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**Policy Briefing #7/11**

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**The Single Equality Act and  
healthcare: service cuts and the  
impact on inequalities  
and protected groups**

**November 2011**

## Introduction:

This briefing examines the application of the Single Equality Act in the context of workforce and service cuts and health care reform. It examines how law on equality duties has recently been applied in social care in the context of efficiency savings. It also sets out some steps to identify service cuts or reform which may have detrimental consequences for patients and the steps that might be taken if concerns arise about a trust's lack of due regard or mitigation for these consequences.

## Background:

The scale of the challenge that the NHS currently faces is unprecedented. It is tasked with managing increasing demand on its services, principally derived from the health needs of an ageing population, whilst meeting 4% efficiency savings every year, over four years; that is £20 billion by 2014/15. In addition, NHS reforms – the exact detail of which is still being discussed and agreed in Parliament – constitutes wholesale reform, and will be both costly and disruptive to the delivery of high quality and improved care.

Efforts to meet this challenge are already beginning to have a dramatic impact on NHS services and workforce. Over the past year alone, the RCN's *Frontline First* campaign has identified 56,058 healthcare posts earmarked for cuts, including 48,029 posts in England.<sup>1</sup> Such significant job losses are having clear implications on services, and often go hand in hand with service closures, bed cuts and rationing. The RCN has previously highlighted examples of trusts cutting services such as: Community Falls<sup>2</sup>, Alcohol Detoxification and Treatment Unit<sup>3</sup>, public health targeting the Lesbian, Gay and Bisexual population<sup>4</sup>, and Psychological Therapies<sup>5</sup>. Furthermore, there are implications for the quality of care being delivered as considerable pressure is put on a dwindling workforce. The RCN's recent employment survey has shown the proportion of staff who said patient care had deteriorated over the previous year increased by a third to 28% between spring and winter 2010. The NHS clearly faces a period of uncertainty, with significant risks for the care patients receive and can access.

## The Single Equality Act and equality duties – Current Law

On the 6th April 2011 the new single equality duty came into effect. The duty was introduced by the Equality Act 2010. The Act seeks to simplify the law by combining all previous anti-discrimination duties into one single Act. In the past, the duties on public bodies were found in a number of statutes. The Act replaces these previous public sector equality duties with one single public sector duty. It also extended the application of the duties to new 'protected characteristics'.

Characteristics covered by the duty include:

- age
- gender reassignment
- pregnancy and maternity
- disability
- religion or belief
- sexual orientation
- sex
- race
- marriage and civil partnership

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1 <http://frontlinefirst.rcn.org.uk/>

2 NHS Stockport

3 Lancashire NHS Foundation Trust

4 South West Essex PCT

5 Birmingham and Solihull Mental Health NHS Foundation trust

**The single duty is deliberately intended to be a powerful tool to promote equality.**

It seeks to do this by setting out key elements that all public authorities must consider – or have due regard to - when carrying out its functions. These include:

- eliminating discrimination, harassment and victimisation;
- advancing equality of opportunity for those who share a protected characteristic and those who do not share it;
- removing or minimising disadvantages suffered by people who share a protected characteristic;
- taking steps to meet the needs of persons who share a protected characteristic, that are different from the needs of persons who do not share it;
- encouraging people who share a relevant protected characteristic to participate in public life or in any other activity where their participation is disproportionately low.

## **The Act in practice: case law**

Although the Act came into effect relatively recently, the extensive case law that existed on the previous individual duties is directly relevant to the interpretation of the new single duty. In addition, the Act has been tested, with one notable and ground breaking ruling made regarding cuts made by Birmingham City Council in social care.

In light of this case law, it is possible to make the following assumptions (the relevant case is referenced with each assumption):

### What decisions does the duty apply to?

- All decisions taken by public bodies, including policy decisions and decisions on individual cases.<sup>6</sup>
- It is most powerful when decisions are taken that directly affect the protected groups.<sup>7</sup>

### When must 'due regard' be given to the duty?

- Before and at the time that a particular policy, that will or might affect protected groups/individuals, is being considered by the public authority in question'.
- It is an 'essential preliminary' to any important policy decision, and cannot be done retrospectively: as a 'rearguard action following a concluded decision'.<sup>8</sup>
- Or, put another way, consideration of the duty must be 'an 'integral part of the formation of a proposed policy, not justification for its adoption'.<sup>9</sup>

### What does the duty entail in practice?

- 'Due regard' entails a conscious approach to the specified needs of the protected groups.<sup>10</sup>
- Due regard requires analysis of the relevant material with the specific statutory considerations in mind.<sup>11</sup>
- General awareness of the duty does not amount to the necessary due regard.<sup>12</sup>

