

# Keeping it legal



**A guide for third sector  
organisations  
on public law  
and equality rights**

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# Acknowledgements

This report has been researched and written by Pam Grant (NAVCA), Terry Perkins (NAVCA), Ange Jones (NEP), Diane Astin (Public Law Project), Louise Whitfield (Public Law Project) and edited by Geraldine Nolan (NEP).

## Empowering the Voluntary Sector

Empowering the Voluntary Sector, run jointly by NCVO's Compact Advocacy Programme, NAVCA and the Public Law Project, with support from the Big Lottery Fund, provides tailored advice and training to help local third sector organisations understand the principles and framework of the Compact and public law.

## National Association for Voluntary and Community Action (NAVCA)

NAVCA is the national voice of third sector local infrastructure organisations (LIO's) in England. We help to ensure communities are well served via our member LIO's and their work with over 160,000 local groups and organisations.

NAVCA believes that local voluntary and community action is vital for healthy and inclusive communities. We support and promote the local third sector nationally by providing our members with learning and networking opportunities, information, resources and advice to support success, sustainability and to assist in building the capacity of local frontline groups.

In turn, NAVCA draws on its members' experience to influence government and contribute to national policy. We ensure that policy makers and opinion formers hear the perspectives of local groups and are able to understand their value in the delivery of public policy objectives. We also work closely with other national bodies to ensure a collaborative approach to policy development.

## National Equality Partnership (NEP)

The National Equality Partnership supports the third sector to challenge inequality and promote equality and human rights. It is a three year project (2008-11) funded by Capacity builders under the Improving Support Programme. Our national programme covers the whole of England.

### What do we do?

We offer training, information and one-to-one support to umbrella organisations to help them challenge disablism, homophobia, racism, sexism and other forms of discrimination and human rights abuse. We enable equalities organisations to increase their voices so that inequality is tackled effectively. All of our work promotes collaboration and partnerships, sharing expertise and encouraging long-term relationships between equalities organisations and the wider third sector.

Our work is closely informed by our reference group encompassing all equalities sectors as well as generalist organisations. The partnership of NEP is made up of:

- » Women's Resource Centre (WRC)
- » Voice4Change England
- » Consortium of Lesbian, Gay, Bisexual and Transgender Voluntary and Community Organisations
- » National Association for Voluntary and Community Action (NAVCA)

Women's Resource Centre is the lead partner with core staff based at our London office.

We believe that organisations run by people with direct experience of inequality and discrimination have a unique and vital role in creating lasting solutions to inequality. At NEP we ensure that all work to address equality, diversity and human rights in the third sector is done with close involvement of equality organisations.

## **Public Law Project**

The Public Law Project (PLP) is a national legal charity which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage.

Within this broad remit PLP has three main objectives:

- » increasing the accountability of public decision-makers;
- » enhancing the quality of public decision-making;
- » improving access to justice.

Uniquely for an organisation of its kind, PLP undertakes research, policy initiatives, casework and training across the range of public law remedies: judicial review, complaints procedures and Ombudsman schemes.

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# Introduction

This guide is designed to give voluntary and community sector (VCS) organisations a broad overview of how to use public law in combination with the current range (at the time of writing; September 2009) of equality duties. The guide aims to:

- » Explain the public law principles that public bodies must follow when making decisions
- » Explore how groups may use public law to challenge unfair decision making
- » Explore successful challenges such as Southall Black Sisters and Chavda
- » Summarise the law relating to the 'equality duties' that most public bodies must now follow.

The current legislative processes that apply to race, gender and disability discrimination impose a range of duties on public bodies. Failure to apply these duties can lead to unfair actions and decisions being made and therefore will leave the public sector open to challenges being made in the courts. This guide looks at how public bodies should deliver on these duties, how to identify when there have not been followed and how to take actions to rectify the situation.

Each area of legislation follows a similar pattern. Each contains a general anti-discrimination duty (binding on most public bodies) to have due regard to the need to eliminate unlawful discrimination, to promote equality of opportunity; and to promote good relations. Disability discrimination legislation goes even further and requires public bodies to take steps to take account of disabled people's disabilities (even where that involves treating disabled people more favourably); to promote positive attitudes towards disabled people; and to encourage participation by disabled people in public life.

These general duties are supplemented by additional specific duties, such as a requirement on public bodies to publish Equality Schemes setting out how they propose to meet the relevant general duty. These can usually be accessed via the body's own website.

But what does this mean in terms of the voluntary and community sector's relationship with public bodies? Most obviously, it means that the public body will have to consider the possible impact of its decisions, policies and procedures upon those within the community that are protected by anti-discrimination legislation (e.g. black and minority ethnic groups, women or those with disabilities). Therefore, if it is considering cuts to funding for organisations serving or representing these groups, the public body may well be obliged to:

- » Conduct a full impact assessment of the proposed cuts
- » In the case of services for disabled people, square its decision with its additional duties towards this group
- » Consider any other options that achieve the objective of saving money in ways that impact less upon the protected groups.

For obvious reasons, this process must be completed before any final decision is made.



A failure to follow this process may well render any final decision unlawful. An example of this can be seen from the case in July 2008 when Southall Black Sisters (SBS), represented by the Public Law Project, were successful in their legal case against the London Borough of Ealing. SBS provide services to black and Asian women who are the victims of domestic violence. They were challenging Ealing's decision to stop funding SBS and they relied on the 'race equality duty' to persuade the court that Ealing's decision was unlawful. This case is looked at in more detail later in the guide.

