

# Complying with the equality duty:

public authorities must still comply with their obligations under the new equality duty despite the budget cuts, says Sarah Sackman

**T**he equality duty requires public sector bodies to ensure that their decisions do not adversely impact protected groups, regardless of whether their budgets have been slashed, so how can these bodies protect themselves against the latest favourite ground for judicial review?

We may be finding ourselves in an age of austerity but the state's obligations to promote equality have never been greater. Section 149 of the Equality Act 2010, which came into force in April 2011, introduced the public sector equality duty (PSED). Section 149 echoes the equality duties under predecessor legislation to avoid discrimination but goes further in imposing a duty on public authorities to act positively to advance equality.

The duty requires public authorities to have 'due regard' to the need to eliminate discrimination on the grounds of age, disability, sex, sexual orientation,



religion or race and advance equality of opportunity. Having 'due regard' means that public bodies must consider the impact of their decisions on protected groups. This is especially relevant in the context of public spending cuts which will arguably have a disproportionate impact on the disabled, the elderly, women and ethnic minorities. Public authorities can ultimately decide to implement cuts notwithstanding their impact on vulnerable groups. However, section 149 provides a rigorous procedure requiring authorities to take account of the impacts which may lead them in practice to mitigate those impacts and, at the very least, justify their decisions.

## Challenges to the cuts

Lawyers representing claimants have begun to appreciate the PSED's effectiveness in challenging the cuts. In the

last 12 months there has been a raft of claims against central and local government decisions including decisions to cut school buildings programmes (*R (Luton Borough Council & Ors) v Secretary of State for Education* [2011] EWHC 217), reduce community care budgets (*R (Rahman) v Birmingham City Council* [2011] EWHC 944; *R (JG & MB) v Lancashire County Council* [2011] EWHC 2295), close court buildings (*R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528) and cut funding to local voluntary groups (*R (Hajrula) v London Councils* [2011] EWHC 448).

Although a high-profile claim by the Fawcett Society against the government's failure to undertake a proper equality impact assessment (EIA) of the 2010 budget was unsuccessful, it set the tone for subsequent PSED challenges to the proposed cuts. The cases illustrate how the PSED has become a standalone ground of challenge. Even where a decision is judged to have been rational and even non-discriminatory, it may still be impugned where the public authority has failed to have due regard to its equality duties.

*R (W) v Birmingham City Council & others* [2011] EWHC 1147, which concerned cuts to community care services, illustrates the onerous nature of the PSED. Although the defendant could show in that case that it had considered its decision's impact on disabled people, that was not sufficient to discharge its obligations under the PSED. According to the court, the defendant needed to go further and ask whether a decision with that potential impact would be consistent with the need to pay due regard to the principles of disability equality.

The significance of the PSED in judicial review claims should not be underestimated. While some public bodies

may be able to reach the same decisions despite compliance with the PSED, in many cases the rigorous consideration of the equality impacts and their enforcement by the courts could have a real influence on policy making, altering the nature and extent of the cuts.

## Lessons learned

Public sector organisations cannot escape their PSED duty, even in straitened times, but they can minimise exposure to challenges if they remember a few key elements.

The PSED is a mandatory, continuing duty which must be performed substantively and with an open mind. It is not sufficient to adopt a mechanistic, 'tick box' approach.

Although explicit reference to the duty is not required in documents preceding a decision, it is good practice to refer to the duty. Importantly, it must be considered before the relevant decision is carried out.

Consultation must be lawful and adequate, which means that it must be timely, provide consultees with sufficient information on the public body's proposals, and the final decision should demonstrate that consultation responses have been taken into account. Given the need to consult disabled and vulnerable groups, special thought should be given to the form of the consultation.

Finally, any EIA should be based on sufficient evidence. Public authorities need to consider alternatives, including the maintenance of existing services. The EIA should focus on the negative impacts of the decision on protected groups rather than simply assessing the benefits of the new policy.



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