The Public Sector Equality Duty

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Introduction

1. The section 149 public sector equality duty (“PSED”) has been in force for nearly 2 years and continues to be the subject of a great deal of litigation with claims often directed at local authorities. Increasingly detailed analysis on review is carried out. In a recent case submissions from the Equality and Human Rights Commission (“EHRC”) about the extent of the duty was founded to a significant extent on detailed competing accounting arguments. Not all those arguments were accepted, but the court did agree that even a cost calculating decision anterior to actual assessment of need, cutting of services or curtailing choice required a section 149 approach.

2. The courts themselves have generally been less intensive than the ERHC might have wished in applying the duty (particularly in relation to budget setting) but it remains a difficult area for local authorities and one which requires careful preparation, and often ongoing detailed legal advice.

3. This Note is in 2 parts: (1) Checklist of the basics and (2) Examples from case law involving local authorities from the last 12 months; the sample represents a “score draw” for local authorities with 4 successful claims that the section 149 duty was breached and 4 unsuccessful claims.

PART 1: THE BASICS

1 Since 5 April 2011
2 R (South West Care Homes Limited and others) v Devon County Council with the EHRC as Intervener [2012] EWHC 2967 (Admin)
3 The fact that each resident would later be subject to individual assessment was no answer
4 Including in one 2012 case the presence of Counsel at meetings
4. Although the courts state often\(^5\) that the relevant jurisprudence is clear and not controversial, it bears re-stating because it is against the framework of decided cases that local authority decision making will be judged.

Section 149(1) of the 2010 Act provides:

“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.”

5. The Act sets out 9 protected characteristics in section 4:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

\(^5\)R (Daniel Coleman) v Barnet & Trustees of Etz Chaim Primary School [2012] EWHC 3725 at paragraph 65
Each of these is a protected characteristic. However, in respect of certain aspects of the policy of the Act marriage and civil partnership status do not have the quality of a “relevant protected characteristic”.  

6. Section 149 imposes the duty on public authorities (which includes other bodies exercising public functions7) to have “due regard” to the three aims set out in the section. This duty applies when the body is “exercising a function”.8 The duty must be fulfilled not only when a body exercises a statutory function under a specific provision of law, but when exercising any discretion vested in it or when carrying out a common law obligation.9

7. The duty applies not only to general formulation of policy but to decisions made in applying policy in individual cases.10

Case principles

8. Due regard is “the regard that is appropriate in all the circumstances”.11 The question is whether the decision-maker has in substance had due regard to the relevant statutory needs”. This requires one to “turn to the substance of the decision and its reasoning”.12 The duty is not, however, a duty to achieve a result but to have due regard to the need to achieve the statutory goals. This vital distinction means that substance must not be sacrificed to form. That is to say, mere mention of the duty is insufficient to fulfil it, mere absence of a statement of the duty is not of necessity a failure of the duty.

9. Regard that is “appropriate in all the circumstances” must take into account the importance of the areas of life of the members of the disadvantaged group, the extent of the inequality

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6 Section 149(7)
7 See the HRA definitions and jurisprudence on scope
8 Section 149(2)
9 R (OAO) D & S v Manchester City Council [2012] EWHC 17(Admin) at [48]
10 Pieretti v Enfield Borough Council [2010] EWCA 1104 [26] – an application for accommodation to the local authority
11 R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141.
12 At [37]
and such countervailing factors as are relevant to the function which the decision-maker is performing.\textsuperscript{13}

10. Pill LJ observed in \textit{Harris}\textsuperscript{14} that "due regard" to the statutory equality needs means \textbf{analysis of the material} available to the decision maker "\textbf{with the specific statutory considerations in mind}".