# Using public law to identify the issues

## Working definition of public law

We are all aware that public bodies carry out a wide range of public functions such as funding the VCS, welfare benefits and housing. These functions must be delivered following a clear, open and fair process. Public law is a set of legal rules which ensure that bodies carrying out public functions follow such processes.

**The principles of public law can be summarised as follows:**

- » **public bodies must act lawfully**
- » **public bodies must act fairly**
- » **public bodies' decisions must not be perverse or irrational**

Remember the difference between you and a public body – you can do what you like unless it is illegal – private law; a public body can only do what it is legally allowed to do – public law.

The way in which the courts look at public law differs from private law. We are used to the courts deciding, in a private law case such as a contract dispute, who is in the right and who must pay. In a public law case, the courts will only look at how public bodies behave and whether the court should intervene to correct this behaviour.

There is also a difference in the way private and public law cases are brought to court. In a private law case, there are specific requirements as to who can bring the case, e.g. the claimant must be a party to the contract or a person injured in an accident. In a public law case, anyone with sufficient interest (i.e. anyone affected by the decision, action or failure) can bring the case.

Many problems will arise because public bodies think that they can do what they like; they do not realise that they must have the power to do something and must only operate within the principles of public law. These have evolved due to the courts' concerns about public bodies' behaviour; public law provides a check on the power and actions of public bodies.

## Acting lawfully

A public body can only make decisions it has the legal power to make. This includes acting within its powers. For example, if a local authority has the power to demolish buildings only for specific purposes (e.g. regeneration or road building), it would be unlawful if it decided to demolish buildings for other reasons.

This principle extends to the way decisions are made. When making any decision a public body must take account of relevant information. If a public body makes a decision it has the power to make but ignores relevant information, the decision may be unlawful. An example would



be where a public body fails to have any regard to certain legal duties, including the general equalities duties.

Similarly, taking into account irrelevant information may also make a decision unlawful. An example of this may be a local authority making the decision to withhold funding on the basis that it has heard that the group is outside of the law. If the decision is made based on hearsay rather than an investigation of the facts, then the information may be irrelevant.

Even if a public body has a wide discretion when making a decision, it must still act lawfully in exercising that discretion. When making a decision it must consider the purpose of the power it has been given and act consistently with that purpose. Also, it must not operate a rigid policy which would mean that in reality it is not exercising discretion at all. This is called 'fettering discretion' and is unlawful. An example would be where a local authority has the power to offer financial help to people in certain circumstances (such as with the cost of school uniforms). It would not be unlawful to have a policy which applied certain criteria so that some people would be refused help. It would be unlawful to have a policy that says that the local authority does not offer help to anyone.

## Acting fairly

The duty to act fairly usually means that the public body has to ensure two things:

- » That the decision-maker (person or body) has no bias or personal interest in the resulting decision
- » That those affected by the decision are given a fair hearing.

'Bias' is hard to prove and the courts will usually only find that a decision-maker was biased if s/he had a personal, usually financial, interest in the outcome.

A 'fair hearing' does not necessarily mean an actual hearing but does mean giving to the person affected by the decision notice of any adverse or negative information and a chance to respond or explain before the decision is made. An example would be where a funding body decides to end a community group's funding relying on information about the group's poor performance. The funding body should tell the group about the information they have and give them an opportunity to respond before it makes the decision.

## Consultation

The duty to act fairly may mean that a public body must carry out consultation before making a decision. Sometimes there may be legal rules that specify that a body must consult about certain decisions. An example is where a public body is devising its Equality Scheme; consultation must be carried out with certain groups of people likely to be affected (see Appendix).

Additionally, there may be a duty to consult because a public body has a policy or a history of consulting on a particular matter. If a public body failed to consult and this failure led to an adverse or negative effect on those affected, it would raise what is called a 'legitimate expectation'. This could be challenged.

Consultation is particularly important in relation to the equalities duties. Usually, if a public body is considering a decision that may have an adverse effect on a particular group; it must consult before making the decision. Many public bodies will set out on their websites the kinds of decisions on which they will consult and how they will consult. If they fail to follow their own policies this may also make their decision unlawful.

## **Giving reasons for decisions**

Public bodies don't have to give reasons for all decisions. However, sometimes the law says that reasons must be given, for example, when a local authority makes a negative decision on a homeless application.

In other cases, even where there is no clear legal duty to give reasons, the courts may expect reasons to be given so that those affected by the decision know whether the decision has been made properly or not. An example would be where a public body gives funding to voluntary organisations and offers a right of appeal if a funding application is refused. The voluntary organisation would need to know the reasons for the decision to make the appeal meaningful.

## **Perverse or irrational decisions**

Public law is mostly about the way decisions are made rather than the merits (outcome) of the decision itself. However, if a decision is perverse or irrational – a decision that no rational body could have made – the court may find that the decision cannot stand. This is sometimes called 'Wednesbury unreasonableness', after the case in which this rule was set out by the court. An example of irrationality is seen in the case against Leicester City Council, who had banned a rugby club from playing at its own ground because team members had been on a tour to South Africa during the apartheid regime, the court held that this decision was irrational or unreasonable.

Because this is a very high standard, cases rarely succeed on this basis alone. However, decisions for which there was no evidence at all or which "flew in the face of the evidence" have been held by the courts to be irrational.

# The Equality Duties

Race and sex discrimination have been unlawful since the 1970s: this is provided for by the Race Relations Act 1976 (RRA), the Sex Discrimination Act 1975 (SDA) and the Equal Pay Act 1970 (EqPA). In 1995 the Disability Discrimination Act 1995 (DDA) made discrimination on the grounds of disability unlawful.