<sup>6</sup> *Pieretti v Enfield* [2010] EWCA Civ 1104; [2011] HLR 3 at [25] -[26]

<sup>7</sup> DRC Code of Practice at 2.3

<sup>8</sup> R (BAPIO Action Ltd) v SSHD [2007] EWCA Civ 1139 at [3] per Sedley LJ

<sup>9</sup> R (Kaur and others) v Ealing LBC [2008] EWHC 2062 (Admin) at [24]

<sup>10</sup> R (Meany) v Harlow District Council [2009] EWHC 559 (Admin) at [74] and [84]

<sup>11</sup> R (Rahman) v Birmingham CC [2011] EWHC 944 (Admin) at [35];

<sup>12</sup> R (Boyejo) v Barnet LBC [2009] EWHC 3261 (Admin); (2010) 13 CCLR 72 at [58], [59] and [63];

- In a case where the decision may affect large numbers of vulnerable people, many of whom fall within one or more of the protected groups, the due regard necessary is very high.<sup>13</sup>
- The duty may require positive steps to be taken if the circumstances require it to address disadvantage to the protected group.<sup>14</sup>
- Similarly, if a risk of adverse impact is identified, consideration must be given to measures to avoid that impact before fixing on a particular solution.<sup>15</sup>
- Impact assessments must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact.<sup>16</sup>

**The Act notes that compliance with the duties may involve treating some people more favourably than others.**

## **The Single Equality Act and Birmingham City Council**

The most recent application of the duty<sup>17</sup> concerned Birmingham City Council (BCC) and its decision to restrict eligibility for adult social care to only those individuals with ‘critical’ needs.<sup>18</sup> This meant that the Council would no longer offer free social care to those with substantial needs. Such needs include being unable: ‘to carry out the majority of personal care or domestic routines’ and ‘the majority of family and other social roles and responsibilities’.<sup>19</sup> For those who have substantial care needs but who do not have the means to fund care themselves, withdrawal of the support the Council provided would have a significant, detrimental impact on their day-to-day activities and lives.

BCC produced several equality impact assessments which purported to show ‘due regard’ to the disability equality duty. However, the judge held that ‘due regard’ had not in fact been shown. He noted the lack of assessment of the practical impact on those individuals affected by the change in eligibility. As a result, the judge found that both the budget and the resulting cuts to adult social care were unlawful and described the impact of the proposed move to ‘critical only’ care on disabled people as ‘potentially devastating’.

Similarly, the courts found that BCC had not had ‘due regard’ in another recent judgment concerning cuts to funding to legal advice services.<sup>20</sup> The Equality Impact Needs Assessment was found to have been driven by the hopes of the benefits to be gained from the new policy rather than focusing on the assessment of the degree of disadvantage to existing users, and how their needs could be alternatively met.

## **The Single Equality Act and health care decision-makers**

The decisions made against BCC and its funding cuts have clear and important implications for decision-makers in public bodies across the board. Any decision to cut or reduce health services will engage the duty, and most likely in relation to several protected groups. As such, in taking the decision the PCT or other health body would be required to do the following to ensure compliance with the duty:

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<sup>13</sup> R (Hajrula) v London Councils [2011] EWHC 448 (Admin) at [69][1][1][2]

<sup>14</sup> Pieretti at [34][2][2][3];

<sup>15</sup> Kaur and others at [44], R (Domb) v LB Hammersmith & Fulham [2009] EWCA Civ 941 at [62], Rahman at [35] (sub-para 8)[3][3][4]

<sup>16</sup> Using the Equality Duties to Make Fair Financial Decisions – A Guide for Decision-Makers, Equality and Human Rights Commission at p2

<sup>17</sup> The Birmingham cases in 2011 were actually decided in relation to the Disability Discrimination Act duty as the decisions were taken just before the single equality duty came into force.

<sup>18</sup> Walker J in R (W, M and others) v Birmingham CC [2011] EWHC 1147 (Admin).

<sup>19</sup> [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_4019641.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4019641.pdf)

<sup>20</sup> R (Rahman) v Birmingham CC [2011] EWHC 944 (Admin), Blake J

1. Pay 'due regard' to the specified needs early, and well before the decision is taken.
2. Gather all the information necessary about the potential impact of the proposed cuts on each protected group, including through consultation with both nurses and patients
3. Having obtained the necessary information, give proper consideration to whether the proposed cut can be avoided, for example through making savings elsewhere which would have a less detrimental impact on the relevant protected group(s) and / or using reserves to avoid the need to make savings at all.
4. If it is impossible to avoid making the cut, give careful consideration to how the impact can be mitigated, including through the provision of alternative services.
5. Ensure that the ultimate decision-makers have 'due regard' to the duty when the final decision is taken, not simply nodding through a decision based on analysis conducted by more junior officers.