11. Review of the duty to pay due regard is substantive: the court does not simply review whether the failure to have due regard is Wednesbury unreasonable.\textsuperscript{15}

12. The statutory section is, clearly, devoid of detailed direction as to implementation. The framework case law guidance to which the court returns again and again is that contained in the earlier case of \textit{Brown}\textsuperscript{16} (referring to section 49A(1) of the Disability Discrimination Act 1995). \textbf{Six principles} were held to apply to the discharge by a public authority of its duty to have due regard to the goals set out in that section. The framework is transferrable to the obligation contained with the 2010 Act:

\begin{itemize}
\item \textbf{1} – The public authority must be \textbf{made aware of its duty} to have due regard to the identified goals [90].
\item \textbf{2} - The due regard duty must be \textbf{fulfilled before and at the time} that a policy affecting people is being considered by the public authority [91].
\item \textbf{3} - The duty must be exercised \textbf{in substance, with rigour and an open mind} and integrated within the discharge of the public functions of the authority – it is not a question of ticking boxes [92].
\item \textbf{4} - The duty may not be delegated [94].
\end{itemize}

\textsuperscript{13} Baker [31]
\textsuperscript{14} \textit{Harris v London Borough of Haringey} [2010] EWCA Civ 703 at paragraph [40],
\textsuperscript{15} \textit{R (CPAG) v SOS for Work & Pensions} [2011] EWHC 2616 [70]
\textsuperscript{16} \textit{R (Brown) v Work and Pensions Secretary} [2008] EWHC3158
5 - The duty is a continuing one [95].

6 - The keeping of an adequate record showing that the equality duties had actually been considered and the relevant questions pondered is good practice [96].

The process of the due regard duty is integral to the formation of the decision: it is not ex-post facto justification once the decision is made.\textsuperscript{17}

13. It should be noted, that the courts have drawn a distinction between disability and other targets of equality legislation such as race or sex because of the numerous different forms which disability may take. Needs are materially different: blindness, deafness and other disabilities require different consideration, and disability comes in varying degrees.\textsuperscript{18}

14. The need for sufficient information to enable the necessary balancing exercise inherent in performance of the duty is essential\textsuperscript{19}

15. Statements of the statutory purpose of the imposition of a general duty are helpful as was stated in Brown it was to

\textit{“Create a greater awareness on the part of public authorities of the need to take account of disability in all its forms and to ensure that it is brought into the mix as a relevant factor when decisions are taken that may affect disabled people”.}\textsuperscript{20}

16. Furthermore, the importance of the duty has been highlighted, see in relation to the race discrimination duty (formerly section 71 of the Race Relations Act 1976):
“It is the clear purpose [of section 71] to require public bodies to whom that provision applies to give advance to consideration to issues of race discrimination before making any policy decision which might be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State’s non-compliance with that provision was not a very important matter.”

17. It has also been formally expressed recently,\(^\text{22}\) (the citation comes from Baker)\(^\text{23}\) “promotion of equality of opportunity . . . will be assisted by but is not the same thing as the elimination of [racial] discrimination . . . the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non—discrimination . . .”

**Assistance given by the statute**

18. The Act gives help as to the intended meaning of the phrases it uses and defines some of them further. Subsection 149(3) particularly explains that having due regard for **advancing equality of opportunity** involves 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”

\(^{21}\) *R (Elias) v Secretary of State SOS for Defence* [2006] 1WLR 3212 at [273]-[274]

\(^{22}\) Recently in *R (OAO) SW Care Homes & Others* at [13]

\(^{23}\) *Supra*
19. The Act states that **meeting the needs of people** from protected groups involves taking steps to take account of those people’s needs. It describes **fostering good relations** as:

i. tackling prejudice, and

ii. promoting understanding.

20. It is imperative to note that subsection 149(6) provides:

“**compliance with the duties in this section may involve treating some persons more favourably than others; but that it not to be taken as permitting conduct that would otherwise be prohibited by or under this Act**”.

21. Section 149(6) should be read in conjunction with section 158 which provides, so far as material:

"(1) This section applies if a person (P) reasonably thinks that -

a) persons who share a protected characteristic suffer a disadvantage connected with that characteristic,

b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or

c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of -

d) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
e) meeting those needs, or

f) enabling or encouraging persons who share the protected characteristic to participate in that activity.

