adjustment requirements amounts to discrimination against a disabled person to whom the duty is owed. See e.g. [MM v Secretary of State for Work and Pensions \[2013\] EWCA Civ 1565](#) at §§50-58, holding the process for assessing entitlement to employment and support allowance caused substantial disadvantage to claimants with mental health problems.
- The general public sector equality duty
 - Public authorities are required to have due regard to the mandatory equality considerations listed in s149 when exercising their functions. Whenever there is an issue which needs at least to be addressed under that section, s149(1) demands:

“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 [in particular in particular, to the need to (a) tackle prejudice, and (b) promote understanding]”*
 - By s149(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).”*
 - It 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...”* see [R \(Baker & Others\) v SCLG \[2008\] EWCA Civ 141](#).
 - Nevertheless, s149 is a duty which imposes *“a heavy burden on public authorities ... in ensuring that there is evidence available, if necessary, to demonstrate that discharge”*: see [R \(Bracking\) v Secretary of State for Work and Pensions \[2013\] EWCA Civ 1345](#) at §60.
 - As [R \(Lunt\) v Liverpool City Council \[2009\] EWHC 2356 \(Admin\)](#) explained at §44, the first and most fundamental step in having due regard is to properly understand *“...the problem, its degree and extent. The margin of discretion as to fact and policy that the common law affords to decision-makers under the test in the Wednesbury Corporation case only applies to decision-makers who have acted fairly and directed themselves accurately on the relevant considerations to be weighed in making a matter of judgment or exercise of discretion.”*

- There is no statutorily prescribed way of discharging the duty, but many public authorities do so by means of an impact assessment or another similar tool (as the EHRC recommends). Where impact assessments are used, they must show how due regard has been had to material *“with the specific statutory considerations in mind”*: see [R \(Harris\) v Haringey LB \[2010\] EWCA Civ 703](#) at §40 and *“must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact”*: see [JM & NT v Isle of Wight Council \[2011\] EWHC 2911 \(Admin\)](#) at §122.
- For helpful ‘checklists’ see [Brown v Secretary of State for Work and Pensions \[2008\] EWHC 3158 \(Admin\)](#) §89-96 and [R \(D\) v Worcestershire County Council \[2013\] EWHC 2490](#) at §93.

E.g. the wheelchair accessible taxis case, [Lunt](#), and the deportees case, [R \(Medical Justice\) v SSHD \[2011\] EWCA Civ 1710](#).

- Statutory codes and guidance
 - By section 5(4)(b) of the 2010 Act, a Court is required to take the Code of Practice into account where it appears to be relevant.
 - Rational reasons must be given for departing from guidance, whether the EHRC’s or a public authority’s own guidance to itself (see [R \(Kaur and Shah\) v London Borough of Ealing \[2008\] EWHC 2062 \(Admin\)](#) at §27).

2. The specific public sector equality duties in Wales

- Part 2 of schd 19 of the 2010 Act (supplemented and amended by the [Equality Act 2010 \(Specification of Relevant Welsh Authorities\) Order 2011](#))
 - Identifies particular public authorities in Wales for the purpose of imposing additional planning, monitoring and reporting duties.
 - Listed bodies include local authorities, education bodies (including schools), health bodies and the Welsh Government.
- The [Equality Act 2010 \(Statutory Duties\) \(Wales\) Regulations 2011](#) impose special duties on the listed bodies, intended to supplement the general public sector equality duty. E.g.:
 - Regulation 3 requires each authority to publish *“equality objectives”* designed so as to enable them to better perform their general public sector equality duty. If an authority does not publish an equality objective in respect of one or more of the protected characteristics it must publish its reasons for not doing so.
 - Regulation 4 requires an authority to comply with the *“engagement”* provisions in Regulation 5 and have due regard to *“relevant information”* that relates to compliance (or otherwise) with the general duty when considering and designing its equality objectives. Engagement means the authority must involve those persons

that the authority considers represent the interests of persons who share one or more of the protected characteristics and who have an interest in the way the authority carries out its functions.

- Regulation 6 requires the taking of all reasonable steps to ensure that any documents or information that the authority is required to publish under the Regulations, are accessible by persons who share one or more protected characteristics.
 - Regulation 7 imposes duties on authorities in relation to relevant information. An authority must put appropriate arrangements in place to ensure that it identifies the relevant information that it holds and identifies and collects relevant information that it does not hold.
 - Regulation 8 requires an authority to make arrangements in order to assess the likely impact of proposed policies and practices on its ability to comply with the general duty, as well as the impact of any policy or practice that an authority has decided to review or any proposed revision to a policy or practice.
 - Regulation 12 requires an authority to publish an action plan which sets out any policy it has relating to the need to address the causes of any gender pay difference and any gender pay equality objective published by the authority.
 - Regulation 18 makes provision about public procurement in instances where an authority is a contracting authority. Such authorities should have regard to whether award criteria should include considerations relevant to performance of the general duty.
- Special guidance ECHR has been prepared on these duties (see below).
 - To my knowledge, these specific duties have yet to be litigated.

