

## Section 75, Northern Ireland Act 1998 and Section 49A, Disability Discrimination Act 1995

**T**he aim of this guidance note is to provide an overview of some key aspects of the public sector equality and disability duties. In particular the guidance focuses on the concepts of 'due regard' and 'regard' and their implementation within the context of a public authority equality scheme and disability action plan. This guidance is informed by the Equality Commission's existing guidance<sup>1</sup> and our understanding of relevant case law.

The Section 75 statutory duties require designated public authorities to have **due regard to the need** to promote equality of opportunity in relation to the nine equality categories<sup>2</sup> and to have **regard to the desirability** of promoting good relations between persons of different religious belief; political opinion; and racial group. A public authority's equality scheme sets out how it will comply with both duties.

The Disability Discrimination Act 1995 ("DDA") Section 49A requires designated public authorities to have due regard to the need to promote positive attitudes towards disabled persons, and to the need to encourage participation by disabled persons in public life. This duty is supported by an obligation to have a disability action plan<sup>3</sup>.

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1 Section 75 of the Northern Ireland Act 1998, A Guide for Public Authorities, April 2010, Chapter 5 – Scope of the legislation.

2 Between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.

3 Section 49A and Section 49B of the Disability Discrimination Act 1995 (the 'DDA 1995'), (as amended by Article 5 of the Disability Discrimination (Northern Ireland) Order 2006).

## 'Due Regard' and 'Regard'

These public sector duties share a common obligation in which public authority decision-makers are obliged to have due regard, or regard, to each of the specific factors: meaning that they must take them into account when carrying out their functions. The matters of 'due regard' and 'regard' have been considered by the courts and have benefitted from judicial dicta.

In terms of 'due regard', it is established that the consideration must be given in advance of a final decision being made, not afterwards, and it must be done with an open-mind to achieve the goals set out in statute. Hence due regard and regard are not determinants of final policy outcomes but are the processes of providing the appropriate levels of consideration.

*"The equality of opportunity goal enshrined in section 75(1) must be duly taken into account but the section does not mean that the policy adopted must achieve a particular goal... If there were evidence that the Department had simply failed to have a due regard to the need to promote equality of opportunity or had failed to have due regard to its own equality scheme then it would have failed to have taken into account relevant considerations. Here, the evidence indicates that the considerations were taken into account. The question of weight to be attached to the consideration was for the Department."*

[Mr. Justice Girvan, as he then was, in R \(E on behalf of S \(a minor\)\) -v- North Eastern Education & Library Board \[2004\], at paragraph 22.](#)

*"Proper compliance with [the duties] requires that appropriate consideration has been given to the need to achieve statutory goals whose achievement will almost inevitably, given the use of the word "promote", involve the taking of active steps."*

[Mr. Justice Munby in R \(E\) -v- Governing Body of the JFS \[2008\]](#)

The word "regard" is also a common feature of many statutory duties on public authorities, including the Section 75(2) duty, and is often referred to in case law. For example, when performing their functions in relation to children with special educational needs, the Education and Library Boards are obliged "to have regard to the provisions" of the Department of Education's Code of Practice on the Identification and Assessment of Special Educational Needs. This was dealt with in a 2013 Judicial Review, as follows:

*"Such a duty is not absolute nor does it compel exact compliance with the provisions of the Code but simply requires that they should be properly and reasonably taken into account by the decision-maker"*

[Lord Justice Coghlin in JR62's Application \[2013\] NICA 51, at para 28\(iv\).](#)

Article 67, Race Relations (Northern Ireland) Order 1997 also places a duty on District Councils “to make appropriate arrangements with a view to securing that its various functions are carried out with **due regard to the need to eliminate racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups**”

### Complying with the Public Sector Duties

Case law has determined some principles, commonly known as the Brown principles, from a case of that name<sup>4</sup> in Great Britain. These are principles that the courts in Great Britain take account of when assessing compliance with the public sector duties. In Northern Ireland public authorities, in planning for compliance with their duties, may find these helpful:

1. a decision-maker must be aware that he/she is obliged to comply with the public sector duties;
2. the duties must be fulfilled before and at the time that a particular decision is being considered, and not afterwards;
3. the duties must be exercised in substance, with rigour and an open mind; and not as a “tick boxing” exercise;
4. the duties are non-delegable; meaning that it is the actual decision-maker who must comply with the duties, and not some other person;
5. the duties are continuing ones;
6. it is good practice to keep adequate records that will show that the statutory goals have actually been considered and pondered and to promote transparency and discipline in the decision-making process.

### Relevance and proportionality

Commission guidance appreciates that certain functions may be more relevant than others to the Section 75 statutory duties<sup>5</sup>. Case law has also determined that a duty to give “due regard” to certain statutory goals means giving appropriate consideration to them i.e. the degree of consideration that is appropriate in the specific circumstances of the decision or policy being made. What is appropriate is likely to vary from case-to-case, and from one public authority to another.

As a general rule-of-thumb, where the level of relevancy is high, then a proportionately high level of consideration is required; and vice versa.

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4 R (Brown) –v- Secretary of State for Work & Pensions & others [2008] EWHC 3158 (Admin).

5 Section 75 of the Northern Ireland Act 1998, A Guide for Public Authorities, April 2010, Chapter 5.

***“In a case where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high.”***

***As noted by Mr. Justice Calvert Smith in R (Hajrula and Hamza) –v- London Councils [2011]***

### **Relationship between the Section 75 (1) & (2) duties**

The Equality Commission’s guidance<sup>6</sup> provides information on the inter relationship between the two duties, noting that the duty to have due regard to the need to promote equality of opportunity was intended to be, and is, stronger than the duty to have regard to the desirability of promoting good relations. In either case an authority is required to take the specified matters into account and give them the required weight when carrying out its functions.