22. Regard must further be had to the Guidance and Technical Guidance (newly issued) to assist public bodies in meeting the equality duty in their policy-making and decision-making. The Recent Technical Guidance summaries the requirements for compliance with the duty as follows:  

   (i) knowledge of the duty

   (ii) timeliness

   (iii) real consideration

   (iv) sufficient information

   (v) non-delegable

   (vi) review, and

   (vii) evidence of consideration.

23. Perhaps, the obvious but necessary comment is this: the law is well established, the principles are clear and frequently expounded, however, the manner in which the analysis plays out in any case is heavily context and fact dependent. Furthermore, the manner in which the Court chooses to characterise the operative decision may influence considerably their approach to the intensity of the duty in any case.

**European underpinning**

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24 Para 5.2. This paragraph is, of course, a summary of the requirements set out in Brown.
24. There has been judicial consideration of the Treaty context to obligations in respect of disability. The UN Convention on the Rights of Person with Disabilities (CRPD) has been used to illuminate the concepts of disability discrimination and justification for discrimination.

25. The Court of Appeal has explained that the CRPD prohibits discrimination against people with disabilities and promotes the employment of fundamental rights for people with disabilities on an equal basis with others. It provides the framework for Member States to address the rights of persons with disabilities. As a legally binding international treaty that comprehensively clarifies the human rights of persons with disabilities as well as corresponding obligations on state parties, “a state by ratifying it, undertakes that wherever possible its laws will conform to the norms and values that the Convention enshrines.”

26. Article 4 obliges State Parties to:

"take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs or practices that constitute discrimination against persons with disabilities."

Article 5(3) provides that:

"in order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."

Article 19 provides:

"State Parties ... recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to

25 R (South West Care Homes Limited and others) v Devon County Council EHRC intervening[2012] EWHC 2967 (Admin)
26 InBurnip & Ors v Secretary of State for Work & Pensions[2012] EWCA Civ 629 see alsoAH v West London Mental Health Trust & Secretary of State for Justice[2011] UKUT 74
27 The CRPD was adopted by the General Assembly on 13 December 2006. It was ratified by the United Kingdom on 7 August 2009 and by the European Union on 23 December 2010.
facilitate full engagement by persons with disabilities of this right and their full inclusion and participation in the community by ensuring that

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community and to prevent isolation or segregation from the community;

(c) Community services and facilities are available on an equal basis to persons with disabilities and are responsive to their needs."

27. Plainly this may have resonance in the consideration of local authority duties and ratified treaties are, of course, relevant to the construction of domestic statute. The Courts also note in this context the relevance of Article 8 of the European Convention which has been interpreted as including the right to develop a personality in conjunction with others and the 'zone of interaction' with other people (see Niemietz v Germany [1992] 17 EHRR 97).28

28. Moreover, disability is a protected 'status' for the purposes of Article 14 of the European Convention which provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

PART 2: RECENT CASE LAW

28 "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
29. Against that general background – as stated, agreed by the Courts generally, to be clear and settled, this section will consider the following cases from the last 12 months where it was held that the section 149 duty had been breached:

   i. R (South West Care Homes Limited and others) v Devon County Council with the EHRC as Intervener [2012] EWHC 2967 (Admin)
   
   ii. R (RB) v Devon County Council [2012] EWHC 3597 (Admin)
   
   iii. R ((i) Lisa Williams (ii) Nicholas Dorrington) v Surrey County Council [2012] EWHC 867
   

30. And the following cases from the last 12 months where it was held that the section 149 duty had not been breached:

   i. R (Daniel Coleman) v Barnet London Borough Council & Trustees and Governors of Etz Chaim Primary School [2012] EWHC 3725 (Admin)
   
   
   iii. R (Greenwich Community Law Centre) v Greenwich London Borough Council [2012] EWCA Civ 496
   

Cases where the duty was held to have been breached

R (South West Care Homes Limited and others) v Devon County Council with the EHRC as Intervener [2012] EWHC 2967
In this case the High Court held that Devon County Council had failed to meet its public sector equality duty when setting care home fees for 2012/2013. The Council had issued its fees decision to providers and South West Care Homes had complained that the fees would provide a nil rate of return on capital and therefore some of the homes would not be financially viable and would have to close.

