

Report to Cabinet

Meeting to be held on 26 November 2015

Report of the Director of Governance, Finance and Public Services

Electoral Division affected:

None

Public Sector Equality Duty

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Executive Summary

Public authorities are required to pay "due regard" to the equality duties contained in section 149 of the Equality Act 2010 in carrying out all their functions, commonly referred to as the "Public Sector Equality Duty" (PSED). Alleged failure to comply with the duty has become a common ground of legal challenge, particularly where services are being stopped or reduced.

Since the introduction of the 2010 Act training has been rolled out Council-wide to officers and Members, including training for current Cabinet Members. Training on the PSED is also provided to all Members through the current programme of bite size briefings.

Whilst we can be confident that Members are by now familiar with the PSED and understand why Equality Analysis templates accompany reports where that is required, this report serves as a timely reminder of the principles underpinning the legislation and the how the duty should be discharged by Cabinet and Full Council. An intelligent appreciation of what the duty entails lies at the heart of compliance.

Recommendation

This report is for information.

Background and Advice

This report is intended to remind Members of a series of guidelines explaining how the statutory "Public Sector Equality Duty" (PSED) duty under section 149 of the Equality Act 2010 (EqA 2010) should be discharged by the Council, in particular in making policy decisions to achieve budgetary savings that may have an impact on the groups of people protected by that Act.

Since 5 April 2011, section 149 has replaced its predecessor provisions – that is section 71 of the Race Relations Act 1976 (RRA); section 76A of the Sex Discrimination Act 1975 (SDA) and section 49A of the Disability Discrimination Act (DDA). The section 149 duty is formulated in somewhat different terms from the previous set of provisions, but there is little doubt that the requirements explained in the existing case law on the previous provisions will apply when considering whether the expanded requirements of section 149 have been met. It is these principles that have been used to formulate the guidelines that follow.

The terms of the statute

The core duty under section 149 is set out in sub-section (1) as follows:

“(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.”

The “relevant protected characteristics” for the purposes of section 149(1)(b) and (c) are listed at subsection (7), and are set out below. It is worth noting that this list is almost the same as the list of “protected characteristics” under section 4 of the Act, in respect of which direct and indirect discrimination are prohibited; but that “marriage and civil partnership” is not a “relevant protected characteristic” for purposes of section 149(1). It is nevertheless relevant to section 149(1)(a), which requires “due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act.”

The content of the section 149(1)(b) duty is elaborated under section 149(3) as follows:

“(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.”

Further detail is spelled out in sub-sections (4) to (8);

“(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.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9)Schedule 18 (exceptions) has effect.”

The substance of the analysis is all-important

A key point that emerges from the cases on the PSED is that the courts will look at whether, as a matter of substance, a local authority has paid “due regard” to the requirements of the PSED. The need for actual, substantive compliance has a number of ramifications, which are considered below. However, the critical point to understand is that producing a written document labelled “Equality Impact Assessment” (EIA) or “Equality Analysis” (EA) will not discharge the duty if the EIA/EA fails fully and properly to get to grips with the actual, practical impacts that may result from the measure under consideration - ticking boxes is not enough.

In other words, an EIA/EA is a means to an end, not the end in itself. It is a tool that should help those responsible for formulating and developing a policy and deciding whether it should be implemented, to go through the process of gathering and analysing information about the impact of the proposed policy/decision on the statutory needs (e.g. the need to promote equality of opportunity between disabled and non-disabled people), and then to weigh up that impact against countervailing factors, such as financial pressures. It is this process, rather than the mere completion of a form called an EIA/EA, that lies at the heart of the section 149 duty.

Similarly, the absence of a formal EIA/EA is not in itself fatal if the evidence shows that those responsible for formulating and bringing into effect a policy or decision have paid proper attention to the actual or potential impact of what is being considered. In other words, a written EIA/EA is neither necessary nor sufficient. It is however a record of the on-going equality analysis, in the absence of which it will be much more difficult to persuade a court that due regard was paid to the factors identified in section 149.

What is meant by ‘due regard’

The courts have said that “due regard” is “the regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority”.

Proportionality

What is required goes beyond taking notice in passing of the statutory equality goals. They must be given *due* regard, that is the degree of regard that is proportionate in all the circumstances, taking into account the nature of the policy or decision, its predicted effect on the statutory equality goals, and the way in which its impact will be experienced by those affected. In other words, the greater the potential adverse impact of the proposed policy on a protected group (e.g. disabled people), the more vulnerable the group in the context being considered, the more thorough and demanding the process required by section 149 will be.

