A Cut Too Far? Financial Constraints and the Public Sector Equality Duty

| Robert Sutherland, Advocate

The purpose of this talk is to look at the Public Sector Equality Duty (PSED) set out in **Section 149** of the **Equality Act 2010** in the specific context of a local authority's functions and decision making at a time when the financial resources continue to be cut, but demands and expectations at best remain unchanged, and are often increasing.

S.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.

(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 PSED in Section 149 of the 2010 Act was not novel. Section 71 of the Race Relations Act 1976 required local authorities to make appropriate arrangements with a view to securing that their various functions were carried out with due regard to the need to eliminate unlawful discrimination, and promote equality of opportunity and good relations between persons of different racial groups. This duty was not enforceable. The impetus for a more proactive approach arose from the Macpherson Report's comments about institutional racism, leading to the Race Relations (Amendment) Act 2000 and an amended version of section 71 of the 1976 Act which was more tightly worded. Section 149 replaced section 71 of the Race Relations Act 1976, section 49A of the Disability Discrimination Act 1995 and section 76A of the Sex Discrimination Act 1975. Those provisions imposed similar (but not identically worded) general duties in relation to race, disability and gender (implicitly including pregnancy and maternity, and to an extent also covered gender reassignment). There were no equivalent public sector equality duties for age, religion or belief or sexual orientation in the earlier anti-discrimination legislation. The section expressly extended the new public sector equality duty to cover gender reassignment, age, religion or belief, and sexual orientation. In addition to the general duties in Section 149 of the 2010 Act, there is a specific duty in **Regulation 5** of **The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012** that listed authorities must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in Section 149(1) of the 2010 Act. There is also a requirement to make such arrangements as are appropriate to review, and where necessary, revise any policy or practice that it applies in the exercise of its functions it complies with the equality duty.

Examples given by the Government of how the Section 149 duty might be used included:

- reviewing recruitment procedures to ensure they did not unintentionally deter applicants from ethnic minorities;
- targeting training and mentoring schemes at disabled people to enable them to stand as local councillors;
- funding for a black women's refuge for victims of domestic violence, with the aim of advancing equality of opportunity for women, and in particular meeting the different needs of women from different racial groups;
- providing staff with education and guidance, with the aim of fostering good relations between its transsexual staff and its non-transsexual staff;
- a local authority reviewing its use of internet-only access to council services in order to improve equality of opportunity, for example to meet the needs of older people;
- reviewing a school's anti-bullying strategy to address homophobic bullying
- a local authority introducing measures to facilitate understanding and conciliation between Sunni and Shi'a Muslims living in a particular area, so as to foster good relations between people of different religious beliefs.

Whilst activities of this nature are common features of the day to day application of Section 149, there is a significant amount of case law in which the background has been the reduction or removal of a benefit, service or facility against a background of budgetary pressures faced by a public body. It also needs to be borne in mind that the PSED may well apply not just in terms of general policies, but also in relation to decisions under statutory duties to particular individuals in fact-specific cases. A recent example of that is ***Hotak v Southwark London Borough Council*, [2015] UKSC 30, [2015] 2 WLR 1341**, which concerned issues about priority need and the vulnerability of three homeless applicants under the Housing Act 1996 (issues which do not arise under the Part II of the Housing (Scotland) Act 1987 as amended). The Supreme Court approved the judgement of the Court of Appeal in the earlier case of ***Pieretti v Enfield London Borough Council*, [2010] EWCA Civ 1104, [2011] 2 All ER 642**, (which concerned a question of whether disabled applicants were intentionally homeless), and warned that there could be cases where an otherwise lawful decision was rendered unlawful because it did not apply with the equality duty.