In the High Court the section 149 challenge was one of 3 challenges (the other 2 being failure to consult lawfully and irrationality). South West Homes won on the section 149 claim but lost on the other 2 heads of claim.

The case is useful because the judge (HH Judge Milwyn Harman QC) gave extensive consideration to the section 149 duty and considered relevant international jurisprudence.

The ‘function’ in question was identified as the responsibility under section 21 of the National Assistance Act 1948 to provide accommodation to adults who by reason of age, illness, disability or any other circumstances are in need of care and attention not otherwise available. Under section 47 of the 1948 Act, the Council was required to carry out an assessment of the care needs of such people.

The judge held that the Council had failed to have due regard to the section 149 duty “in substance or with rigour or with an open mind, to the need to eliminate discrimination and to promote equality of opportunity amongst elderly or disabled residents’. The Council ‘in carrying out this exercise failed to ask itself what it could do in respect of those needs’. There had not been any proper consideration of mitigation measures or proper management of potential home closures in setting the fees. The EIA should have been reconsidered in the light of this. Moreover there had been no proper consideration of the staff costs of engaging and interacting with residents suffering from dementia.

The case has been appealed.
R (on the application of RB) v Devon CC [2012] EWHC 3597 (Admin)

37. In this case it was held that both the local authority and the primary care trust had failed to discharge the section 149 duty when deciding to appoint an organisation called Virgin Care as the preferred bidder for a contract to provide integrated care and health services for children. The services had previously been provided jointly by the local authority and the primary care trust and when an EIA was written, it concluded that there was to be no change in the services provided and that therefore there was no perceived adverse impact on people with protected characteristics.

38. The mother of two children who received support under the previous scheme operated by the Council and PCT argued that they had failed to discharge the public sector equality duty.

39. The notion that because there would be no change in the services the duty would not be engaged misunderstood the duty. More was required. There should have been focus on the needs identified in s.149. The judge granted a declaration that the defendants, in reaching the decisions to appoint Virgin Care as preferred bidder, failed to discharge the public sector equality duty under s.149. However, he refused to quash the decisions as (i) time was pressing and (ii) the defendants had now addressed the public sector equality duty by a later EIA and (iii) the claimant was unable to point to any specific detriment which she or her children might suffer by the defendants' failure to address the public sector equality duty in the earlier decisions.

R (on the application of (1) Lisa Williams (2) Nicholas Dorrington) v Surrey County Council [2012] EWHC 867 (QB)

40. In this case it was held that when deciding that library provision in certain areas should be delivered via a community-partnership model whereby libraries would be staffed by volunteers, the defendant local authority had breached the section 149 duty by failing to consider a relevant matter, namely the nature and extent of the equality training needs of the volunteers and the way in which such needs might be met.
The Council’s decision to move to a volunteer model resulted from the need to reduce spending. Between May 2010 and January 2011, it conducted a "public value review" of its library service which culminated in a report to cabinet dated February 1, 2011. The report recommended, among other things, that there should be consultation about a community-partnership approach at selected libraries. The report stated that a "change of this magnitude would require skills new to the service as well as sufficient staff and management time to help establish community partnered libraries and to then support them on an ongoing basis with issues such as training". The consultation period ran from March to September 2011. On September 27, the cabinet, having considered a report described as "a progress update", made the decision now challenged.

The claimant argued that the Council had not had regard to the obvious equality issue of the need for training for volunteers.

The judge held that the cabinet did not consider a relevant matter, namely the nature and extent of the equality training needs of volunteers which had emerged from the consultations with the various community groups and the way in which such training needs might be met. The Council had therefore failed to have due regard to the equality issues referred to in section 149 and its decision was unlawful.