3. [The European Convention on Human Rights \(ECHR\)](#)

- Article 14
 - To be 'read with' other ECHR rights:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
 - The concept of “status” is therefore much broader than “protected characteristic” under the 2010 Act.
 - If a State, as a matter of its discretion and political judgment, makes arrangements to help ensure respect for particular rights (e.g. the right of parents to choose a certain form of education for their children), those arrangements must not unjustifiably

discriminate on the basis of statuses including race, language and religion, or be such as to have an unjustified adverse impact on particular racial or faith groups. See, e.g. [Belgian Linguistic \(No. 2\) \(1968\) 1 EHRR 252](#) and [DH v Czech Republic \(2008\) 47 EHRR 3](#).

- Rights may not be compromised on a discriminatory basis either, unless this is justified: see [A and others v Secretary of State for the Home Department \[2004\] UKHL 56](#) in which the House of Lords held that the indefinite detention of foreign prisoners (but not those with UK nationality) in Belmarsh without trial was incompatible with Article 14 read with Article 5.
 - However, discrimination may be justified, and so will be lawful, if it is a proportionate mean of meeting a legitimate aim.
 - The degree of justification the law demands depends on whether the discrimination is on a suspect ground (e.g. race or gender, as opposed to country of residence, see [R \(Carson\) v SSWP \[2006\] 1 AC 173](#)) and context. A “wide margin” is usually allowed to the State under the ECHR in respect of general measures of economic or social strategy, see [James v United Kingdom \(1986\) 8 EHRR 123](#) leading to the development of the [Stec v UK \(2006\) 43 EHRR 47](#) test of “manifestly without reasonable foundation” in some benefits cases. This is not absolute, however. E.g. in [R \(Tigere\) v Secretary of State for Business, Innovation and Skills \[2015\] 1 WLR 3820](#) Baroness Hale considered that it did not apply to discrimination in the context of the right to education under Article 2 of Protocol 1.
- Discrimination or harassment may, in some circumstances reach the threshold of inhuman and degrading treatment which Article 3 prohibits absolutely. The violation may be by the state directly or because of others’ conduct it fails to prevent. E.g.:
 - [East African Asians v. United Kingdom 3 E.H.R.R. 76](#) restrictions were imposed on admission to the United Kingdom for persons of Asian origin resident in former British dependencies. The Commission held that no further action was called for, since the applicants had subsequently been admitted, but as regards to their complaint under Article 3 (prohibition of inhuman or degrading treatment) that they had been treated as “second-class citizens”, the Commission observed that discrimination based on race could in certain circumstances amount to degrading treatment. See also [Cyprus v. Turkey \(2001\) No. 25781/94](#).
 - In [Đorđević v. Croatia No. 41526/10, 24 July 2012](#), a mentally and physically disabled man complained that the authorities had failed to protect them from harassment and violence perpetrated by children living in their neighbourhood. The ECtHR held the authorities were obliged to take reasonable measures to prevent further abuse. Isolated reactions to specific incidents (like the prompt arrival of police officers, interviews with the children and police reports) were not sufficient in a situation where incidents of harassment and violence had persisted over a long period of time. The ECtHR concluded that there had been a violation of Article 3 in respect of the

disabled man. See also [Identoba and Others v. Georgia No. 73235/12, 12 May 2015](#), concerning a homophobic attack against the participants of a peaceful assembly of LGBT associations.

- [Protocol 12](#)
 - This prohibits discrimination in relation to the 'enjoyment of any right set forth by law', 'by any public authority' so broader than Article 14.
 - However, it has not been signed or ratified by the UK, nor likely to be.
- Articles 14 and 3 made enforceable in the UK through the [Human Rights Act 1998](#)
 - S3 interpretive obligation.
 - S6 duty to act to avoid breach of scheduled ECHR rights, save where legislation makes doing so impossible.
 - Declarations.

4. The common law

- The common law does not permit secondary legislation which is unjustifiable because it is "partial and unequal": see [Kruse v Johnson \[1898\] 2 QB 91](#) and [R v Immigration Appeal Tribunal, ex p Manshoora Begum \[1986\] Imm AR 385](#)
- The principle of legality may demand the clearest justification for denial of fundamental rights e.g. access to justice on an unequal basis: see [R \(Public Law Project\) v Secretary of State for Justice \[2014\] EWHC 2365 \(Admin\)](#) (overturned by the Court of Appeal, whose decision was [overturned by the Supreme Court](#) on other grounds).
- Discrimination between similarly placed persons and other forms of inconsistent treatment of like cases may be a form of irrationality: see [Gurung, Pun and Thapa v Ministry of Defence \[2002\] EWHC Admin 2463](#), a successful judicial review of a decision to exclude Gurkhas from the scheme of ex gratia payments of compensation to former P.O.Ws of the Japanese based on a 1950s distinction that was racially discriminatory. The Court held "[t]he adherence to the same distinction in 2000, particularly if the racial nature of the disciplinary distinction originally made in the 19th century was not appreciated (as seems clear it was not), appears to me (with genuine respect for the aims of the scheme) to be irrational and inconsistent with the principle of equality that is the cornerstone of our law."

