

LITIGATING THE CUTS: THE PUBLIC SECTOR EQUALITY DUTY

PLP CONFERENCE WORKSHOP

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PSED & cuts cases

- Cuts impact on protected groups
- If more people affected (and more vulnerable), PSED more important
- Puts brakes on cuts
- New decisions can result in more money being found (e.g. London Councils case, *W & Others v Birmingham*)

The law and guidance

s.149, *Equality Act 2010* (in force from 5 April 2011) – replaced s.71 RRA (race equality duty), s.49A DDA (disability equality duty), s.76A SDA (gender equality duty):

- more protected groups added – see s.149 (7)
- retains “due regard” test: see below
- “statutory needs” defined more fully: see s.149 (3) for advancing equality of opportunity and s.149(5) for fostering good relations
- applies to public authorities listed in Schedule 19, see s.150(1);
- applies to all those exercising a public function (even if not public authority in list), see s.149(2); “public function” definition is same as HRA, see s.150(5).

Secondary legislation - new regulations came into force on 10 September 2011: The Equality Act 2010 (Specific Duties) Regulations 2011. Less onerous than earlier versions, very general and quite vague:

- ❖ requirement to publish info to demonstrate compliance with PSED
- ❖ by 31 Jan 2012 (most public authorities – see schedule 1 to Regs) or 6 April 2012 (mainly schools, see schedule 2), then annually
- ❖ requirement to prepare/publish “significant and measurable” objective(s) to do anything under s.149(1) EA 2010 by 6 April 2012 and every four years

EHRC guidance - statutory guidance/codes issued in respect of each of the three previous duties; current guidance is non-statutory and already out of date as based on the proposed specific duties which govt has now dropped. But still important to look at guidance and public authorities should consider it (on basis of general public law principles re guidance and also see *R (Kaur & Shah) v L B Ealing*). See the EHRC website for guidance and updates¹.

¹ When these notes were prepared the EHRC had not yet updated their guidance even though the specific duties regs came into force on 10 September 2011; if the position has changed by 13 October 2011, we will update you during the workshop.

Decisions

No decisions yet on breach of s.149 EA 2010 as only in force from 5.4.11 but can rely on earlier decisions concerning breaches of the equality duties.

Key features of the duty/key cases to be aware of:

- public authority must ask itself the right question and have material available to answer them: *R (W & Others) v Birmingham City Council* [2011] EWHC 1147 (Admin) – and see the 22 propositions at § 151
- timing – *R (Elias) v SoS for Defence* [2005] EWHC 1435 (Admin): “advance consideration”
- rigour, ongoing, non-delegable etc - *R (Brown) v SoS for Work & Pensions* [2008] EWHC 3158 (Admin) – see extract below
- right material before decision-makers – *R (Chavda & Others) v L B Harrow* [2007] EWHC Admin 3064
- record-keeping – *R (Elias) v SoS for Defence* [2005] EWHC 1435 (Admin)
- specific regard to statutory criteria, not general regard to equality issues – *R (Meany) v Harlow BC* [2009] EWHC 559 (Admin), § 84
- “due regard” test – *R (Baker) v SoS for Community & Local Govt* [2008] EWCA Civ 141:
“What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.”
- what is the public authority expected to do and when? See *R (JG & MB) v Lancashire County Council* [2011] EWHC 2295 (Admin)

Current and key issues

- Overlap with consultation arguments: getting home on failure to consult on the basis of a breach of PSED
- s.149(3): need to encourage participation in public life and other activities
- EIAs: no duty now (or before) to undertake EIA but public authority must still show how they have had due regard

- Are we drifting from a procedural duty into a substantive one? See judgment at § 183 in *R (W & Others) v Birmingham City Council*:

“Thus I conclude that there was a failure in the material prepared for consideration on 1 and 14 March to address the questions which arose when considering whether the impact on the disabled of the move to “critical only” was so serious that an alternative which was not so draconian should be identified and funded to the extent necessary by savings elsewhere.”

- Was Kenneth Parker J right in the Lancashire case (§ 11 of judgment) to ignore his own observation: “It is not immediately obvious how the Council could achieve a 25 per cent reduction in the ‘non-schools’ budget without affecting expenditure on a sector [adult social care] that comprised two fifths of that budget.”?
- Or to put it another way, why has no-one solved the *Domb* question? See Sedley LJ at § 80:

“The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court.”

Equality Act 2010

149 Public sector equality duty

(1) 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;

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

(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).

(3) Having due regard to the need to **advance equality of opportunity** between persons who share a relevant protected characteristic and persons who do not share it involves having **due regard, in particular**, 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;

(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.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, **steps to take account of disabled persons' disabilities**.

(5) Having due regard to the need to **foster good relations** between persons who share a relevant protected characteristic and persons who do not share it involves having **due regard**, in particular, to the need to—

(a) **tackle prejudice**, and (b) **promote understanding**.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—
age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex;
sexual orientation.

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150 Public authorities and public functions

(1) A public authority is a person who is specified in **Schedule 19**.

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(3) A public authority specified in Schedule 19 is subject to the duty imposed by section 149(1) in relation to the **exercise of all of its functions** unless subsection (4) applies.

(4) A public authority specified in that Schedule in respect of certain specified functions is subject to that duty only in respect of the exercise of those functions.

(5) A public function is a function that is a **function of a public nature for the purposes of the Human Rights Act 1998**.

R (Brown) v Secretary of State for Work & Pensions [2008] EWHC 3158

“89. Accordingly, we do not accept that either section 49A(1) in general, or section 49A(1)(d) in particular, imposes a statutory duty on public authorities requiring them to carry out a formal Disability Equality Impact Assessment when carrying out their functions. At the most it imposes a duty on a public authority to consider undertaking a DEIA, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability. To paraphrase the words of WB Yeats in *An Irish Airman Foresees his Death*, the public authority must balance all, and bring all to mind before it makes its decision on what it is going to do in carrying out the particular function or policy in question.

90. Subject to these qualifications, how, in practice, does the public authority fulfil its duty to have "due regard" to the identified goals that are set out in section 49A(1)? An examination of the cases to which we were referred suggests that the following general principles can be tentatively put forward. First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals: compare, in a race relations context *R (Watkins – Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 at paragraph 114 per Silber J. Thus, an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them: see, in a race relations case, the remarks of Moses LJ in *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin) at paragraph 45.

91. Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. On this compare, in the context of race relations: *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 at paragraph 274 per Arden LJ. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty: compare, in the race relations context, the remarks of Buxton LJ in *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882 at paragraph 49.

92. Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes". Compare, in a race relations case the remarks of Moses LJ in *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin) at paragraphs 24 - 25.

93. However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have "due regard" to the needs set out in the section is not determinative of whether the duty under the statute has been performed: see the judgment of Dyson LJ in *Baker* at paragraph 36. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where section 49A(1) is in play. "In that way the [policy or] decision maker is more likely to

ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced": **Baker** at paragraph 38.

94. Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non – delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty. Compare the remarks of Dobbs J in **R (Eisai Limited) v National Instituted for Health and Clinical Excellence** [\[2007\] EWHC 1941 \(Admin\)](#) at paragraphs 92 and 95.

95. Fifthly, (and obviously), the duty is a continuing one.

96. Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record - keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1): see the remarks of Stanley Burnton J in **R (Bapio Action Limited) v Secretary of State for the Home Department** [\[2007\] EWHC 199 \(Admin\)](#) at paragraph 69, those of Dobbs J in **R (Eisai Ltd) v NICE** (supra) at 92 and 94, and those of Moses LJ in **Kaur and Shah** (supra) at paragraph 25."