R (on the application of Barrett) v Lambeth London BC [2012] EWHC 4557 (Admin)

In this case, a local authority's decision to withdraw funding from a charity providing services to people with learning disabilities had amounted to a decision to no longer provide such services and was thus a breach of the section 149 equality duty but as the local authority had set aside that decision no relief was granted by the court.

The claimant (the director of the charity and a user of its services) applied for judicial review of two decisions of the local authority concerning the funding of a charity which provided services to people with learning disabilities.
Revenue from the local authority amounted to almost 90 per cent of the charity’s income: it received annual local authority grants and had a contract to provide services to people with learning disabilities within the local authority's area. When the local authority was forced to make budget cuts, it stopped the charity’s funding. Although it prepared an equality impact assessment (EIA) dealing with the decommissioning of the charity’s services, the cabinet agreed the budget cuts without being aware that an EIA had been done. The budget cuts were then agreed at a meeting of the full council. In April 2011 the local authority set aside its decision to decommission the type of services previously provided by the charity. It outlined the types of service it intended to commission and prepared a further EIA. In August 2011 it decided to commission, from another provider, some services previously provided by the charity. The decisions complained of were the decision to stop the charity’s funding and the decision to commission services from an alternative provider.

The judge held that a distinction could be made between stopping the charity’s funding and stopping funding the services it provided. While the former would not of itself engage the equality duty, the latter plainly would. It was undeniable that after January 2011 the local authority had decided that the type of services provided by the charity should not be provided, or that they should be changed significantly. However, the decision-making process on the budget cuts had got out of kilter with the EIA process. When the cabinet dealt with the budget cuts it had known that an EIA was necessary, but it had not been told that one had been done. Though the full council, when it approved the budget cuts, had been told that an EIA had been done, it had not seen it. The budgetary decision was an exercise of the local authority's functions and the equality duty was clearly engaged. The regard had for the EIA by the local authority's officers could not be attributed to the councillors, and therefore no regard to the equality duty could be attributed to the local authority. The decision on the budget cuts was therefore unlawful. However, that decision had been set aside by April 2011 and there was no point in granting relief in respect of it.

In terms of the decision to stop funding that particular charity, it was up to the local authority to decide the scope of the required consultation. It had been well aware of what services the charity provided and there was no need for consultation on that issue. It was entitled to consult simply about the nature of the services needed by people with learning disabilities. The way in which a local authority went about consulting on that question was
very much a matter for its judgment. It was unnecessary for a lawful consultation process to provide specific proposals, or to compare one provider's services with another's and to seek users' views on the difference. Finally, the local authority had properly considered the consultation responses. While it had had a closed mind as to whether it would fund any services through the charity, that was not the same as having a closed mind as to what services would be commissioned. It was clear that the local authority had not had a closed mind as to what services would be provided. That was what the EIA had focused on, and its contents were sufficient to show that the equality duty had been fulfilled. There was no need for an EIA to provide detailed explanations and lengthy analysis, so long as the features necessary for due regard were properly understood. The analysis did not have to resolve, with reasons, every issue that a party might raise. The challenge to the second decision would therefore be dismissed

_Cases where the duty has not been breached_

**R (on the application of Daniel Coleman) v Barnet London Borough Council & Trustees & Governors of Etz Chaim Primary School [2012] EWHC 3725 (Admin)**

49. This case held that when granting planning permission for the development of a school on land on which a garden centre had been situated, the local planning authority had discharged the public sector equality duty.

50. The claimant sought judicial review of a decision of the defendant local authority to grant planning permission for the development of a school on land on which a garden centre had been situated.

51. The garden centre had incorporated many green spaces, indoor and outdoor horticultural areas, an aquatic centre and an all-day cafe. It was regularly used by the disabled and elderly. The local authority concluded that "the [benefit] to the wider community of the provision of new educational facilities [outweighed] the adverse impact on those with protected characteristics".
The judge held that the local authority had done all that was required of it under section 149. In their report, the local authority's officers acknowledged that the implications of the new proposal for the 2010 Act represented one of the main planning issues on which the members had to concentrate in making their decision.