There is no statutory requirement to produce an 'Equality Impact Assessment' or any other specific document. The duty is one of substance not form; if challenged, the health body will need to demonstrate that it paid due regard to the duty in taking the relevant decision, not that it produced a document with any specific title. However, the courts have repeatedly noted<sup>21</sup> that it will be helpful to the public body's case if it can evidence its 'due regard' to the duty by way of a detailed impact assessment document.

The Equality and Human Rights Council has recently issued guidance to decision-makers in public bodies to help them make 'fair decisions' in the current financial context: [www.equalityhumanrights.com/financialdecisions](http://www.equalityhumanrights.com/financialdecisions)

### **Examples of cuts that would affect protected groups:**

Below are some examples of decisions that organisations may make, and which would have required 'due regard' to the single equality duty. Scale is an important thing to bear in mind both in relation to the impact the cuts would have to the health and well-being of those affected, and to the number of individuals affected.

1. A PCT decides to reduce the number of nurses employed to provide nursing care to disabled children receiving respite care. As a result, some children will lose their respite care entirely and others will see their nights reduced. This decision most obviously engages the disability aspect of the duty in relation to the children, but due regard would also need to be given to the age aspect in relation to the children and the gender aspect in relation to the impact on their parents, given that disabled children are disproportionately cared for by single mothers.
2. A decision is taken to stop funding a community recovery unit. The 30 bed unit provided intermediate care for elderly patients who were discharged from hospital but not yet 'fit' enough to cope at home. As a consequence, many older patients may find themselves quickly readmitted into hospital, having been unable to care for themselves at home. The impact of closing this service on their health, wellbeing and independence is likely to be devastating therefore. The aspect of the duty engaged here is age.

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<sup>21</sup> See for example *Brown v SSWP*

3. A decision is taken to close the maternity unit of a local hospital, requiring expectant mothers to travel a significant distance to another hospital across town and resulting in substantial redundancies for maternity nurses. The gender dimension of the duty is the one most obviously engaged here and the level of regard necessary will be very high indeed given the highly detrimental impact of this decision on a particularly vulnerable group.
4. An outreach service which has been providing culturally sensitive sexual health advice to a predominantly South Asian Muslim community is cut. The primary aspect of the duty engaged here is race, and the health body will need to demonstrate at the outset that it has properly understood the likely impact on the community of this decision, for example it knows whether those who have previously used this service would be prepared to use an alternative sexual health service and what the likely consequences would be if not. The gender and sexual orientation aspects of the duty are also likely to require very careful consideration.

### **The Single Equality Act and steps you can take:**

As noted above, all decisions taken in the health care sector are likely to affect people from the protected groups, and therefore should have been subjected to 'due regard' of the single equality duty. Here are some steps you might take to ensure that 'due regard' is followed:

1. Feel free to **ask questions** about whether decision-makers have taken appropriate consideration/and or mitigation towards protected groups during their decision-making process – they have a legal obligation to be able to explain how they have taken 'due regard'.
2. **Use your time wisely:** you are unlikely to have time to monitor all decisions taken and whether they have had due regard to the Single Equality Act. However, there may be some decisions where you feel could be as significant as those made by Birmingham City Council. Here are some questions for you to reflect on:
  - Will the decision affect many patients from a protected group?
  - Will there be severe or even devastating implications for the health and wellbeing of the patients affected?
  - Will cutting this service mean these patients will not have their care needs met?
  - Will patients and the general public be concerned by the decision?
3. If the answer is yes to these questions, and you would like to discuss next steps with someone, please email the Laura Clarke at RCN Policy and International – [laura.clarke@rcn.org.uk](mailto:laura.clarke@rcn.org.uk)
4. **A crucial issue is timing.** It is very difficult to challenge financial decisions if any significant time has elapsed, particularly if steps have been taken in reliance on this decision (for example, redundancy notices have been issued and staff have begun to find alternative jobs). Please contact Laura on your concerns about service cuts as soon as you can.

**If you have any concerns or questions about issues relating to redundancy, terms or conditions, or pensions, please contact RCN Direct on 0845 772 6100.**

**Policy & International Department, RCN, November 2011**