



Public Sector Equality Duty

Scope and interaction with free speech requirements

IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. IT MAY BE OUT OF DATE: see its publication date and also the important notice at page 7.

Summary of key points

Section 149 of the Equality Act 2010 (the “Equality Act”) creates the Public Sector Equality Duty (the “PSED”). The following important points are discussed further below:

- The PSED applies in respect of the range of beliefs which are protected under the Equality Act (“**protected beliefs**”). It therefore operates in respect of the creation of policies and programmes which affect the free speech of people who hold such protected beliefs.
- The PSED is a duty to give “*due regard to*” (i.e. to consider or take account of) the need to achieve certain aims, and give those aims appropriate weight in context. It is not, however, a duty to take any particular actions to achieve those aims and is not in itself a mandate to override other considerations. It has been described as a “*process duty not an outcome duty*”.
- As the Equality and Human Rights Commission (“EHRC”) and case law have stressed, the duty falls on decision makers and concerns the manner in which they make decisions.¹ It is not a duty for an institution to have a particular programme or agenda.
- Positive duties to take action will therefore override the PSED in cases where (and to the extent that) the duties conflict. Such duties include those imposed under the Higher Education and Research Act 2017 (“HERA”) (in particular the Secure Duty as defined below) and the legal obligation under the Equality Act itself to avoid discriminating

¹ Paragraph 2.45 of the EHRC’s *Technical Guidance on the Public Sector Equality Duty: England*, and *R (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.

against or harassing people with protected beliefs. The PSED cannot, therefore, be relied upon to justify non-compliance with either a positive duty to reach a particular outcome (such as the Secure Duty) or a negative duty to avoid certain action (e.g. discriminating against protected beliefs).

- Decisions will need to be made in the context of all relevant factors, of which the PSED will be only one, and a relatively weak one at that once its interaction with the Secure Duty is properly considered. Another such factor will be contrary legal obligations to act, including those to protect free speech as discussed below.
- HERA imposes a duty on Higher Education Providers (“HEPs”) in England to take all reasonably practicable steps to secure freedom of speech, having “*particular regard*” to the importance of freedom of speech (the “**Secure Duty**”). “*Particular regard*” is a requirement for a higher level of regard than “*due regard*” under the PSED. This ensures that, in cases where the process duty under the PSED is applicable to decisions regarding whether/what action is required under the Secure Duty, the need to have “*particular regard*” with respect to free speech will have greater importance and force. Thus, even this process aspect involved in compliance with the Secure Duty is plainly a more onerous than the process duty imposed by the “*due regard*” requirement under the PSED.
- The PSED is carefully formulated and extends to a specific and limited range of stated needs only. HEPs should not consider themselves justified in taking actions in purported compliance with the PSED, where those actions are in fact neither aimed at, nor realistically likely to contribute to, achieving the specific range of goals referred to in the PSED.

The Duty: a process duty not an outcome duty

Section 149 of the Equality Act 2010 (the “Equality Act”) creates the Public Sector Equality Duty (the “PSED”). Section 149(1) states that:

“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;²

² Sub-section 149(3)(a) states that this includes having due regard to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic.

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”³

The PSED is a duty to give “*due regard to*” (i.e. to consider or take account of) the need to achieve certain aims, and give those aims appropriate weight in context. It is not, however, a duty to take any particular actions to achieve those aims and is not in itself a mandate to override other considerations. It has been described as a “*process duty not an outcome duty*”.⁴

PSED applies in respect of protected beliefs under Equality Act

The PSED applies in respect of the range of protected beliefs under the Equality Act. It therefore operates in respect of the creation of policies and programmes which affect the free speech of people who hold such protected beliefs. In having due regard to the needs set out in Section 149(1) with respect to the particular protected characteristic of belief, decision makers may need to consider:

- avoiding adopting policies which would infringe the rights of people who hold protected beliefs;⁵ not adopting an official, institutional position on those subjects about which individuals hold protected beliefs as this can lead to liability;
- promoting tolerance and civil dialogue between those with protected beliefs, and those with contrary beliefs;
- taking steps not to rely on or reinforce stereotypes of people with protected beliefs, and of the beliefs in question; and
- ensuring that they do not otherwise encourage or exacerbate hostility towards and persecution of individuals with protected beliefs.

