1. I am asked to advise the British Medical Association (‘BMA’) as to whether, from a legal perspective, the draft Equality Impact Assessment (‘EIA’) completed by the Department of Health and Social Care (‘DHSC’) is adequate to discharge the Secretary of State’s statutory duty under section 149 of the Equality Act 2010.

2. The context within which the duty arises, and to which the EIA is directed, is the proposed new junior doctors’ contract.

3. The duty under section 149(1) of the Equality Act (the public sector equality duty or PSED) is a duty to “have due regard”, in the exercise of the Secretary of State’s functions, 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 relevant protected characteristics are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

4. The objective referred to in section 149(1)(b) – the advancement of equality of opportunity – is further developed in section 149(3),
which explains that having due regard to the need to advance equality of opportunity includes having regard 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; and (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.

5. There is a substantial body of case law on what the PSED requires of a decision-maker and what is meant by having ‘due regard’: see, e.g., R (Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345. The most relevant principles are as follows:
   a. The duty is upon the decision maker personally.
   b. The decision maker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the taking of a decision and not merely as a rear-guard action following a concluded decision.
   c. The duty must be fulfilled before and at the time when a particular decision is being taken.
   d. The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes".
   e. General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.
   f. There is no duty to achieve a particular outcome.
g. It is for the decision maker to decide how much weight should be given to the various factors informing the decision.

6. Section 149 does not impose any legal requirement for an EIA. However, the completion of an EIA is the most usual means of facilitating and evidencing compliance with the PSED.

7. Viewed from a legal perspective of compliance with the PSED, this draft EIA is (in my view) sufficient to enable the Secretary of State to discharge the due regard duty (provided, of course, that the Secretary of State actually gives careful consideration to the EIA). In particular:
   a. The EIA specifically draws attention to the requirements of section 149. It may seem an obvious point, but it is surprising how many reports or documents, particularly in the context of local government decision-making, fail even to make reference to the requirements of section 149.
   b. The EIA seeks to identify the likely or foreseeable impact of the proposed changes to the terms and conditions of the contract. Again this no doubt seems an obvious point, but in fact it is not uncommon to see EIAs which contain no assessment of impact at all.
   c. Insofar as pay and allowances are concerned, the EIA describes each of the main changes; identifies (insofar as able to do so – the EIA explains that there are some respects in which data is not available) the group or groups with protected characteristics who may be affected by the change(s); sets out the extent to which there may (for example) be a differential
impact on one group; and where there is such an impact puts forward an objective justification (see, e.g., paragraph 31).

d. The EIA also identifies where groups with protected characteristics may benefit from a change (in other words, where the impact is a positive one): see, e.g., paragraph 36 which considers the introduction of an LTFT allowance and explains how equality of opportunity may be advanced.

e. The EIA acknowledges that there are issues which do not form part of the review of the contract, but which may require consideration through other means (e.g. the review into the gender pay gap: see paragraph 57).

f. A similar analysis is undertaken for the other central provisions of the proposed new contract (such as safety and rest limits, where the EIA identifies no detrimental impact on those with protected characteristics and a potential positive impact on those with caring responsibilities: paragraph 77).

g. There are no obvious deficiencies of reasoning or omissions in the draft EIA.

8. I am not in a position to assess whether the specific conclusions reached in the EIA as to particular impacts or benefits are well-founded (and I understand that the BMA will, for the sake of completeness, be seeking the input of an equalities expert). However, as set out above, section 149 does not in any event impose a duty to reach any particular conclusion, or to avoid or mitigate detrimental impact – it merely requires that consideration is conscientiously given
to the statutory objectives identified in section 149. From the perspective of compliance with section 149, the draft EIA asks the right questions and provides sufficient information to allow the Secretary of State to discharge the PSED.

9. Please do not hesitate to contact me with any queries arising out of the above.

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