There are particular aspects to note about the wording of Section 149. Firstly, the use of the word **must**, meaning that the provisions are mandatory. As a matter of law, a public authority is under the duty to have due regard to the relevant needs whether or not a section 149(1) point is raised by anybody at any stage of the process. Furthermore, as has been pointed out in connection with the legislation preceding the 2010 Act, it is for an authority to work out its equality priorities, and to allocate resources in a way that is proportionate to the relevance equality has to those functions. However, given that the duty is mandatory, a lack of resources is no excuse for compliance.[1] But that just begs the question as to exactly what it is that is mandatory. Section 149(1) requires that **due regard** is had to the **need** to achieve the goals set out. However a general duty that due regard is had to a need for a goal to be achieved is not the same thing as a specific duty to achieve that goal. It is not a requirement of the PSED that the desired result is achieved, which is a vital distinction (see ***R (Brown) v Secretary of State for Work and Pensions*, [2008] EWHC 3158 (Admin) at para 81**; ***Baker v Communities and Local Government Secretary*, [2008] EWCA Civ 141, [2009] PTSR 809 at para 31** and ***Hotak v Southwark London Borough Council*, [2015] UKSC 30, [2015] 2 WLR 1341 at para 74**). It also needs to be borne in mind that the PSED is not the same thing as actively doing something which is prohibited conduct, so that a failure to promote equality of opportunity or to foster good relations between members of different racial groups, is not the same as race discrimination (***Baker v***

***Communities and Local Government Secretary*, [2008] EWCA Civ 141, [2009] PTSR 809 at para 30; *R (on the application of Core Issues Trust) v Transport for London*, [2014] EWCA Civ 34 at para 71**).

Where there are other considerations to be taken into account, it is for the decision maker to decide what relative weight ought to attach to PSED matters and what weight should be attached to these other considerations (***Baker v Communities and Local Government Secretary*, [2008] EWCA Civ 141, [2009] PTSR 809 at paras 31 and 34**; ***Brown v Secretary of State for Work and Pensions*, [2008] EWHC Admin 3158, [2009] PTSR 1506 at paragraph 82; *R (on the application of Meany & Ors, v Harlow District Council*, [2009] EWHC 559 (Admin) at paras 57 and 78 and 79**. In ***R (on the application of Copson) v Dorset Healthcare University NHS Foundation Trust*, [2013] EWHC Admin 732 at para 57(4)** it was said that the PSED was not "*a back door by which challenges to the merits of decisions may be made*". As it was put in **R (on the application of MA) v Secretary of State for Work and Pensions [2013] EWHC 2213 (QB)**:

> *"The courts will not administer s.149 so as in effect to steer the outcome which ought in any particular case to be arrived at. The evaluation of the impact on equality considerations of a particular decision clearly remains the responsibility of the primary decision-maker."*

The decision in ***R (Domb) v Hammersmith & Fulham London Borough Council*, [2009] EWCA Civ 941, [2009] BLGR 843** is particularly relevant, because there may be an earlier decision which significantly shapes any subsequent decision making process, but in respect of which no consideration has been given to the PSED. In ***Domb*** the local authority made a decision that the council tax was to be cut by 3%. There were a number of other matters which affected the overall budget as well, and the consequence was that in order to meet a shortfall between planned spending and income council officials reached the conclusion that the only options available were either to increasing the threshold eligibility criteria for home care services or to introduce charges for those services. The threshold criteria were divided into four levels of eligibility: critical, substantial, moderate and low. In the past, all levels of need save for low had been met. In 2007 the Council had a consultation exercise and raised the banding criteria so as to exclude lower moderate needs as well as low. In 2008 the alternatives under consideration were either to exclude all moderate needs or to introduce charging. The exclusion if all moderate needs would result in a large number of users losing a service and was therefore regarded as the less preferable choice. The Council therefore decided to consult on the possibility of re-introducing a home care charging scheme. Although it could not be said that the outcome of the consultation was pre-determined, had it been decided not to introduce a charging scheme or change the threshold eligibility criteria then the Council would have had to think again about how it was going to balance its books. In the Court of Appeal Lord Justice Sedley and Lord Clarke of Stone-Cum-Ebony MR both expressed very considerable misgivings because they believed that the case before them had to be conducted on a highly debatable premise, *i.e.*, that the prior decision that council tax was to be cut by 3% had to be implemented. Once that was given, the only practical choice for social services was going to be either to raise the eligibility threshold or to charge for home care. Lord Justice Sedley put it this way:

> "*[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?"