Beliefs which have to date found to be protected under the Equality Act include gender-critical beliefs, anti-Zionism, and opposition to aspects of critical race theory. More beliefs will be confirmed as protected in time. See in this regard BFSP’s detailed statement [*Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others*](#).

There can be conflicts (perceived or actual) between protected beliefs and other characteristics. Institutions should be mindful in such circumstances that the PSED requires them to consider both sets of characteristics and to foster good relations (encouraging an atmosphere of tolerant

³ Sub-sections 149(5)(a) states that this includes having due regard to the need to tackle prejudice, and promote understanding.

⁴ *R (Bridges) v Chief Constable of South Wales Police* 2020 EWCA Civ 1058: “We accept (as is common ground) that the PSED is a duty of process and not outcome.”

⁵ Again, the case of the University of Sussex is instructive of the dangers of adopting policies which restrict lawful free speech.

debate would be a way of complying with the free speech duties in HERA as well as the PSED).

PSED's scope does not extend to everything seen in HEPs' EDI policies and programmes

The PSED is carefully formulated and extends to a specific and limited range of stated needs only. HEPs should not consider themselves justified in taking actions such as instituting specific programmes or enacting specific policies, in purported compliance with the PSED, where those actions are in fact neither aimed at, nor realistically likely to contribute to, achieving the specific range of goals referred to in the PSED. This has general relevance beyond interactions between the PSED and the Secure Duty.

HEPs need to be clear about what actions and policies are not justifiable by reference to the PSED, as it will not be possible for them to defend those actions and policies by invoking the PSED in any circumstances, let alone where there is a breach, for example, of the more powerful Secure Duty. It is highly likely that programmes and policies promoting or embedding a number of contested concepts such as "*social justice*", "*antiracism*" and other ideas reflecting the extremer ends of critical theory, and the view that questioning aspects of Trans ideology is "*transphobic*", are beyond what is contemplated by the PSED and are in any event liable to create a chilling effect or otherwise lead to free speech compliance failures. In other words, the PSED, in interactions with the Secure Duty and more generally, provides no defence for EDI initiatives to promote and/or entrench highly contested political ideologies and academic theories. Some at least of these programmes and policies have already led to liability under the Equality Act for discrimination against or harassment of people who hold dissenting views and, indeed, to the fine issued in 2025 by the Office for Students on Sussex University for having a policy (derived from a template provided by a predecessor organisation of Advance HE) which contravened its conditions of registration regarding free speech.

Meaning of "due regard"

For these purposes, to have "due regard" means to consciously consider, when making decisions and in day-to-day activities, the need to do the things set out in the PSED: eliminate discrimination, advance equality of opportunity and foster good relations.⁶ The EHRC has stated that the duty must be exercised "in substance, with rigour and with an open mind" and "in such a way that it influences the final decision". Further, it has stated that it is good practice for bodies subject to the duty "to keep an accurate record showing that they had actually considered [the PSED] and pondered relevant questions... If records are not kept, it may make

⁶ Paragraph 2.39 of the EHRC's *Technical Guidance on the Public Sector Equality Duty: England* [updated in 2023].

it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty.”⁷

PSED only one requirement relevant to any decision: overridden by other duties to take action

The PSED will be just one factor which will be relevant to any particular decision. Other relevant factors will include the relevant circumstances and the relevance of the aims in the PSED to the decision or function in question.⁸ Another relevant factor will be whether there is any contrary positive obligation to act, as well as any higher duty of regard, such as under the Secure Duty and pursuant to the Equality Act, in respect of the relevant matter, as discussed below.

The PSED is a meaningful and substantive process duty of consideration, but it does not mandate an outcome, or indeed any action at all except ensuring its processes are compliant, and compliantly undergone in the specific case. .

Institutions need to appreciate the following important factors.

- As the PSED is a duty only to give consideration, not a duty to reach any particular outcome, positive duties to take action, where these conflict with the PSED, are, therefore, likely to override it. Such contrary duties include the duty under the Equality Act not to discriminate or harass, and the effective duty to take all reasonable steps to prevent their employees from discriminating or harassing individuals with protected characteristics (including through holding various protected beliefs). They also include the Secure Duty to take all reasonably practicable steps to secure freedom of speech, having “particular regard” to the importance of freedom of speech (Welsh and Scottish universities are subject to different but parallel requirements).
- Decision-makers need to give consideration under the PSED in the context of all applicable circumstances, including requirements which may be inconsistent with particular steps which might be taken to achieve the aims in the PSED. Other factors, including other legal and regulatory requirements, may ensure that, overall, decision makers are not required, or are required not, to act in a particular way.
- The aims in Section 149(1), while very specifically worded, are broad. In any case where a possible action which would contribute to those aims restricts freedom of speech, there will almost certainly be an alternative action which similarly contributes, but which does

⁷ Ibid, paragraph 2.44. These requirements, part of the “Brown principles”, were put forward and confirmed by the Courts in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), later confirmed in *R (Domb and others) v London Borough of Hammersmith and Fulham* [2009] EWCA Civ 941.

⁸ Paragraph 2.40

not restrict speech, or restricts it to a lesser degree, and which would be more practicable in the light of other applicable factors.

PSED and free speech at HEPs

Most, if not all, HEPs are public authorities for the purposes of Section 149, and therefore subject to the PSED. English and Welsh HEPs (at least) are, as discussed above, also subject to positive duties *to take action* to protect free speech, *rather than merely to have due regard* under the PSED.

The discussion above has the following consequences for such HEPs.

- The PSED does not require or justify consideration of factors wider than the specific needs stated in the PSED when HEPs devise their EDI related programmes and agendas.
- If a positive duty prohibits a course of action which a decision maker would otherwise have taken in furtherance of the PSED absent such positive duty, then the decision maker cannot take that action in reliance on the PSED. When determining what the Secure Duty requires, the PSED will be a relevant factor to consider but is weaker than the “*particular regard*” element of the Secure Duty and ultimately must give way to both that and the positive outcome nature of the Secure Duty. This includes actions considered in the course of complying with the PSED which engage the Secure Duty via creating a chilling effect for freedom of speech.
- The PSED will be just one factor which will be relevant to any particular decision. Another relevant factor will be whether there is any contrary positive obligation to act (under the Equality Act or the Secure Duty), as well as any higher duty of regard, such as under the Secure Duty, in respect of the relevant matter. It is therefore extremely unlikely that the PSED will justify any particular action which restricts freedom of speech at an HEP.
- “*Particular regard*” under the Secure Duty is a requirement for a higher level of regard than “*due regard*” under the PSED. This ensures that, in cases where the process duty under the PSED is applicable to decisions regarding whether/what action is required under the Secure Duty, the need to have “*particular regard*” with respect to free speech will have greater valence. Thus, even the process aspect involved in compliance with the Secure Duty is plainly more onerous than the process duty imposed by the “*due regard*” requirement under the PSED.

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- *is a short summary of a complex area of law and its implications, and does not purport to be complete or definitive. It is not (and may not be relied on as) legal or other advice: HEPs and others should consult their legal and other advisers in respect of all matters relating to free speech in connection with their institution, including those referred to in this document;*
- *does not seek to prescribe detailed specific policies, practices and requirements for particular HEPs, will have to be developed by HEPs themselves, in the context of their own particular circumstances;*
- *will be revised from time to time as the law, guidance and knowledge develop; and*
- ***MAY BE OUT OF DATE:*** *see its publication date above.*