

Overview and Scrutiny Committee

SUPPLEMENTAL AGENDA

DATE: Wednesday 20 July 2011

AGENDA - PART I

9. PUBLIC SECTOR EQUALITY DUTY – LESSONS TO BE LEARNT FROM RECENT CASE LAW (Pages 1 - 12)

Report of the Director of Legal and Governance Services

AGENDA - PART II - NIL

Note: In accordance with the Local Government (Access to Information) Act 1985, the following agenda item has been admitted late to the agenda by virtue of the special circumstances and urgency detailed below:-

Agenda item

Special Circumstances/Grounds for Urgency

9. Public Sector Equality Duty – Lessons to be learnt from recent case law

Members requested this report, which was not available at the time the agenda was printed and dispatched. Members are requested to consider the report as a matter of urgency as the next ordinary meeting of the Committee is not until 22 September 2011.

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**REPORT FOR: OVERVIEW AND
SCRUTINY COMMITTEE**

Date of Meeting:	20 July 2011
Subject:	Public sector equality duty. Lessons to be learnt from recent case law
Responsible Officer:	Director of Legal and Governance Services
Scrutiny Lead Member area:	Councillor Miles – Scrutiny Policy Lead – Corporate Effectiveness and Finance Councillor Ferrari - Scrutiny Performance Lead – Corporate Effectiveness and Finance
Exempt:	No
Enclosures:	<i>Appendix A – discussion paper on Rahman R on the application of Birmingham City Council's 2011 and R (W & Others) v Birmingham City Council 2011</i>

Section 1 – Summary and Recommendations

This report sets out a summary of recent case law which fleshes out the legislation in relation to the public sector and equality duty.

Recommendations:

To note the discussion paper and the key messages for the council in Appendix A to the report.

Section 2 – Report

There have recently been a string of cases on equalities issues. The public sector equality duty came into force on 5 April 2011. This report is to update Members on equalities issues and to highlight some key issues.

Current situation

At the time of writing there have been no challenges under this new legislation. The cases that are discussed in the appendix were taken under the old equalities legislation however the concept of “due regard” that is fleshed out in them is still relevant to the Equalities Act 2010.

The public sector equality duty can be found in section 149 of the Equalities Act as follows:

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;

marriage & civil partnership

A discussion of this duty can be found in appendix A.

Why a change is needed?

The Council needs to keep a breast of these changes in law so that it can make robust decisions.

Implications of the Recommendation

The public sector equality duty applies when ever the council exercises any of its functions this includes making decisions adopting policies for example. It is every important that members and officers are aware of it. However it is the decision maker (members) who must have due regard, it is not a duty that can be delegated to officers. Merely conducting an equality impact assessment is not always enough. An equality impact assessment is just a tool by which the decision maker can have due regard to the equalities impact. They must be robust and the decision maker should also take into account other material such as reports in the press and communications from the public. The duty is a continuing duty and the decision maker has to have due regard when they are making the decision.

Financial Implications

If the council does not have due regard to the equalities duty then it is at risk of legal challenge and this may have financial consequences.

Legal Implications

Included in the report.

Equalities Implications

Included in the report

Environmental Impact –

None

Risk Management Implications

Robust decision making means that the council is less likely to be successfully challenged.

Corporate Priorities

Keeping neighbourhoods clean, green and safe

United and involved communities: a Council that listens and leads

Supporting and protecting people who are most in need

Supporting our Town Centre, our local shopping centres and businesses

The equality duty applies to all of the council's activities in carrying out any of its functions.

Section 3 - Statutory Officer Clearance

Name: Steve Tingle	<input checked="" type="checkbox"/>	on behalf of the Chief Financial Officer
Date: 7/7/11		
Name: Jessica Farmer	<input checked="" type="checkbox"/>	on behalf of the Monitoring Officer
Date: 7/7/11		