The inquiry into the murder of Stephen Lawrence found that ‘institutional racism’ affected the police services in London and nationally. The inquiry report stated that: “It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.” In response to the Inquiry’s findings the RRA was amended in 2001. The amendment gave all public bodies a positive duty to tackle discrimination, harassment and inequality on the grounds of race. Similar amendments were made to the DDA in 2005 and to the SDA in 2006.

As a result, most public bodies now have a general duty to take a proactive approach to discrimination and inequality on the grounds of race, gender and disability. Most public bodies also have specific duties to prepare and publish Equalities Schemes setting out how they propose to carry out the general equality duty. A summary of the general and the specific duties is set out in the appendix.

## The General Equality Duty: race, gender and disability

Public bodies must have ‘due regard’ to the need to eliminate unlawful discrimination and to promote equality of opportunity. The precise duty is described in a slightly different way in each scheme (see appendix). What is common in all cases is:

- » The public body must be proactive:

*It is not enough to avoid actually discriminating. The public body must consider whether its decisions and policies are likely to have an impact on equality of opportunity and look for ways to promote equality.*

- » The duty applies to public bodies and to private bodies exercising public functions:

*Public bodies include government departments, local authorities, Primary Care Trusts (PCTs) and bodies distributing public money, such as the Big Lottery Fund (BLF). The duty applies to all the activities of public bodies although it may be less relevant to some activities than others.*

*Private bodies are sometimes contracted to carry out public functions. This would include private contractors or voluntary agencies given funding by public bodies to provide services that the public body has a duty to provide. An example would be a private company running a prison. Such organisations would have to follow the general equalities*

*duties only when carrying out these public functions but not when carrying out private functions, such as operating security services for private individuals and companies.*

- » The duty is to have 'due regard':

*The duty is not to actually eliminate discrimination and promote equality of opportunity but only to have regard to the need to do so.*

*'Due regard' means having the regard that is appropriate in the circumstances, given the relevance of the particular decision or function to equality issues. To decide this, it may be necessary for a public body to assess the likely impact of the decision or policy under consideration (see below).*

- » The duty only applies in relation to race, gender and disability.

## **Other equality considerations and the new Equality Bill**

At present, it is unlawful in relation to some of its activities for a public body to discriminate on the grounds of:

- » Age
- » Religion or belief
- » Sexual orientation.

However, for these groups there is not yet any general duty to promote equality of opportunity or to eliminate unlawful discrimination. The new Equality Bill includes these groups in the definition of persons with "protected characteristics" and there will be a general equality duty applying to race, gender, disability, religion and belief, age and sexual orientation.

Many public bodies, in anticipation of the new Equality Bill, have adopted policies under which they say they will take steps to promote equality of opportunity and to eliminate unlawful discrimination on these additional grounds. If the public body has a policy setting out how it will treat certain groups, it must follow its own policy, or give good reasons for not doing so.

## **Targeting services**

As a general rule it is unlawful for a public body to discriminate on the grounds of race, gender or disability. However, in some circumstances a public body may provide or fund services for one racial group, for women (or men) only or for disabled people. This 'positive discrimination' must be justified on specific grounds as set out in each Act.

The general equality duties do not require a public body to provide targeted services. However, in some circumstances it may be argued that targeted services are the best way to satisfy one of the general equality duties.

The particular criteria that must be met to justify targeted services are set out in the appendix.

## **Specific duties: Equality Schemes**

The general duty applies to almost all public bodies and to private bodies exercising public functions. In addition, most public bodies have specific duties relating to race, gender and disability equality. These specific duties do not apply to private bodies. The most important specific duty is the duty to develop and publish an Equality Scheme for each equality group. The action a public body intends to take in relation to each equalities group may be set out in a single equality scheme but particular issues need to be addressed for each group (see Appendix).

The Southall Black Sisters case illustrates many of the general principles of public law as well as the impact of the general race equality duty on local authority decision making.

# How to use public law to prevent and manage disputes

## Familiarise yourself with the public body's policies

Most public bodies must prepare and publish 'equalities schemes' (see appendix). These can usually be found on their websites. Sometimes the website will also set out the kinds of decisions on which it will consult and how it will consult – this may be part of the equalities scheme or may be part of a general policy on consulting stakeholders on its decisions.

If a public body makes a decision without doing what it says it will do to consult or to assess the impact of the decision this will usually mean the decision is unlawful. It is important therefore to be familiar with the published policies of the public body you are dealing with.

The way a public body has behaved in the past and the promises it has made may also create a 'legitimate expectation' that it will continue to behave in the same way. So, if you have been consulted in the past you may expect to be consulted in the future unless the public body has a good reason for changing what it does.

## Keep records and put things in writing

Sometimes decisions are communicated and promises made during meetings or on the telephone. If you are told something important you may want to write to the public body, just confirming what was said. Below is an example of such a letter.



Dear X

I am writing as the secretary of the YY Group.

I wanted to confirm what we discussed at our meeting with you and the Grants Officer on 4 January. We asked you about the council's proposals regarding our funding for the next financial year and you told us that we had nothing to worry about and that we would be receiving the same level of funding as we received during the current year.

We are very pleased about this and we look forward to working with you in the future.

Yours sincerely

Z

Remind the public body about the equality duties and tell them why they apply. If you are aware that a public body is considering a decision that you think will have an adverse effect on an equality group, contact them and tell them why.