Lord Justice Rix said this:

"[60] ….. It is conceded by Mr Wolfe that he cannot attack that decision, but that must be true of the very many other budget decisions as well. We just do not know the ramifications of the budgetary meetings and decision-making: those decisions have not been challenged and no evidence about them has been formulated. They simply lie in the past, as data. For all we know, the budget had to be balanced; and each department or spending area had to be capable of living within its own budget. However, we simply do not know these matters, for they have never had to be investigated.

[61] In these circumstances, it is in my view mistaken to suggest that all possible theoretical options had to be regarded as being open and in contention in connection with the matter which came up for consideration on 16 June 2008. Decision making would become simply impossible on such a basis. One has to start somewhere, and the budget decisions which had already been taken, whether final or capable of being revisited, are not capable of being impugned in these proceedings.

[62] I am far from saying, however, that in another case, it might not be necessary for a local authority to be able to demonstrate, as a matter of its duty to have due regard to the need to promote disability equality that it had considered, in substance and with the necessary

vigour, whether it could by any means avoid a decision which was plainly going to have a negative impact on the users of existing services. However, in my judgment, the complaint that the Council failed to do that in the limited circumstances open on the occasion in question, viz on 16 June 2008, is not here sustainable.

[75] …….. Essentially, decisions which had already been taken as a part of the budgetary process, such as the decision to reduce the Council Tax, were water under the bridge……."

In short, the Court held that because the Council had carried out a consultation exercise in which it could be seen that consideration was given to the potential impact of introducing a charging regime on those groups of people who could be identified as being affected by that decision it had met its duty. Although the courts look at the whole decision making process and not just at the final decision made, there is an inherent reluctance to be seen as interfering with decisions involving policy considerations. It also has to be recognised that it is for the public authority to decide to decide how much information it needs in order to make the decision. The public authority does not have to investigate or explore every single possibility *ad infinitum*. Nor should they analyse the situation to the same degree that a QC would apply in court. Such an exhaustive exercise would make effective decision making on the part of local authorities unduly and unreasonably onerous, ***R (Bailey) v London Borough of Brent*, [2011] EWHC 2572 (Admin) at para 102**. So long as the public authority carries out a reasonable amount of information gathering to allow it to make a decision a court might find that there was more information which could have been obtained, but the court will not go on to find that more information had to be obtained, ***Watt v Lothian Health Board*, [2015] CSOH 117.**

The PSED does not necessarily mean that an Equality Impact Assessment is required for every proposed policy or decision. In ***Brown v Secretary of State for Work and Pensions*, [2008] EWHC Admin 3158, [2009] PTSR 1506 at paragraph 85** it was noted that the wording of Section 49A of the Disability Discrimination Act 1995 imposed a duty to consider undertaking a formal equality impact assessment (along with other means of information gathering), and to consider whether it is appropriate to have one in relation to the function or policy at issue when it will or might impact on the disabled. It should be noted that in Scotland the consequence of **Regulation 5** of **The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012** means that an Impact Assessment will be required in respect of any proposed new or revised policy or practice. However there appears to be some confusion as to the circumstances in which Regulation 5 applies. In ***M v Fife Council*, 2014 SLT (Sh Ct) 147** a sheriff held that the local authority had an unwritten policy or practice of not funding young people's education beyond the age of 18, except to allow the person to complete the school year where they reached 18 during the course of the school year. The sheriff held that as a result of the recognised disability of the pursuer the defenders owed a positive duty in terms of Regulation 5(1) of the 2012 Regulations to carry out an assessment of the impact of the policy upon him. Whilst there might be an argument that the approach of the local authority was flawed, it seems to me that the sheriff was not correct to hold that Regulation 5 imposed a specific duty on the Council in this case. Firstly, there was no indication that this was a new policy or practice on the part of the authority. Secondly, Regulation 5(1) is not concerned with the application of a policy to a particular case. It is anticipatory. It requires the authority to consider the likely impact of a **proposed** new or revised policy or practice before that policy or practice is adopted. Thirdly, the assessment that is required is an assessment of the proposed new policy or practice against the needs specified in Section 149(1)(a) – (c) of the 2010 Act, *i.e.*, what impact would the new or revised policy or practice have in terms of meeting the general duty obligations. This is a new aspect of the impact assessment duty. Under the previous and existing legislation, impact is assessed against equality for certain groups, *i.e.*, what impact would this have on those with disabilities or on a particular gender. This does not mean that in reaching an individual decision concerning their functions that the PSED does not have a role (as noted above), it is just that Regulation 5 of the 2012 Regulations was not correctly applied in the ***M*** case. There are two further points to be aware of in relation to the ***M*** case. Firstly, that case was an action for payment and damages raised in the sheriff court under Section 114 of the 2010 Act. The PSED is a public law duty enforceable by judicial review, it does not give rise to an action for damages[2]. Secondly, the sheriff's decision was appealed to the Court of Session. The appeal hearing took place on 28 and 29 October 2015 and considered a number of different aspects of the sheriff's decision. The outcome may well be of wider interest in the context of discrimination law.