The officers' report displayed a coherent approach to the requirements of the "due regard" duty. When the committee resolved to grant planning permission, the officers, and in their turn the members themselves, were conscious of the equality duty under section 149, conscious of the particular effects the development was likely to have on those with protected characteristics and conscious that due weight should be given to those effects in the decision that had to be made. The officers marshalled all the material relevant to the equality duty. They collected the facts relating to the use of the garden centre and the representations made about the impact of its loss on those who had used it, including, specifically, the elderly and the disabled.

In their advice to the members, they placed those facts and those representations within their planning analysis, having taken care to distinguish the material relating to those with protected characteristics from that relating to the local populace as a whole. They expressed their conclusions, which were conclusions on balance. Guided in that way, the committee accepted the officers' advice and recommendation. And the local authority stated the result of the process, in concise terms, in its decision notice. All of that showed a conscientious approach to the imperatives of the equality duty.

There could be no doubt that the local authority's officers, and the members, were alive to each of the needs in section 149(1) and had the specific statutory considerations in mind. Not merely in form but also in substance, the equality duty in section 149 was properly discharged.

Tested by the six principles stated in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) the local authority's performance of the duty emerged as sound and complete. It had due regard to the need to achieve the statutory goals, not as an
abstract exercise but with realism and common sense. It did what was appropriate in all the circumstances. It had regard not only to "the importance of the areas of life of the members of the disadvantaged group ... affected by the inequality of opportunity and the extent of the inequality" but also to the "countervailing factors" to which due weight should be given.

Aaron Hunt v North Somerset Council [2012] EWHC 1928 (Admin)

57. In this case it was held that the local authority had complied with its duty under the Education Act 1996 and with its obligation to have regard to the public sector equality duties under section 149 when reducing its budget for the provision of youth services.

58. The claimant sought a quashing order in relation to an item of the revenue budget of the local authority which related to financial provision for youth services.

59. The local authority was faced with significant cuts in its allocation of funds. During a review, the local authority identified that there might be a need to consider making substantial financial savings in respect of the provision of youth services. The proposal adopted by the council was that it should "review youth service provision through promoting non-[council] funded positive activities, supporting transfer of responsibility to towns/parish councils and community groups or closing youth centres as a last resort ([ensuring] that targeted youth support will continue for the most vulnerable)" and specific budget reductions were set.

60. The Claimant argued that, in approving the budget reductions, the Council had, interalia, failed to comply with its duty to have regard to section 149.

61. The judge held that the evidence showed that the Council’s members did have due regard to the public sector equality duties when they reached their decision to approve the revenue budget. Among other things, the relevant equality impact assessment identified those budget proposals which had a high impact on service-users; it dealt explicitly and in detail with the
impact of the reduction in the youth-service budget; it referred explicitly to the impact on a number of the protected characteristics itemised in section 149 and it set out the information on which it based its conclusions and the steps to be taken to minimise or mitigate that impact.

R (Greenwich Community Law Centre) v Greenwich London Borough Council [2012] EWCA Civ 496

62. A local authority had had due regard to the section 149 duty when making changes to its funding of community legal advice services.

63. The appellant law centre appealed against a decision (R. (Greenwich Community Law Centre) v Greenwich LBC [2011] EWHC 3463 (Admin)) dismissing its application for judicial review of the respondent local authority's decision to cease funding it.

64. The law centre provided legal advice to some of the most vulnerable people in an area of London. It relied upon funding and one of its key funders had been the local authority. Available grants for the voluntary sector were reduced in January 2011 as a consequence of the Government's comprehensive spending review. The local authority reviewed its decision-making process to determine to whom funds should be given and undertook a full equality impact assessment and a re-commissioning exercise which led to a tendering process to provide legal advice services which were split into four modules. The law centre was unsuccessful in its tender for one of the contracts which was awarded to a different provider which had scored more highly in the selection criteria. At a later meeting, two local authority councillors exercised their right to call in the decision on the question of accessibility and the geographical spread of the services. After a consideration of those matters at a final meeting, the local authority reaffirmed its decision. The law centre’s application for judicial review of the local authority's decision was dismissed.