Section 4 - Contact Details and Background Papers

Contact: Jessica Farmer ex 2889

Background Papers: None

Appendix A - discussion paper of recent cases on equalities 6/7/11

1. On the 5 April 2011 the public sector equality duty under section 149 of the Equalities Act 2010 came into force. Prior to this section coming into force a string of cases have been brought against councils under the previous equalities duties. The concept of due regard remains the same under the old and new legislation and has been fleshed out in case law.
2. **The public sector equality duty is 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.*
 - (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.*
3. The public sector equality duty means more than merely guarding against negative impacts it also involves positive duties.
 - 3.1. Having due regard to:
 - 3.1.1. The concept of due regard, the courts have said must be looked at with an open mind with vigour. It should not be a tick box exercise; it should go into the substance of the matter. The public can look at countervailing factors and the court will leave the weight that it gives those up to the decision maker unless they are irrational.
 - 3.2. From these recent cases the following key points should be noted by the council.
4. **Key message from the cases for the Council**
 - 4.1. It is the decision makers (members) who must take into account the equality duty and have due regard when they take a decision. Every decision maker must be aware of the existence of the public sector equality duty insofar as it applies to the decision they

are making. They must be aware of the equality impact assessment (EIA) and their contents.

- 4.1.1. In the Rahman case when the matter of making cuts was first put before cabinet the members were not aware of the equality duty. Report writers must make sure that the decision makers have access to all relevant information, this might mean putting lengthy documents in group offices or emailing them to members. Report writers must bear in mind that documents mentioned in reports are background papers and that the public will have access to them unless they specify that they are part II documents.
- 4.2. The EIA must have an adequate assessment of the degree of disadvantage to existing users if the decision is made (this may involve consultation even when there is not a statutory need for it as otherwise officers and members may not be able to imagine the effects).
 - 4.2.1. In R(W and others) v Birmingham City Council the court found that there was no attempt to assess the practical impact of the changes on users.
- 4.3. Consultation must be adequate and follow the council's own guidance.
 - 4.3.1. In R(W and others) v Birmingham City Council the court found that the consultation had not been adequate. The consultation was flawed because of the scope for confusion about whether the New Offer related to personal or social care and because the true amount of the proposed saving for the move to critical only was not made clear until a late stage, so that consultees did not have the opportunity to assert that the sum involved in leaving the eligibility threshold unchanged could properly be found by making savings elsewhere.
- 4.4. EIAs should not be too optimistic.
 - 4.4.1. In the Rahman case the Judge found that officers had been too optimistic about the negative equalities impact of the decisions.
- 4.5. Merely completing an EIA is not enough - it is just a start.
 - 4.5.1. In the Rahman case the Judge said that the decision maker should not only have regard to the EIA but also to other material such as press reports and letters from users of the service. There is no statutory requirement to complete an EIA it is just a document that should bring all of the equalities information together.
- 4.6. When setting budgets must have the option of going for alternative options that are not so draconian e.g. funding from elsewhere if an extremely negative equality impact is found.
 - 4.6.1. In R(W and other) Birmingham City Council there was a failure in the material prepared for cabinet 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.
- 4.7. Equality duty is a continuing duty, it effects all decisions.
- 4.8. The decision maker must be able to show that they have paid regard to the public sector equality duty and relevant countervailing factors. The courts will not interfere in

the weight the public body gives to the countervailing factors unless the assessment is seen to be unreasonable or irrational.

4.9. The way that Judges are interpreting the public sector equality duty currently means that when the council is considering where to put its resources then it must have the public sector equality duty as a primary consideration.

4.10. The remainder of this paper sets out the cases and the public sector equality duty in detail.

5. **Detailed consideration of case law and legislation.**

5.1. Sources: Andrew Arden QC and Christopher Baker of Arden Chambers and Court judgments in both cases.

5.2. All of the cases below were brought under legislation which preceded the public sector equality duty under the Equalities Act which came into force on 5 April 2011. The concepts of due regard outlined in these cases are still valid.

6. **The public sector equality duty under section 149 of the Act is 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.

(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; and
marriage and civil partnership.

7. (Rahman, R) on the application of Birmingham City Council) [2011] EWHC 944 (Admin) (“the Rahman case”)