There have been a number of cases where decisions have been reduced or a public authority has been held to have acted unlawfully despite the existence of an Impact Assessment. In ***R (Kaur) v London Borough of Ealing*, [2008] EWHC 2062 Admin** the local authority funded a number of individual organisations to provide services around issues of domestic violence to particular groups of people. The Council decided that rather than funding individual organisations under sponsorship agreements it would commission borough-wide services from community and voluntary organisations by open competition according to published criteria. The local authority proposed that the service provider would provide the service to all individuals resident within the borough experiencing domestic violence irrespective of gender, sexual orientation, race, faith, age or disability. The claimants were an organisation who were funded under the existing arrangements. They expressed concerns that the criteria would have a disproportionate impact on black and minority ethnic women and that there had been no racial equality impact assessment. The Council agreed to withdraw its decision in order to prepare what it described as a draft equality impact assessment. Following this it maintained its proposal only to fund a single borough-wide service provider. The Council's decision was quashed because there had been no full racial equality impact assessment until sometime after the proceedings had been launched. That failure was a clear breach of section 71 of the Race Relations Act 1976 and the statutory code and the specified duties which the local authority was required to follow under the Race Relations Act 1976 (Statutory Duties) Order 2001. In determining as criteria that the provider should be a single source of services to all throughout the borough or a consortium with a single leader before a full racial equality impact assessment had been undertaken, the local authority acted unlawfully. Moreover it was wrong to fix on a solution with only the prospect of monitoring its effect on minorities in the future. Once the authority had identified a risk of adverse impact, it was incumbent upon it to consider the measures to avoid that impact before fixing on a particular solution.

In the conjoined cases of ***R (on the application of Green) v Gloucestershire County Council*** and ***R (on the application of Rowe) v Somerset County Council*, [2011] EWHC 2687 (Admin)** there were EIAs in relation to proposals to withdraw (Gloucesrtershire) or reduce (Somerset) their mobile library services and to reduce their static library service. The Court agreed that the issue was whether in substance the PSED had been carried out. There was no obligation to refer expressly to the statutory language in the EIA, although it would have been better practice if that had been the case. What was important was that the decision makers were aware of their PSED obligations when making their decision. The evidence however suggested that the local authorities' decision-makers had not consciously directed their minds to their obligations under the legislation.

In ***R (on the application of Winder) v Sandwell Metropolitan Borough Council*, [2014] EWHC 2617 (Admin)** the local authority were required to devise a council tax reduction scheme following the abolition of council tax benefit, as required by section 13A of the Local Government Finance Act 1992. A draft scheme was prepared and put out to consultation and an equality impact assessment was carried out. When the proposed scheme went to full council it was decided to impose a two year residence requirement to obtain the full benefit of the scheme, on the basis that the wider public funding cuts could result in people from other areas in which housing was more expensive migrating to that area, which could place further strains on the council's finances. That proposal had not been in the consultation process. The Court held that the residence requirement was ultra vires, but that even if the scheme had been intra vires the imposition of the residence requirement was unlawful in that it constituted an unjustified obstacle to free movement of people within the European Union, it amounted to unlawful indirect discrimination contrary to domestic, EU and human rights law, and it had been imposed by the council without the necessary consultation or due regard to its PSED.