Take this situation as an example:

The council provides a welfare rights advice service. The service is available by referral only and most of the referrals are made by the council's social services and by the community local mental health team. The office has disabled access and welfare rights workers offer home visits, signing and have access to interpreters. You have heard that the council intends to end the funding to the service from next year. They say that the council gives grants to other organisations that provide similar services, such as the Citizens Advice Bureau and Mind and they want to avoid duplication of services. You don't know when the decision is to be made or who will make it.

An example of a letter you could send to the council appears on the following page.



To: The Chief Executive, Nicetown

Dear Sir/Madam

We are a local carers' group.

We understand that the council is considering ending or reducing the funding for its welfare rights service. We are concerned about the effect this decision is likely to have on our disabled family members and other disabled people locally.

We have been told that the council think that the Citizens Advice Bureau (CAB) and Mind will be able to help those who currently use the council's service. However, we believe that many people will be left without help if the council stops providing a welfare rights service.

The welfare rights advice service provides specialist advice on disability benefits. It also offers representation at tribunals. Its offices are accessible to wheelchair users and outreach sessions are held at the Nicetown Hospital's psychiatric unit. We know that the CAB gives some welfare rights advice but they only have one full-time welfare rights adviser and she is so busy that you usually have to wait two to three weeks for an appointment. She doesn't do home visits and the CAB don't represent people at tribunals. Mind offer only 'signposting advice' and, in fact, they refer most people who need specialist welfare benefits advice to the council's service.

In the circumstances this decision would obviously have a negative impact on disabled people locally.

In addition, the council's service uses language interpreters whereas the CAB has access only to telephone interpreting services and Mind does not have access to any interpreters although some of their volunteers speak community languages.

We therefore think it likely that the decision would also have an adverse impact on Black and minority ethnic service users.

The council's Equalities Scheme says that the council will, when considering "a new or significantly changing policy, carry out an Equality Impact Assessment to identify adverse impact on the promotion of race, gender and disability equality". The council's consultation policy also says that it will consult local people about the services it provides.

We therefore expect the council to carry out a full Equality Impact Assessment on the proposal to stop funding the council's welfare rights service. We also expect that you will consult all those likely to be affected, including ourselves, on the proposal.

Please can you confirm that these steps will be taken before any decision is made?

We would be grateful to hear from you within 14 days, i.e. by Friday 16th XXX 2010.

## Don't be afraid to ask questions

Often groups dealing with public bodies hear rumours about decisions that have or are about to be made. If this happens, don't be afraid to write and ask the public body whether a decision has been made, and if so, when. Or, if the decision has not yet been made, ask when it will be and by whom.

Public bodies also make many of their promises verbally in meetings; if you have been promised something by a public body, such as additional funding or support, record it. Send an email to the person making that promise outlining what has been agreed or promised. If they fail to respond, then arguably that promise stands and the public body must deliver. For example, an organisation based in Yorkshire, providing services to families, was promised a substantial sum of additional funding to carry out a range of services. The money did not materialise so the chief officer of the organisation asked a number of questions in a meeting with the public body. It was pointed out to the public body that when a promise was made, unless the public body had good and clear reasons to change it, then they must act upon their word or potentially face a public law challenge. As a result, the organisation received all funding that had been promised.

## Don't just wait for the final decision

As happened in the SBS case, a public body may devise policies and set criteria which disadvantage certain groups before the actual decision on funding is made. If the public body sets the criteria for commissioning in a way that means that groups working specifically with women, black and minority ethnic groups or disabled people cannot bid for the funds, this may be the decision that needs to be challenged.

## Get legal advice early

If a decision has been made without proper consultation or without considering the equality duties and the impact the decision is likely to have on equality groups, it may be unlawful and a court could quash the decision. However, you must bear in mind that a claim must be brought as soon as possible and in any event, within three months.

**Failure to act promptly when faced with a public law dispute can create problems. You must take legal advice early on in the process, particularly if you are considering Judicial Review.**

**You must (with the support of your legal team) apply to the High Court for proceedings to be issued against the public body as soon as possible after the action or decision has been taken by the public body, and in any case, it must be within three months of that date.**

**The High Court has turned down claims entered within the three month time scale because they feel the claimant could have acted more quickly.**

Although you may hope to persuade the public body not to implement the decision, negotiating and making representations does not extend the time limit. Even if the public body says it will consider what you have to say, the time limit still applies. For example, if you find out about a decision one month after it was made, and you take another month to put forward your arguments, which the public body considers for one month, before confirming that the decision stands, you will be too late to bring a legal challenge.

## Considering a challenge

Poor decision making by public bodies can be challenged in four main ways:

- » Complaints procedures
- » Ombudsman schemes
- » Compact advocacy
- » Judicial review.

Regardless of which method of dispute resolution will suit your needs, the best method of starting the process is to open dialogue with the public body and try to identify a way forward. To this end, the use of the Compact as a method of dispute resolution is more likely to provide a non-adversarial route to solving the issues that have arisen. Consider your reaction to being the recipient of challenge, would you prefer to have a meeting in order to negotiate a way forward or face a judicial review or investigation by the Ombudsman.

It is important to remember that even though you need to consider all methods of dispute resolution, there is no order of hierarchy or requirement that you try them all before bringing a judicial review claim. Court proceedings may in fact be the only solution available to you for a variety of reasons, and you may be able to justify going ahead with a judicial review even without trying any other remedies.

Judicial review is the court procedure which allows public decisions to be challenged. In the main the courts will confine themselves to looking at the process of decision-making: judicial review is not like an appeal; the court cannot make the decision itself, it can only ensure that the public body makes the decision in a lawful way. For this reason, the most common kind of court order, if a claim is successful, is one where the decision is cancelled ('quashed'). The public body must then make the decision again. Sometimes the public body can make the same decision but, having followed the proper procedure, the decision cannot then be challenged.

Remember, a claim for judicial review must be made within three months of the decision being challenged. However, claims should be made as soon as possible and if there is any delay the court can refuse to give permission for the claim to be brought; even if it is within three months.

# Successful challenges using the equality duties

## *The Southall Black Sisters case*

Southall Black Sisters (SBS) is a not-for-profit organisation, founded in 1979. For 30 years it has provided specialist services to Asian and Afro-Caribbean women, particularly relating to issues arising from domestic violence. Since the mid-1980s it has been partly funded by the London Borough of Ealing. SBS manages a resource centre in West London providing a comprehensive service to women experiencing violence and abuse. It provides specialist advice, information, casework, advocacy, counselling and self-help support services in several community languages.

Under a three-year rolling sponsorship agreement SBS received £102,000 from Ealing for the years 2007 and 2008. However, in June 2007 Ealing decided that, instead of funding individual organisations under sponsorship agreements, it would commission borough-wide services from community and voluntary organisations; contracts would be awarded by open competition according to published criteria. Ealing gave notice to SBS on 16 July 2007 that its funding would end in March 2008.

The original specification drafted by Ealing suggested that it would grant an award of up to £100,000 per year for three years to the successful bidder; the aim was that the successful bidder would provide the service to “all individuals irrespective of gender, sexual orientation, race, faith, age, disability, resident within the Borough of Ealing experiencing domestic violence”. Ealing quickly abandoned the criterion requiring services to be provided irrespective of gender but maintained the other criteria. On 18 September 2007, after consultation, Ealing decided that this was the basis upon which the awards would be made.

As part of the consultation SBS expressed concerns that the criteria would have a disproportionate impact on black and minority ethnic women and that no racial equality impact assessment (REIA) had been carried out. In response, Ealing agreed to withdraw the decision of 18 September 2007 in order to prepare what it described as a draft equality impact assessment. It consulted voluntary organisations including SBS on the REIA.

During the further consultation more concerns were expressed about the likely impact of the proposal to award funds to a provider who offered services throughout the borough to all in need, whatever their ethnic origin. It was argued that this would have a detrimental effect on the specialist services provided to black and minority ethnic women.

On 26 February 2008 Ealing confirmed the decision to fund only an organisation providing services to all throughout the borough.

SBS brought a claim for judicial review challenging the decision of 26 February 2008. They argued that:

- » The decision was contrary to the council's general race equality duty
- » The council had failed to follow its own policy for assessing the impact of its decision on ethnic minorities, and
- » The proposed criteria were based on a misunderstanding of the Race Relations Act and how it applied to the policy of 'cohesion' which Ealing was promoting.

On the second day of the hearing Ealing conceded that it could not maintain the decision. They agreed to continue to fund SBS until a new decision was made about commissioning services for the victims of domestic violence.

Despite this concession the judge decided to give a full judgment, setting out the relevant principles in the legislation and the Code of Practice.

## **The Law**

### **The General Race Equality duty and the Code of Practice**

The Race Relations Act section 71(1) provides:

"Every body or other person [listed in the Act] shall, in carrying out its functions, have due regard to the need –

- a) To eliminate unlawful racial discrimination, and
- b) To promote equality of opportunity and good relations between persons of different racial groups."

There is also a statutory Code of Practice which the judge said gave the legal obligations on public bodies "recognisable content". The Code must be taken into account by the court or tribunal if it is relevant.

The Code identifies the four principles which should govern public authorities' efforts to meet the duty to promote race equality. These are:

- a) Promoting race equality is obligatory for all listed public authorities
- b) Public authorities must meet the duty to promote race equality in all relevant functions
- c) The weight to be given to race equality should be proportionate to its relevance
- d) The elements of the duty are complementary which means they are all necessary to meet the whole duty.



## How relevant is the duty?

When deciding how much weight to give to the duty, the public body must consider how relevant the duty is to a particular function; greater consideration and resources should be given to those functions or policies which have the most effect on the public. The Code identifies important questions that a local authority should ask itself, particularly:

**“ Could the policy or the way the function is carried out have an adverse impact on equality and opportunity to some racial groups; in other words, does it put some racial groups at a disadvantage? ”**

So, how the duty may apply depends on an assessment of the potential impact of the decision or policy on the equalities group.

## On whether the impact must be assessed before taking the decision

The judge said:

**“ Of particular relevance to [this] case is the duty to assess the likely impact of those policies on the promotion of race equality ... These provisions express the vital principle that the impact of any proposed policy should be assessed and steps to obviate [prevent] any adverse impact considered before the adoption and implementation of the proposed policy... What is important is that a racial equality impact assessment should be an integral part of the formation of a proposed policy, not justification for its adoption. ”**

Therefore:

- » A public body must assess the potential impact of a decision or policy it is considering
- » This must be done before the decision is taken or the policy adopted
- » The equality impact assessment should be undertaken as part of the formulation of the policy not as a ‘justification for its adoption’.

## On following the Codes of Guidance

The judge said:

**“ An authority is only entitled to depart from the statutory code for reasons which are clear and cogent. ”**

While the statutory Code is not the law, a public body should follow the Code unless there is a good reason not to and must be able to explain why it has decided not to follow the Code.