7.1. Background to the case

- 7.1.1. In this case, three Birmingham residents, who relied upon Legal Entitlement Advice Centres to provide services successfully argued that Birmingham City Council had failed to discharge its public sector equality duty in making a decision to cease to fund the Centre. The Council had commissioned the advice centre to provide services since 2004 on a three year funding agreement and the council had funded the centre to a lesser degree since 1998. The council decided to review its funding to the centre and consulted on this review. The funding was to be terminated mid year.
- 7.1.2. The Court found that had the Council followed proper and appropriate process then it would not have been able to intervene in this decision to reduce funding. However, the decision made was flawed because the decision makers had failed to take into account the Equality Duty.
- 7.1.3. In particular the Judge found that when the first decision was made by the Council, each of the decision makers were unaware of the equality duty with which they were required to comply. The legislation requires that they should have taken into account their duty when they took this decision and on that basis the Court found that the decision was “clearly deceptive”.
- 7.1.4. The matter was then put back before the members and the members were made aware of an equality impact assessment which had been carried out and that they had to consider it. However in relation to this decision, the Court found substantial defects in the equality impact assessment which had been performed. In particular the Judge, in examining the equality impact assessment concluded that there was inadequate assessment of the degree of disadvantage to existing users from discontinuance of funding. He felt that the equality impact assessment appeared to be driven instead by

hopes of the advantage of a new policy, leading to more than a hint of what the Judge described as “policy based evidence rather than evidence based policy”. In short, it was too optimistic and unreliable about the negative equalities impact.

7.1.5. The Judge also found that the consultation process itself had been inadequate in a number of respects and did not follow the defendant’s own guidance.

7.2. **Message from the court**

7.2.1. Every decision maker has to be made aware of the existence of the public sector equality duty insofar as it applies to the decision which they are making. Further, and in any event, when equality impact assessments have been carried out, the decision makers need to be made aware of them. Most importantly, from the point of view of this decision, is the finding that the impact assessment itself was entirely flawed in terms of its content.

7.2.2. The decision maker should have proper regard to all of the goals of the public sector equality duty in the context of the function that is being exercised at the time by the public authority. At the same time the public authority must also pay regard to any countervailing factors which in the context of the function to be exercised it is proper and reasonable for the public authority to consider. What are relevant countervailing factors will depend upon the function to be exercised and economic and practical factors are important. The weight to be given to countervailing factors is a matter for the public authority rather than the court, unless the assessment by the public authority is unreasonable or irrational.

7.2.3. The performance of an equality impact assessment does not alone respond to the duties imposed under the equality Legislation. The duty on decision makers is to take full account of the existence of the public sector equality duty and its implications. They should take into account not just the EIA but other available material such as letters in response to a consultation, press reports and other comments for example.

8. ***R (W and others) v Birmingham City Council* [2011] EWHC 1147 (Admin) 19 May 2011**

8.1. The High Court has held that Birmingham City Council, in determining a budget in respect of Adult Social Care and changing the eligibility threshold for such services from “substantial” needs to “critical” needs only, had acted unlawfully by (1) failing to give sufficient regard to matters concerning disabled people under s49A(1) Disability Discrimination Act 1995 and (2) a lack of clarity in material issued for consultation. The court refused, however, to grant relief in respect of the authority’s budget.

8.2. **Background of the case**

8.2.1. The Government’s Spending Review 2010 provided that, in general, grants to local authorities would reduce by 28% in real terms over 4 years. In respect of the authority, the reduction in funding required them to make savings of over £300m within 3-4 years, over half of which had to be made in 2011/12.

8.2.2. On 1 March 2011, following a 90-day consultation exercise, the authority’s Full Council approved its Business Plan for 2011 onwards, which included the calculations required under ss32 and 33 Local Government Finance Act 1992 for determining their expenditure budget and setting the council tax. The Business Plan included proposals being made by the authority’s Adults & Communities Directorate (“A&C”) to reduce its spending for 2011/2012 by c£51m, including a saving of c£17m by raising the needs threshold for eligibility for Adult Social Care services. Across the whole authority, the

Business Plan included total revenue savings of c£212m for 2011/12. On the basis of such savings, the Full Council approved the Business Plan and the budget calculations, though it was not its function to decide whether to change the eligibility threshold.

- 8.2.3. On 14 March 2011, the authority's Cabinet, following a separate 90-day consultation exercise, approved (among other matters) a proposal by A&C for a "New Offer" for Adult Social Care, which included raising the eligibility threshold, formerly set at the level of "substantial" needs but from 2011/12 to be raised to "critical" needs only. In mitigation of the reduction in service provision particularly for those with substantial needs, the New Offer included a number of elements, particularly the provision of "preventative and enablement" services (such as help and advice on avoiding falls) in order to keep people independent as long as possible, and "signposting" to assistance available in the community.
- 8.2.4. The consultations in respect of the Business Plan and the A&C proposals had at times indicated that the New Offer would provide funding in respect only of critical personal needs, apparently suggesting that wider social care needs would not be met. Although the authority issued a further A&C consultation document in January 2011 to clarify that the change in the eligibility threshold was concerned with social care as a whole, responses to the A&C consultation included complaints that the position was unclear. Further, until a late stage, information given to consultees appeared to indicate a savings figure of £33m for 2011/12 in respect of the raising of the eligibility threshold, whereas later it was indicated to be c£17m.