> "[94] ….. *Section 149 was undoubtedly engaged: indeed, that was well recognised by the Council, in the way in which it conducted an EIA at various stages before the residence requirement was tabled on 4 December 2012. However, there is simply no evidence that the Council conducted any assessment at all of the race or gender impact of the residence requirement at or before it adopted the 2013–14 CTR Scheme; and scant evidence that it did so prior to the 2014–15*

Scheme. I do not consider that the evidence that there is (e.g. with regard to feedback towards the end of 2013, from wherever it came: see paragraphs 27(ii) and 75 above) is sufficient to show that the Council grappled at all with the effects of the requirement on those with the identified protected characteristics."

In ***R (on the application of Bracking) v Secretary of State for Work and Pensions*, [2013] EWCA Civ 1345, [2014] Eq LR 60** the SSWP proposed to close the Independent Living Fund in 2015 on the basis that its existing arrangements were financially unsustainable. There was a consultation, and an Impact Assessment and an Equality Impact Assessment were carried out. Following these the Minister for Disabled People decided to close the Fund. The majority of the court were not prepared to accept that in light of the very limited analysis of the adverse consequences of closing the Fund, that the Minister was sufficiently aware of the very real adverse consequences which closing the Fund would have on the lives of many of the more severely disabled. Nor were all three judges in the Appeal Court persuaded that the Minister properly appreciated and addressed the full scope and import of the matters which she is obliged to consider pursuant to the PSED. The EIA and the IA did not identify her legal obligations, for example, the positive obligation to advance equality of opportunity, nor to more specific obligations in the UN Covention on the Rights of Persons with Disabilities and which ought to inform the scope of the PSED with respect to the disabled. The primary focus of concern appeared to have been on achieving fairness as between those who benefit from the fund and those who do not. The Court (with an expressed degree of reluctance) was not prepared to assume that the Minister for Disabled People must be taken to be fully aware of her legal duties and to have complied with them, as this would undermine the important role which the PSED should play in governmental decision-making.

The decisions in ***Brown*** and ***Bracking*** are particularly important for anyone considering the requirements of the PSED. In particular in ***Bracking*** Lord Justice McCombe at paragraph 25 sets out a summary of principles on the application of Section 149 which is drawn from the earlier case law. This summary of principles has been repeatedly cited in many cases since then. In many ways these principles are no different from many of the basic principles of administrative law which are familiar to local government practitioners:

- The decision maker should be aware of all the legal duties which apply to the area under consideration, either because they have been correctly told what those duties are, or because they show in their decision that they correctly understand those duties;
- The decision maker or supporting officials should make inquiries with any relevant person or body and gather sufficient factual information before a decision has been made, so as to allow the decision maker to make an informed decision on the basis of the material available;
- Neither information gatherers nor decision makers should disregard relevant information, or take into account irrelevant information;
- The decision maker should come to matters with an open mind, aware of the possible need to reconsider any previously held views in the light of all the information available, and understanding the consequences of the decision;
- Ensure the decision is taken by a person who actually has the legal responsibility for making the decision;
- Have a record which shows what was done to satisfy the above, who did it, why it was done, and what the outcome was.

Finally, it should be noted that if something has gone wrong, the position is not necessarily irretrievable. In ***Watt v Lothian Health Board***, Lord Uist held that the Board had not been in breach of its PSED in deciding to stop providing an NHS Homeopathy service in Lothian. He went on to say that even if he had been persuaded that there had been a breach of its statutory duty, the countervailing factors were so overwhelming that if the matter was to be reconsidered, it was inevitable that the same decision would be made again. Since there was no real possibility of a different decision being made (***Tesco Stores Ltd v Dundee City Council*, [2012] UKSC 13, 2012 SC (UKSC) 278, Lord Reed at para 31**) he would not have ordered reduction of the original decision. Whether that argument is possible will, of course, depend on the nature of the issues involved and the strength of what is said to be the countervailing factor(s).

Robert Sutherland
Advocate
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[1] Hill and Kenyon, *Promoting Equality and Diversity, A Practitioner's Guide*, (OUP, 2008), para 3.40.
[2] Equality Act, 2010, Section 156, "A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law." This provision therefor applies to the PSED in Section 149 and also to specific duties created under sections 153 and 154 of the 2010 Act.