From the outset, the relationship between the equality of opportunity and good relations duties was noted. The then Secretary of State said: *“[W]e regard equality of opportunity and good relations as complementary. There should be no conflict between the two objectives. Good relations cannot be based on inequality between different religions or ethnic groups. Social cohesion requires equality to be reinforced by good community relations. ... I repeat that we see no conflict between these two objectives”*<sup>7</sup>

Both duties have to be discharged in all circumstances with the discharge of the good relations duty not being an alternative to or setting aside the equality of opportunity duty. Public authorities must take both factors properly into account in the way they carry out their functions, giving the appropriate consideration (based on relevance and proportionality) to meet both the due regard and regard duties.

### **The Section 75 Duties and Promoting Equality of Opportunity**

The equality of opportunity and good relations duties under Section 75 should be core business priorities, and not seen as a parallel process.

The promotion of equality of opportunity entails the positive promotion of equality as well as the elimination of discrimination and is covered by anti-discrimination legislation. The Section 75 (1) duty requires public authorities to have due regard to the need to promote equality of opportunity in relation to the identified equality categories and should not deter a public authority from taking action to address

<sup>6</sup> Section 75 of the Northern Ireland Act 1998, A Guide for Public Authorities, April 2010, Chapter 5.  
<sup>7</sup> Dr Marjorie Mowlam (27 July 1998). House of Commons, Official Report col.109

disadvantage among particular sections of society and such action may be an appropriate response to addressing inequalities. There is no conflict between the Section 75 statutory duties and other affirmative or positive action measures which a public authority may undertake under anti-discrimination laws<sup>8</sup>.

### The Section 75 Duties and Promoting Good Relations

The Commission's guidance<sup>9</sup> on promoting good relations notes that the purpose of the good relations duty, like the equality of opportunity duty, is to mainstream good relations by placing it at the heart of public policy ensuring decision-makings have **regard to the desirability of promoting good relations** in the decision making process.

Promoting good relations should be an integral part of policy development and service delivery in an organisational wide approach, which includes incorporating specific objectives, targets and performance measures into corporate and business plans.

In terms of defining good relations, the Commission notes that there are a number of definitions in use and a range of these definitions are outlined in its 2007 Guide<sup>10 11</sup>.

### Equality Schemes and Disability Action Plans

Under Schedule 9 of the Northern Ireland Act 1998, public authorities designated for the purposes of Section 75 are required to submit an equality scheme to the Commission. Schedule 9 of the Act specifies requirements in relation to the content of an equality scheme. The Schedule, without being exhaustive, specifies particular elements that a scheme must contain. An equality scheme must show how the public authority proposes to fulfil the Section 75 statutory duties in relation to their relevant functions and must also state the authority's arrangements for the discharge of the Section 75 statutory duties.

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8 [Section 75 of the Northern Ireland Act 1998, A Guide for Public Authorities, April 2010, Pages 8-9, 24-25 and Page 87.](#)

9 [Section 75 of the Northern Ireland Act 1998, Promoting Good Relations: A Guide for Public Authorities October 2007, Pages 21-22.](#)

10 [Section 75 of the Northern Ireland Act 1998, Promoting Good Relations: A Guide for Public Authorities October 2007, Chapter 2, Paragraph 2.1, Page 13.](#)

11 [The Equality Act 2010 provides a definition of good relations in respect of public authorities duties in Great Britain, "good relations means, in particular, having regard to the desirability of a\) tackling prejudice and b\) promoting understanding."](#)

A public authority's equality scheme therefore outlines the procedural arrangements that the authority proposes to follow to fulfil the Section 75 statutory duties.

Complying with the arrangements outlined in its equality scheme will considerably help a public authority to comply with, and to demonstrate that it has complied with, the "due regard" duty of Section 75(1), and indeed with the Brown principles. Issues of relevancy and proportionality come into this too, which is why, for example, the Commission's advice on methodology makes provision for two levels of review, which are known as "screening" and "Equality Impact Assessment", in determining whether a policy is relevant to one or both duties and then enabling an appropriate assessment to inform final policy options and decisions.

Public authorities may develop alternative methodologies to enable them to ensure that due regard and/or regard is taken account of in the decision making process. In developing alternative methodologies the public authority must be cognisant of legislative requirements of the two duties.

The Commission's advice is that the same assessment process for both duties is likely to be most helpful. If a public authority develops its own methodology for fulfilling its Section 75 duties and presents these in the Equality Scheme it submits for approval, the Commission will, as it is required to do so, make a determination as to whether these arrangements meet the legislative requirement.

A public authority may include additional matters in its equality scheme, for example specific definitions within its equality scheme rather than in the glossary, reference to the due regard duty placed on District Councils to promote equality of opportunity and good relations between persons of different racial groups<sup>12</sup>; the public authority due regard duty to promote positive attitudes to persons with a disability and participation in public life; or commitments to address other issues, for example tackling homophobia. As such additions are not required by statute it would be for the public authority, in the first instance, to determine how it would deal with any complaints on these issues.

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<sup>12</sup> Article 67, Race Relations (Northern Ireland) Order 1997

A Disability Action Plan is a document that outlines the procedural arrangements that a public authority proposes to follow to fulfil the Section 49A duties and, thus, a plan is intended to serve a function in relation to those duties similar to that which equality schemes serve in relation to the Section 75 duty. Thus, these plans include similar procedural arrangements to those that are found in equality schemes, as well as action measures.

### Further information and advice

For further information and advice on the public sector equality and disability duties please contact us at:

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