5. **EU law - free-standing, prohibition on discrimination, but limited to specific areas made enforceable (for now) by the European Communities Act 1972**
 - E.g. EU Treaties, Charter of Fundamental Rights, Regulations and Directives.
 - E.g. in [Patmalniece v SSWP \[2011\] UKSC 11](#), the Supreme Court examined what constituted direct discrimination on nationality grounds under EU law in the context of access to benefits and, in cases of indirect discrimination, whether a concern to prevent “social tourism” was a justification which is independent of nationality. By a majority they rejected a challenge to the regulations.

6. **Unincorporated equality-promoting treaties made relevant (sometimes) by the common law**
 - E.g. [CERD](#), [CEDAW](#), [CRPD](#) and [UNCRC](#) (to which Welsh public authorities must have due regard under the [Rights of Children and Young Persons \(Wales\) Measure 2011](#)).
 - May e.g. help with interpreting statutory provisions e.g. [Burnip and others v Secretary of State for Work & Pensions \[2012\] EWCA Civ 629](#), “that the UN Convention on the Rights of Disabled Persons 2006 ... is relevant in illuminating what was meant by disability discrimination and justification for it”. See also [Elias, JFS](#) (both above) and [R \(South West Care Homes Ltd and others\) v Devon CC \[2012\] EWHC 2967 \(Admin\)](#).

7. **Case-specific resources**
 - The critical importance of the [pre action protocol](#) letter.
 - The Defendant’s decision making material and justification.
 - Statistical evidence.
 - Impact evidence.

8. **Courts**
 - [The Administrative Court](#)
 - [The County Court](#) (exclusive jurisdiction on damages claims, so parallel claims may be needed when a claim is issues in the Administrative Court).
 - [The Technology and Construction Court](#) (some procurement disputes)

9. **Litigation remedies**
 - Quashing Orders
 - Declarations

- Damages

10. EHRC action

- Formal investigations
- Enforcement action on the County Court
- Legal action in its own name in the Administrative Court
- Funding power in discrimination cases (or mixed discrimination and Human Rights Act 1998 cases).

11. Ombudsmen investigations into maladministration (and, in the health context, service failure)

- No power to investigate illegality as such and no jurisdiction to determine whether torts have been committed.
- In practice, the ombudsmen seem to take a reviewing role when discrimination is alleged and check whether authorities have been proactive in minimising the risk that it might occur and responding to concerns in line with their own procedures. They can be interventionist and recommend significant remedies.

12. The future?

- Public sector duties regarding socio-economic inequalities
 - S1(1) Equality Act 2010 (thus far not brought into force): *"[a]n 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."*
 - Unique duties under the [Well-being of Future Generations \(Wales\) Act 2015](#).
- Transparency litigation, perhaps in Wales.
- Equality under the [EU/UK Withdrawal Agreement](#) and Treaty.
- Action on failure to prevent hate speech.
- Development of common law equality and dignity principles.

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Appendix: some further recommended resources

- 'Equality, the neglected virtue', Rabinder Singh QC (2003):
<http://www.lse.ac.uk/website-archive/publicEvents/pdf/20031126Singh.pdf>
- [Rule of Law, Tom Bingham \(2010\)](#), Chapter 4
- Equality Act 2010 Statutory Code of Practice, Services, public functions and associations (2011):
https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf
- [Monaghan on Equality Law, Karon Monaghan \(2013\)](#).
- The Essential Guide to the Public Sector Equality Duty - An overview for listed public authorities in Wales, EHRC (2014):
https://www.equalityhumanrights.com/sites/default/files/essential_guide_to_the_public_sector_equality_duty_wales.doc
- The Public Sector Equality Duties and financial decisions: an advice note for public authorities, Wales, EHRC (2014):
<https://www.equalityhumanrights.com/en/file/15091/download?token=Q2spEb4>
- Equality Objectives and Strategic Equality Plans, A Guide for Listed Public Authorities in Wales, EHRC (2014)
https://www.equalityhumanrights.com/sites/default/files/equality_objectives_and_strategic_equality_plans_wales.doc
- Assessing Impact and the Equality Duty - A Guide for Listed Public Authorities in Wales, EHRC (2014):
https://www.equalityhumanrights.com/sites/default/files/assessing_impact_and_the_equality_duty_wales.doc#_Toc400977656
- Engagement and the Equality Duty - A Guide for Listed Public Authorities in Wales, EHRC (2010):
https://www.equalityhumanrights.com/sites/default/files/engagement_and_the_equality_duty_wales_2.doc
- Meeting the Equality Duty in Policy and Decision-Making England (and non-devolved public authorities in Scotland and Wales), EHRC (2014):
https://www.equalityhumanrights.com/sites/default/files/meeting_the_duty_in_policy_and_decision-making.docx
- ['Litigating the Public Sector Equality Duty: The Story So Far'](#), Aileen McColgan, *Oxford Journal of Legal Studies*, Volume 35, Issue 3, 1 September 2015, Pages 453–485

- Handbook on European non-discrimination law, EFRA (2018):
<http://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination>