



Homelessness and the Equality Act 2010

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Under the Equality Act, it is unlawful for a public authority to discriminate against people, in the way that it exercises its functions. Public authorities are also subject to the “Public Sector Equality Duty” (“PSED”), in Part 11 of the Act.

Local authorities are public authorities under the legislation. They have duties in relation to housing. Two of the main duties are in relation to: 1) homelessness; and 2) the allocation of housing. This leaflet is about homelessness and the Equality Act, particularly the PSED. For the effect of equality law on allocations by local authorities and other social landlords, see the leaflet: “Housing Allocations and Equality Law Act 2010”.

Homelessness duties of local authorities

Part II of the Housing (Scotland) Act 1987 sets out the duties of local authorities to persons that are homeless, or threatened with homelessness. Those duties are triggered when a person applies to the authority for accommodation, or assistance in obtaining accommodation, and the authority has reason to believe that he may be homeless or threatened with homelessness. In that case, the authority has a duty to make inquiries into whether the person is “homeless” under section 24, and whether he is “intentionally homeless” (this is where the applicant loses settled accommodation because of his own acts or omissions). The local authority has to issue a written decision on those matters. If necessary, it also has to provide interim accommodation to the applicant, and any person that might reasonably be expected to reside with him while those inquiries are ongoing.

Depending on its decision, the authority will have further duties to the applicant. If it decides he is homeless and not intentionally homeless, it has to secure permanent accommodation for him (or arrange for another social landlord to provide it). If the authority decides that the applicant is intentionally homeless, it has an obligation to provide accommodation for him, “for such period as they consider will give him a reasonable opportunity of himself securing accommodation”. It also has an obligation to provide advice and assistance to the applicant, so that he can find his own accommodation.

There is no statutory appeal process under part II of the 1987 Act by which a claimant may challenge a decision of the local authority before a court or tribunal. The applicant can ask the authority to review its own decision. Beyond that, the only further challenge is by judicial review proceedings in the Court of Session. A possible ground for judicial review is that the authority has not complied with the Equality Act.

Unlawful discrimination

It is unlawful for the local authority to discriminate against applicants when carrying out its functions under the homelessness legislation. “Carrying out its functions” includes the decisions it makes under the 1987 Act, the advice and assistance it gives to homeless people, and the way that it secures interim and permanent accommodation.

It may also be unlawful for a local authority to discriminate against applicants when allocating and managing temporary homeless accommodation.

There are different forms of discrimination and prohibited conduct under the Equality Act 2010: Direct and Indirect discrimination; discrimination arising from someone’s disability; failure to make reasonable adjustment where there is a disability; harassment; victimisation and failure to comply with the Public Sector Equality Duty. It is important to note that indirect discrimination and discrimination arising from a disability can be justified where the discrimination is proportionate.

For example, if it could be shown that the authority was giving less advice and assistance to Muslim women, that could amount to direct discrimination under section 13 of the Equality Act. Or, if it could be shown that the authority's practices in relation to securing permanent accommodation had the effect that it was taking much longer for disabled applicants to be accommodated, that might amount to indirect discrimination under section 19, which the authority would have to justify.

The authority also has an anticipatory duty to make reasonable adjustments for disabled people, in the way that carries out its functions. This means anticipating the needs of particular groups of disabled people, like applicants with mental health problems, wheelchair users, etc.

Where the authority is managing homeless accommodation, it might also have a duty to make reasonable adjustments if requested by the applicant. That duty however does not include duty to alter or remove a physical feature. It might cover a request to allow a family member to visit as they care for the disabled person, where the accommodation rules otherwise prohibit visitors.

There is a time limit of 6 months minus a day for raising civil court action in Sheriff Court where there is a claim that there has been discrimination under the Equality Act 2010.

Public Sector Equality Duty (PSED)

Because of the PSED, a public authority must, in the exercise of its functions, have "due regard" to the need to eliminate discrimination, and any other conduct that is prohibited by the Act.

The PSED also means that the authority must have "due regard" to the need to advance equality of opportunity and good relations between people who share a relevant protected characteristic (like disability, race, sex and sexual orientation) and persons who do not share it. Advancing equality of opportunity can mean removing or minimising disadvantages suffered by people, that are connected to that characteristic. Or it could mean taking steps to meet the particular needs of persons who share a relevant protected characteristic.

Local authorities must comply with the PSED when carrying out their functions under the homelessness legislation. This is not only when they are creating or changing policies or practices in relation to their homelessness services. It also applies when they are making decisions about individual cases.

What does it mean to have "due regard" to the matters set out in the PSED?

In homelessness cases, it means that each stage of the authority's decision making must be made with the PSED well in mind, and it must be exercised in substance, with rigour, and with an open mind.

This means that the authority must focus very sharply on issues such as whether the applicant has a disability, and the nature of the disadvantages she suffers as a consequence of that disability. Or, it must focus very sharply on issues such as racial harassment, in deciding whether it is reasonable (or was reasonable) for an applicant to remain in accommodation.

However, it is for the local authority to decide how important these matters are, in relation to its judgment. That will depend on the particular circumstances of each application. In one case, the authority might decide that one of the matters in the PSED is very important. In another case, it might decide that the PSED matters are not so important, given the other circumstances.

However, the authority must be able to show that it has kept the PSED well in mind, when it is making decisions. That will usually be apparent from the letters and any other communications that it has with the applicant, and any other person assisting him. It is not necessary for these communications to specifically mention the PSED, if it is clear that the authority has had due regard to the matters which are described in the PSED.

The EHRC has published extensive guidance for public authorities in relation to the PSED, which is available on its website, including: *Essential Guide to the Public Sector Equality Duty: a Guide for Public Authorities (Scotland) (July 2016)*; and *Technical guidance on the Public Sector Equality Duty: Scotland (September 2016)*.

Homelessness duties of local authorities

The existence of a protected characteristic like sex or race may be obvious. However, particularly as regards disability, it may be necessary to inquire as to whether the protected characteristic exists. The courts have considered this issue in several cases.

In one case, the court held that a letter from the applicant's GP, and his own assertion that he was disabled, was enough to require the authority to further investigate the disability, and decide whether it affected its decision.

The council has a duty to make inquiries under the legislation. It must make reasonable efforts to obtain the information that is relevant to carrying out its duties, including the PSED. Where the authority is not asked by the applicant to consider say, disability, it cannot simply dismiss the possibility that PSED applies. It should ask itself whether there is a real possibility that the applicant is disabled, in a way that is relevant to the decisions that it has to make, in deciding the homeless application.

The type of decisions to which the PSED could apply

The following is a list of the type of judgements or decisions made by an authority, which might require it to “sharply focus” on the PSED. It is important to remember that compliance with the PSED may involve treating some persons more favourably than others.

- Whether it is (or would have been) reasonable for an applicant to continue to occupy accommodation, in deciding whether he is homeless or intentionally homeless.
- Whether an act or omission on the part of an applicant is “deliberate” for the purposes of the intentional homelessness test.
- Whether an applicant has a local connection because of “special circumstances.”

- The way in which the authority conducts its inquiries, particularly inquiries made of the applicant.
- The type of interim (temporary) or permanent accommodation secured for applicants.
- Where an applicant is found to be intentionally homeless, deciding what constitutes a period that gives the applicant “a reasonable opportunity of himself securing accommodation for his occupation”.

If the authority does not comply with the PSED, its decision may be found unlawful in judicial review proceedings, even if, in all other respects, the decision complies with the legislation. There is a time limit of 3 months minus a day for raising judicial review proceedings.

Where a local authority has failed to comply with the PSED it may also be more difficult for the local authority to justify any indirect discrimination in relation to its practice or to justify the failure to make a reasonable adjustment to a practice, criteria or provision.

For further information and advice:

shelterscotland.org/getadvice

equalityhumanrights.com/en/commission-scotland

shelterscotland.org

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