8.3. Law

8.3.1. Section 49A(1) of the Disability Discrimination Act 1995 (replaced as from 5 April 2011 by s149 Equality Act 2010) required the authority, in carrying out their functions to have due regard to, among other matters, the need to take steps to take account of disabled persons and disabilities, even where that involved treating disabled persons more favourably than other persons.

8.3.2. In *R. (Domb) v. Hammersmith & Fulham LBC* [2009] EWCA Civ 941; [2009] B.L.G.R. 843, Rix LJ at [52] summarised the key features of the duty to have "due regard" as being:

"... that there is no statutory duty to carry out a formal impact assessment; that the duty is to have due regard, not to achieve results or to refer in terms to the duty; that due regard does not exclude paying regard to countervailing factors, but is the regard that is appropriate in all the circumstances; that the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind; and that it is a non-delegable duty."

8.3.3. The authority's regard to the matters under s49(A)(1) included the preparation of an Equality Impact Needs Assessment (EINA) in relation to (respectively) the Business Plan and the proposals to be considered at Cabinet. The former contained an overview of the impact of the savings across the authority and their various service areas as a whole; the authority's directorates were leading impact assessments on their own particular proposals in which the majority of the detail was to be included. The material provided to the Full Council for 1 March 2011 included the observation that there was likely to be a disproportionate impact on some of the most disadvantaged groups within the community which might affect older people, those with disabilities and some BME communities. It was stated that reconfiguring care in

order to meet people's needs better and investing in prevention of need would provide some mitigation for older people and those with disabilities. Increasing the budget for A&C was not considered as an option.

- 8.3.4. The EINA in respect of the proposals considered at Cabinet on 14 March 2011 contained some statistical information about the numbers and proportions of service users who either had an assessment of substantial need or were unassessed, and contained some general assessment and comment about impacts. It also included an action plan stating that it was necessary to establish and communicate a "clear vision" of the New Offer. The Cabinet was informed that A&C wished to develop the proposal by engaging and consulting with the public; in written evidence to the Court, the authority explained that until further individual assessments had been carried out the authority would not have a more complete picture of the impacts. No person's existing service provision was to be changed, however, without an assessment.
- 8.3.5. The claimants were all severely disabled adult residents of Birmingham. They initially challenged the consultation processes, prior to the authority's decisions being taken; but the proceedings were later amended to challenge those decisions, seeking quashing orders among other relief. A rolled up hearing was directed for consideration of the applications for permission and the substantive claims, with expedition being ordered.

9. Courts decision

- 9.1. The court granted permission and allowed the claims, but granted relief only to quash part of the Cabinet decision alone, holding as follows:
 - 9.2. There was a failure in the material prepared for consideration on 1 and 14 March 2011 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.
 - 9.2.1. The authority had not in any real sense moved beyond a high level and generalised description of the likely impact and it was difficult in the circumstances to see how there could be due regard to the matters in s49A(1) without some attempt at assessment of the practical impact on those whose needs in a particular respect fell into the substantial but not critical band.
 - 9.2.2. Even if members were able to form some opinion as to the broad impact, there was not in the material any assessment of the extent to which such mitigating factors as were mentioned would or would not reduce the potential severity.
- 9.3. The failure to address the right questions for the purposes of s49A inevitably carried with it a conclusion that the consultation was inadequate.
 - 9.3.1. The consultation was flawed because of the scope for confusion about whether the New Offer related to personal or social care and because the true amount of the proposed saving for the move to critical only was not made clear until a late stage, so that consultees did not have the opportunity to assert that the sum involved in leaving the eligibility threshold unchanged could properly be found by making savings elsewhere.
- 9.4. In terms of relief, all that was required was an order quashing the relevant part of the Cabinet decision; it was neither necessary nor appropriate to grant further relief, for

example any order quashing or declaring unlawful the budget decision or the consultation in respect thereof.