R (on the application of Kaur and Shah) v London Borough of Ealing and EHRC (Intervenor) [2008] EWHC 2062 (Admin) 29 July 2008  
In relation to race equality the list is found in Schedule 1A of the Race Relations Act 1976.

## On recording the impact assessment

The judge said:

***The process of assessment should be recorded ... Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage. ... But a record will not aid those authorities guilty of treating advance assessment as a mere exercise in the formulaic machinery. The process of assessment is not satisfied by ticking boxes. The impact assessment must be undertaken as a matter of substance and with rigor.***

A public body cannot simply claim that it has assessed the potential impact when making a decision. There must be a record of the way the assessment was carried out.

However, the existence of a document is not necessarily enough – the assessment must not simply be a matter of ‘ticking boxes’.

## On whether a public body should follow its own policy

The judge said:

***Ealing has published its own policy for conducting racial equality impact assessments. The policy makes it clear that Ealing would carry out impact assessments in three stages, an initial equality impact assessment, an intermediate impact assessment and a full equality impact assessment. ... Good administration and fairness demands that a local authority like Ealing is only entitled to depart from its own policy where [this is] a proportionate response to the circumstances which led the authority to consider such a departure.***

Almost all public bodies have a duty to publish their equalities schemes – setting out how they will discharge their duties in relation to race, gender and disability equality. The schemes will usually state how they will consult and how the impact of its decisions will be assessed. Public bodies must act in accordance with these published policies unless there is a good reason not to do so.

## Ealing's errors

### No impact assessment until after the decision

The judge said:

***There was no full racial impact assessment until some time after these proceedings were launched, namely on 5 June 2008. This failure establishes a clear breach of Section 71 of the 1976 Act, the statutory code and the specified duties which Ealing was required to follow under the 2001 order [see appendix]. 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 Council acted unlawfully. Moreover it was wrong to fix on a solution with only the prospect of monitoring its effect on minorities in the future.***

### No attempt to consider measures to avoid adverse impact

The judge said:

***Once the Borough of Ealing had identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution. It erred: in having recognised the problem whilst merely hoping to assess its extent after it had settled on its criteria.***

Many impact assessments identify potential adverse impact or summarise the concerns of those consulted about possible adverse impact but, instead of setting out how adverse impact might be avoided, simply state that the impact of the policy will be monitored in the future. In the SBS case this was held not to be sufficient.

### On misunderstanding of Race Relations Act

Ealing seemed to believe that it must fund a service for all residents regardless of racial origin and that to do otherwise would breach the Race Relations Act. They argued that the Act did not allow an organisation to supply services exclusively by refusing to provide services to members of another racial group, and further that it did not permit a service provider to discourage users from a particular racial group from using its services by its choice of language.

However, section 35 of the RRA provides that the RRA does not make unlawful "any act done in affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary [supplementary] benefits."

The judge held that Ealing's understanding was wrong:

***The importance of Section 35 is that it recognises that the elimination of discrimination and the promotion of equality requires indirect discrimination to be eliminated and equality for those who are the victims of indirect discrimination may require their special needs to be met. ... Section 35 is ... a manifestation of the important principle of anti-discrimination and equality measures that not only must like cases be treated alike but that unlike cases must be treated differently.***

Ealing had made its decision on the basis that the government's cohesion policy prevented it from funding services that were only available to certain ethnic groups. The judge said:

***Ealing's mistake was to believe that cohesion and equality precluded the provision of services from such a source. It seemed to believe that such services could only lawfully be provided by a single provider or consortium to victims of domestic violence throughout the borough. It appreciates that it was in error and that in certain circumstances the purposes of Section 71 and the relevant statutory code may only be met by specialist services from a specialist source.***

While it will not always be the case, the judge held that in some cases the general equality duty can only be met by providing specialist services, not available to all regardless of race, gender or disability.

The judge concluded:

***As I have endeavoured to explain, specialist services for a racial minority from a specialist source is anti-discriminatory and furthers the objectives of equality and cohesion. I can do no better than to conclude this judgment – before giving the agreed order – by quoting the chairman of the Equalities Review in the final report *Fairness and Freedom*, published in 2007:***

***'An equal society protects and promotes equality, real freedom and substantive opportunity to live in the ways people value and would choose so that everyone can flourish. An equal society recognises people's different needs, situations and goals and removes the barriers that limit what people can do and can be.'***

## Disability Equality Duties – a legal challenge

To date there have been no reported legal cases about the gender equality duty. However, in the case of Chavda a challenge relying on the disability equality duty was successful.

In Chavda the local authority made a decision to restrict adult care services to people with critical needs only. Previously it had provided services to those whose needs were assessed as 'substantial' as well as those assessed as 'critical'. The decision meant that a number of adults would no longer receive any services from the local authority.

Two service users whose services were to be reduced or withdrawn brought a claim for judicial review of the decision. They argued:

- a) That the authority's consultation process had been flawed
- b) That they had failed to take account of the Human Rights Act
- c) That their decision making did not comply with their disability equality duty
- d) That they had acted unlawfully in applying rigid criteria rather than considering each individual case on its merits
- e) That the decision was irrational.

The judge rejected all of the arguments except the one which relied on the disability equality duty. Although the authority claimed to have had regard to the duty, no reference was made to it in any of the documents.

The authority had conducted an 'equality impact assessment' before the meeting at which the decision was made. This addressed different groups of service users and found that there was a risk of adverse impact and that it should be monitored in future. However, it did not specifically address the disability equality duty.