It follows that there is no one size fits all approach. The way in which the duty is exercised will depend on the nature and extent of the impact of the measure under

review on those affected, weighed against the factors leading the decision-maker to consider adopting the measure. For example, the effects of withdrawal of funding for home-based care for disabled people will need to be very closely scrutinised indeed, whereas a reduction in the hours for which a library is open, although it could well have adverse effects on one or more of the protected groups, is likely to be less serious in its impact.

Case law therefore establishes that in a case where large numbers of vulnerable people, very many of whom fall within one or more of the protected groups, are likely to be affected, the due regard necessary is very high.

Importantly, the decision-maker needs to be told when the disadvantage anticipated is less serious too. Hence the information recorded and conveyed in an EIA/EA should be as specific as possible – it should, for example, state how many or what percentage of people are potentially affected, and in what way. This underlines the importance of working with an adequate evidence base. Such evidence can be compiled using a public authority's existing research and consultation protocols, adapted and supplemented as required for the specific purposes of the investigation.

It is important to analyse what evidence is needed to give enough of a picture of the effect of a policy on the equality strands to allow the decision-makers to make a properly informed decision. For instance, in the case of the withdrawal of subsidised community transport, user surveys may indicate that the majority of users are elderly women, who will be disadvantaged if the service is discontinued. Simply to state that fact in an EIA/EA does not allow the decision-makers to give due regard to the section 149 imperatives, because they cannot know the nature of the disadvantage, or how serious it is.

Officers preparing reports must therefore use their best endeavours to obtain and provide specific information. For example, user data may show that the majority of those affected are elderly/disabled/women – or any combination of these - but that they are able to access public transport, or pay fares for community transport, if necessary. It may show that of those affected, 5% are unable to access any alternative means of getting out of their homes. It should then indicate in clear and honest terms whether alternative arrangements can be made for those who will be stranded in their homes, and if so what the cost of such arrangements will be. The decision-makers are then in a position to make an informed decision with full knowledge of its human or collateral financial costs.

Consultation is inadequate where those affected are given insufficient information on what is being proposed to give the proposals intelligent consideration and to give an intelligent response.

A duty of process, not results

The statute requires the public authority to have due regard to the goals identified in section 149(1), but it does not mandate the achievement of those goals at all costs. In this context, the courts have made it clear that the public authority must also pay regard to any countervailing factors which, in the light of the function being exercised, it is proper and reasonable for the public authority to consider. Economic

and practical factors will often be important and the weight to be given to the countervailing factors is a matter for the public authority concerned, rather than the court, unless the assessment by the public authority is unreasonable or irrational

However, a failure to have “*due regard*” to the requirements of section 149 is unlawful in itself. There is no need for a claimant to show that there was complete failure to have regard to section 149, or that the decision-maker was irrational in its consideration of what the impact of the measure upon those affected and upon the statutory requirements would be. Failure to have due regard can, in itself, be successfully challenged.

On the other hand, once the impact has been assessed, and the authority moves to identify and weigh up the reasons why the policy in question may nevertheless need to be adopted, the court will not interfere unless the public authority has arrived at a conclusion that is irrational. However, a policy cannot be directly discriminatory, and any policy that is indirectly discriminatory will have to be capable of proportionate justification.

The net effect of the decided cases is that where members of the protected groups are likely to be affected by a policy under consideration, public authorities are required to conduct a rigorous examination into the possible adverse effect of the policy with reference to the equality goals. They must identify and unflinchingly consider the effects of the policy in question on those adversely affected. If the constraints are such that the decision-makers must nevertheless adopt the policy, that is for them to decide, but they are not permitted to hide behind a cloak of euphemism as to what the effect of the decision will be.

Principles guiding the exercise of the section 149 duty

First principle – awareness of the duty

Those in the public authority who have to take decisions that do or might affect people within the protected groups must be made aware of their duty to pay “*due regard*” to the identified goals; an incomplete or mistaken understanding of the duties will mean that due regard has not been had to them.

The PSED entails “mandatory relevant considerations”, but there are of course other considerations which public authorities are obliged or entitled to take into account. Amongst those which they are obliged to take into account is the likely impact of any new policy on the human rights of those affected. It is important that, in their focus on equality duties, public authorities do not lose sight of their duties under the Human Rights Act and other legislation. Budgetary considerations are also relevant, but not exclusively so.

Second principle – the duty cannot be delegated

Whether the decision-maker is one or more individuals (such as individual Councillors) or a body (the Full Council, Cabinet or Committee) the individuals in question must be aware of the duty and must discharge it. It is they who must consider each of the factors required by section 149. That they do so based on

investigations, reports and recommendations of officers and others is perfectly acceptable, but it must be clear that the decision-makers have themselves paid due regard to the factors set out in the legislation.