65. The Court of Appeal held that there was a need for the court to ask whether as a matter of substance there had been compliance by the local authority with its duties; it was not a tick-
box exercise (R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141). The local authority in practice dealt with all those groups with the protected characteristics identified in section 149 which realistically might be affected by their decision. The local authority actually structured its policy so as to ensure that those groups were the principal beneficiaries of such funds as remained available. A change from one provider to another without more would not usually engage equality considerations. The local authority fully recognised the accessibility implications and the equality implications were also specifically discussed at its final meeting and it was impossible to suggest that there was not due regard to that consideration.

R (on the application of Zofia Siwak) v Newham London Borough Council [2012] EWHC 1520 (Admin)

66. A local authority that was in the process of considering the long-term provision of advice services had not failed to comply with its section 149 duty because given that the scope of the services it wished to implement were still undefined, consultation at that stage would have been premature.

67. The claimant applied for judicial review of the defendant local authority's decision that future problem-solving advice services would be provided by local authority officers and would not include, as previously, any advice from the voluntary sector.

68. An advice consortium consisting of voluntary sector groups had been awarded a contract by the local authority. The claimant received assistance from one of the groups. The consortium's contract expired and the local authority established an Information Advice and Guidance (IAG) project to consider the long-term provision of advice services. The IAG adopted a three-tier system and Tier 3 was problem-solving advice. The scope of Tier 3 could not be agreed and, therefore, a meeting occurred on November 17 and a report was prepared. A draft Equality Impact Assessment (EIA) accompanied the report and evidence accompanying the draft included figures showing the high percentage of protected groups, the numbers previously assisted by the consortium and a breakdown of a sample of clients
by protected groups. The local authority decided that Tier 3 would include a one-to-one problem advice service administered by local authority officers.

69. The claimant wrote to the local authority challenging its decision not to commission services from the voluntary sector and to make no provision for face-to-face services until April 2013. The local authority confirmed that it would consult widely and examine a range of options including commissioning services from the voluntary sector and that it would publish evidence-based analysis of the impacts of the different potential models on people with protected characteristics as detailed in section 149 and on the fulfilment of the section 149 objectives. S issued proceedings. The local authority confirmed that it had not yet decided to exclude external advice agencies from Tier 3 advice provision, and that such a decision would be the subject of formal consultation.

70. The claimant submitted that (1) the local authority in reaching its decision on November 17 failed to comply with its public sector equality duty under section; (2) the decision was unfair due to the local authority's failure to consult.

71. The judge held that no decisions had been made by the local authority in relation to the future shape of Tier 3 advice, and the process was continuing. The EIA set out the different options of the local authority and voluntary sector provision and their impacts on the protected characteristics set out in section 149 which were very much in evidence. Notwithstanding the importance of the public sector equality duty, the court had to ensure that it did not micro-manage the decisions of local authorities, R. (Greenwich Community Law Centre) v Greenwich LBC [2012] EWCA Civ 496. Interference by the court at the instant stage would be to breach that sensible injunction and would constitute an unwarranted interference into local democratic processes. Consultation would have been premature in the instant case as the Tier 3 service was only in the process of being formulated, was uncosted and was still undefined as to the scope of the services within it. Further, it would have been wasteful as to resources and unhelpful in outcome since it would to an extent have been based on conjecture.
72. There was no duty to conduct a public consultation before November 17; it would have been impossible to engage in meaningful dialogue as there was insufficient detail of the proposals. The decision of November 17 was not a decision to cut the former services provided by the local authority advice consortium; no commissioning decision was involved at that point. Consultation in accordance with the local authority's policy on the preparation of an EIA was intended as confirmed by the local authority

Alison Foster QC
Anna Bicarregui
January 2013