The judge held that:

***The effect of the decision was to deprive those in substantial as opposed to critical need, many of whom are disabled, of a service of which they were, by definition, in need. In its extensive process of consultation the Council had regard to the position of disabled users in the ways mentioned.***

***... I recognise that in the indirect respects which [the authority] identifies, the importance of these matters may have been drawn to the attention of the decision-takers***

***... I recognise that the general duty on the Council under Section 49A is only to have "due regard" to the listed considerations (but as I have mentioned the [statutory Code of Guidance] states that this requires more than simply giving consideration to the issue of disability).***

***These are important duties nonetheless including the need to promote***

***equality of opportunity and to take account of disabilities even where that involves treating the disabled more favourably than others. There is no evidence that this legal duty and its implications were drawn to the attention of the decision-takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes.***

***... It is important that Councillors should be aware of the special duties the Council owes to the disabled before they take decisions. It is not enough to accept that the Council has a good disability record and assume that somehow the message would have got across.***

***...these considerations lead me to conclude that if the relevance of the important duties imposed by the Act had been adequately drawn to the attention of the decision-makers there would have been a written record of it.***

Clearly, therefore, it is not enough for a public authority to say that it has had “due regard” to the duty. There must be evidence that the nature of the duty has been drawn to the attention of those people who make the decision.



## Where to get further help

Individuals seeking legal advice can contact Community Legal Advice on **0845 345 4 345** or visit their website at <http://www.communitylegaladvice.org.uk/>. The website enables people to check whether they are eligible for legal aid.

The Empowering the Voluntary Sector project, a partnership project formed by the Public Law Project, Compact Advocacy and NAVCA provides a free advice service for voluntary and community organisations facing public law disputes. The Advice team, comprising of the Compact Advocates and Lawyers will look at the issues and provide appropriate advice and if necessary, legal representation for such disputes. The team can not provide advice on private law disputes such as contract, employment, etc.

To contact the team call them on **020 7520 3161**, Monday to Friday 10.00 till 16.00 or email them at [evsAdvice@ncvo-vol.org.uk](mailto:evsAdvice@ncvo-vol.org.uk).

Another source of advice in such disputes may be your local infrastructure organisation. To find their contact details go to <http://webdb.navca.org.uk/home.aspx>

If you wish to find out more about the project or attend a one-day workshop on how to use Compact and Public Law go to <http://www.navca.org.uk/evs>

# Appendix

## The Equality Duties

### The General Equality Duties: race, gender and disability

#### Race

Race Relations Act (RRA) section 71(1):

“Every body or other person [listed in the Act – see below] shall, in carrying out its functions, have due regard to the need•

- a) To eliminate unlawful racial discrimination; and
- b) To promote equality of opportunity and good relations between persons of different racial groups.”

#### Gender

Sex Discrimination Act (SDA) section 76A:

“A public authority shall, in carrying out its functions, have due regard to the need•

- a) To eliminate unlawful discrimination and harassment; and
- b) To promote equality of opportunity between men and women.”

Under the SDA unlawful discrimination and harassment includes:

- » Discrimination or harassment related to sex, pregnancy or maternity, gender reassignment and marital or civil partnership status, conduct of a sexual nature and victimisation that is unlawful under the Sex Discrimination Act 1975;
- » Discrimination that is unlawful under the Equal Pay Act 1970.

#### Disability

Disability Discrimination Act (DDA) section 49A:

“Every public authority shall in carrying out its functions have due regard to •

- a) The need to eliminate discrimination that is unlawful under [the DDA]
- b) The need to eliminate harassment of disabled persons that is related to their disabilities
- c) The need to promote equality of opportunity between disabled persons and other persons
- d) The need to take steps to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons
- e) The need to promote positive attitudes towards disabled persons; and
- f) The need to encourage participation by disabled persons in public life.”

DDA section 1(1) defines a 'disabled person' in the following way: 'a person has a disability for the purposes of this Act if s/he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'. Some conditions, such as substance abuse, are specifically excluded. These are set out in the Disability Discrimination (Definition of Disability) Regulations 1996. Note that the general duty is more extensive in relation to disability and under (d) expressly provides for the possibility that treating disabled persons more favourably than other persons may be necessary.

## **To which public bodies do the general equalities duties apply?**

The general equality duties apply to public bodies. Under the RRA the duty applies to those bodies listed in Schedule 1A of the Act. Under the SDA and the DDA the duty applies to 'public authorities'. It also applies to private or voluntary bodies which 'have functions of a public nature'. The duty clearly applies to what are sometimes called 'pure' public bodies, for example, government departments, local authorities, NHS and primary care trusts and police authorities. Where the body is a private or voluntary body carrying out functions of a public nature (e.g. a private company running a prison) the duty only applies to those functions and not to private acts.

If a contract requires a contractor to do things that are functions of a public nature then the contractor would itself be a public authority for that purpose and would have a legal duty to comply with the gender equality duty when carrying out those functions.

## **The statutory Codes of Practice**

There is a statutory Code of Practice in relation to each general equalities duty. They can be downloaded from the Equality and Human Rights Commission website – [www.equalityhumanrights.com](http://www.equalityhumanrights.com).

The Codes are not legally binding but should be followed by public bodies unless they can show that there is good reason not to do so. The Code may be taken into account by any court or tribunal if relevant and, if the Code has not been followed, the court or tribunal may assume that a breach of the law has occurred, unless it can be proved otherwise.