Third principle – the duty must be exercised in substance, with rigour and with an open mind

As referred to above, this three-pronged principle is of the very essence of what “due regard” requires. The duty is not discharged by filling out a form and ticking boxes just before (still less after) a decision is formally taken. The process of paying due regard to the needs identified in section 149 must be “mainstreamed” as part of the development of policies, and not seen as a bureaucratic hurdle to be thought about separately.

Whilst a failure to make explicit reference to the statute *may* not by itself mean that the duty has not been performed, provided that in substance the decision-makers have had due regard to the relevant matters, there will be few cases where in practice it will be possible to persuade a Court that due regard has in substance been had to the various needs identified in s.149 if there is not a clear paper trail showing that the decision-makers have had those needs expressly drawn to their attention.

The requirement of “rigour” means that, where required, the analysis must be thorough-going and unflinching. Those charged with taking the decision need to look the hard facts in the face. It is therefore important for officers not simply to tell members what they want to hear but to be rigorous in both inquiring and reporting to them. If a decision is challenged, the courts will look beyond bland assurances in reports to the hard reality underneath. If mitigating measures are contemplated, specific and detailed information should be provided as to what the measures are, and the extent to which they can be expected to ameliorate the adverse effects identified.

As pointed out above, the provision of specific data as opposed to vague generalisations may indicate that the impact of a measure, though negative, may be less serious than more general statements may indicate. For example, a minor extension to the distance between bus-stops is likely to have a negative impact on elderly and/or disabled passengers. Simply to state that the measure is expected to have a disproportionate negative impact on these groups, without going on to say that most of those affected will nevertheless be able to manage a slightly longer walk/wheelchair ride to their destination, is insufficiently specific for the decision-makers to decide whether the measure is nevertheless proportionately justified and whether the effect on the section 149 goals is off-set by countervailing considerations.

Finally, the need to approach the exercise with an open mind means that the decision-makers must be prepared to consider alternatives to the proposal before them, particularly when the consequences of that proposal are likely to cause significant hardship. As set out above, decision-makers are entitled to take account of relevant countervailing pressures, and these may in the end be determinative, but it must be clear that the decision was not a foregone conclusion.

Fourth principle – a continuing duty

The duty to have due regard, or to pay proper attention, to the needs identified in section 149, by considering the potential impact of a policy on protected groups, must be fulfilled both before and at the time that the decision is under consideration. The factors set out in the legislation must be consciously investigated, thought through and weighed up from when the first proposals are formulated, until the final decision is taken and beyond. The duty cannot be discharged as an afterthought or an add-on to “a done deal”. That is to say that policies must be open to review and modification if in due course circumstances change, and it becomes possible to replace them with policies more readily able to promote the objectives of section 149.

Fifth principle – transparency

As noted above, because the emphasis is on the substance of the duty, producing a formal document styled an EIA/EA is neither necessary nor sufficient to meet the due regard duty. Nevertheless, fulfilment of the PSED in the discharge of public functions should as far as possible be seen to be done – it should be recorded and documented in the interests of transparency and accountability. As a matter of prudence and pragmatism, it will be difficult to convince a court that due regard has been paid when there is no record of any investigation into or consideration of the factors mandated by the statute.

The duty applies to tough financial decisions, even when the public purse is shrinking

Section 149 of the EqA 2010 came into operation on 5 April 2011, a time of straitened public resources. The courts have made it clear that budgetary constraints do not detract from the force of the PSED and a tight budget does not excuse non-compliance with the PSED, on the contrary the need to assess impacts is as great, if not greater.

However, High Court decisions show that, at least at local government level, courts are willing to uphold challenges to the budget setting process even if they may not go so far as to order the entire budget to be set aside.

Conclusion – The Public Sector Equality Duty is in here, not out there

The more the PSED is integrated into the conception, development, execution and implementation of Council policy-making and service delivery, the more effective the Council is likely to be in meeting its duties, and in standing up to the scrutiny of those who seek to enforce those duties – the EHRC, the Courts and would-be litigants.

Templates and check-lists may be helpful in ensuring that Council Members, officers and employees at all levels are reminded of their obligations under the PSED – but they are there to facilitate analysis, and not to replace it. They are a means to a substantive end, and not a formal dead-end in themselves.

Consultations

N/A

Implications:

This item has the following implications, as indicated:

Risk management

A failure to comply with the PSED will leave decision open to legal challenge through Judicial Review