## Specific duties on public bodies – Equality Schemes

In addition to the general equalities duties, most public bodies also have specific duties to formulate and publish the steps they will take to comply with the general duty; they must prepare and publish a Race Equality Scheme, a Gender Equality Scheme and a Disability Equality Scheme. Those bodies that are subject to these specific duties are listed either in the Act itself or in the Orders which set out the specific duties. The list includes most public bodies including local authorities, PCTs, the NHS, government departments and the Big Lottery Fund.

It is not necessary that each Equality Scheme forms a separate document; the Schemes may be found in other documents such as the organisation's business plan. Many public bodies now have a single Equality Scheme in which the strategy in relation to all three duties is set out. Mostly these can be found on their websites.

All of the listed public bodies must:

- » Prepare and publish its Equality Scheme/s – setting out how it will meet the general equalities duties, relating to race, sex and disability discrimination
- » Implement its scheme within three years of publication
- » Review and revise its scheme every three years; and
- » In relation to gender and disability equality the authority must produce a report on the scheme every year.

## Preparing Equality Schemes

The requirements differ slightly depending on the kind of Equalities Scheme being prepared.

### Race Equality Schemes

A Race Equality Scheme must identify those functions and policies or proposed policies assessed as relevant to the general race equality duty. The organisation's scheme must set out the arrangements for:

- » Assessing and consulting on the likely impact of its proposed policies on the promotion of race equality
- » Monitoring its policies for any adverse impact on the promotion of race equality
- » Publishing the results of impact assessments, consultation and monitoring of adverse impact; and
- » Ensuring public access to the information and services it provides.

## Gender and Disability Equality Schemes – Consultation

In relation to Gender and Disability Equality Schemes specific consultation must be undertaken:

- » When preparing the Gender Equality Scheme the public body must consult its employees, service users and others likely to be affected, including trade unions; and
- » When developing the Disability Equality Scheme the public body must involve disabled people who appear to have an interest in the way the body carries out its functions.

## Gender and Disability Equality Schemes – Content

- » Schemes must set out how the public body intends to fulfil its general equality duties, and, in relation to gender equality must specifically address the issue of the pay gap between men and women.
- » Schemes must set out the actions that will be taken to:
  - » Gather information on the effect of its policies and practices
  - » Make use of the information
  - » Assess the impact of its policies and practices.

## Impact assessments

An impact assessment is a process of evaluating the likely impact of a particular decision or policy. Where a public body is considering a decision or policy that is likely to have an impact on one or more of the equalities groups it must be able to show that, when taking the decision, it has had “due regard” to its positive equalities duties.

This may mean that it must carry out an impact assessment– referred to as a Race Equality Impact Assessment (REIA), a Gender Equality Impact Assessment (GEIA) or a Disabled Equality Impact Assessment (DEIA). It will usually be necessary for a preliminary or screening assessment – to decide whether there is likely to be adverse impact and therefore whether a full impact assessment will be needed. The organisation must consult those affected, both at the screening stage and on full impact assessment.

See: The Race Relations Act 1976 (Statutory Duties) Order 2001 (SI 2001/3458); The Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 (SI 2006/2930); and the Disability Discrimination Act (Public Authorities) (Statutory Duties) Regulations 2005 (SI 2005/2966)

The deadline for the publication of the scheme and therefore the start of the three year period differs: for race equality schemes the date is 31 May 2002, for gender equality schemes it is 30 April 2007 and for disability equality schemes the date depends on the nature of the body but will be no later than 1 April 2007. If a public body has failed to produce or publish its scheme enforcement action can be taken by the Equalities and Human Rights Commission.

## Purpose of impact assessments

An impact assessment is carried out so that the organisation:

- » Can ensure equalities groups are not disadvantaged by its decision or policy; and
- » Can identify where and how the body can promote equality of opportunity.

## Results of impact assessments

An authority may identify likely adverse impact but be able to justify its decision. However, if it cannot justify the adverse impact it must consider the steps that can be taken to reduce or eliminate the adverse impact or abandon the policy.

## Positive Discrimination/Targeting services

The RRA and the SDA outlaw discrimination but provide that, exceptionally, services may be targeted at certain racial groups or for men and women only or separately.

### Race

Section 35 of the RRA provides that it is not unlawful to give access to facilities or services to people of a particular racial group in order to meet the special needs of that group with regard to education, training or welfare, or ancillary benefits.

### Gender – public functions

The SDA makes it unlawful for public bodies to discriminate in the exercise of public functions. However, section 21A of the SDA provides that it is lawful to:

- » Provide a service for one sex only where only persons of that sex require the service
- » Provide separate services for each sex where a joint service might be less effective
- » Provide a service for one sex only where the service is also provided jointly for both sexes, and if the service were only provided jointly it might be insufficiently effective
- » Where the level of need for the service by one sex means it is not reasonably practicable to provide separate services for that sex, and if it were provided for both sexes jointly it would or might be, less effective it is lawful to:
  - » Provide a service for one sex only, or
  - » Provide separate services for each sex in different ways or to different extents.
- » Take action in order to assist one sex to overcome disadvantage (compared with the other sex) or the effects of discrimination.



## **Gender – Goods, facilities and services**

It is lawful to provide services for women only where:

- » Women need special care, supervision and attention
- » Women would be embarrassed in the presence of men
- » Women are likely to be in a state of undress.

## **Disability discrimination**

Disability discrimination is different from gender and race discrimination. Unlawful discrimination may be against men or women and may be against any racial or ethnic group. In contrast, only discrimination against people who are defined as disabled is unlawful. The basis of the DDA is that positive action will be necessary to achieve disability equality. For this reason, under the DDA, there is a duty to make reasonable adjustments so as to remove or modify barriers that disabled people face.



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