

# Changing eligibility criteria

## Avoiding disability discrimination



### Introduction

Trusts will from time to time review and make changes to eligibility criteria. When making such changes, it is important that they consider their duties under equality legislation.

### Relevant legislation

Section 75 of the Northern Ireland Act 1998 (NIA) places a duty on public authorities (which includes trusts) to promote equality of opportunity between different groups of people including older people, people with disabilities and carers. The section was introduced to ensure that equality of opportunity was placed at the core of public policy-making.

In addition, the Disability Discrimination Act (DDA) 1995 aims to end the discrimination that many disabled people face. The Disability Discrimination (NI) Order 2006 extended the DDA 1995 to cover functions of public authorities in Northern Ireland. Under the DDA, local authorities here must have due regard to:

- the need to promote positive attitudes towards disabled persons; and
- the need to encourage participations by disabled persons in public life.

### Caselaw decision

A recent High Court decision in England illustrates an important point about the general duties of public bodies under equality legislation.

The case centred on The Disability Discrimination Act 1995. Given that we also have Section 75 NIA, the case highlights the need for trusts to be mindful

of their duties under equality legislation when formulating policy.

The decision is particularly relevant in the context of changes to criteria.

### The case

In R (Chavda & Others) v Harrow LBC (2007), the court had to consider whether Harrow LBC acted lawfully in deciding that they would only provide services to meet needs designated as 'critical' in line with Government Guidance (Fair Access to Care Services). The court found that Harrow had acted unlawfully in its general disability equality duty under s49A of the Disability Discrimination Act 1995.

### Human rights position

In respect of human rights, the court found that the relevant question is not whether the authority, in changing its criteria, had properly considered the applicant's rights but whether those rights had been violated. In other words, the court felt that it is only once the restriction in services is implemented that the Human Rights Act 1998 comes into play. The courts' view in this case is, therefore, that there is nothing inherently unlawful in a public body deciding only to provide services to meet 'critical' needs.

However, it is important to note that the Local Government Ombudsman is moving in a different direction to the courts in this respect. In a recent decision (Complaint 06/A/10428 against Havering LBC) an Ombudsman found Havering Local Authority guilty of maladministration for failing to consider human rights when they are plainly 'engaged'. The question for the Ombudsman is not whether the rights have been violated but whether human rights have been considered at all.

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## Equality duties

Having found that the Authority had not acted unlawfully in respect of human rights, the court went on to find Harrow LBC in breach of the law for failure to comply with equality duties under s49A of the Disability Discrimination Act 1995. The Authority was found to have acted unlawfully in that:

- none of the documentation was placed before the councillors (the decision makers) prior to them deciding to restrict services;
- no reference was made to the general duties under s49;
- there was no effort to actively seek the views of the disabled or to refer to the duty in the planning stages of the consultation; and
- the 'decision makers' had not been informed of the particular obligations which the law imposes.

The court stated that decision makers can only show that they have considered the rights of disabled people under disability legislation by keeping a written record showing they have done so. It is not enough to rely on the fact that an authority has a good disability record. In other words, public authorities must be in a position to show that they have integrated their general equality obligations across all aspects of their activities.

## Position in Northern Ireland

Although an English case the decision can have influence in Northern Ireland courts.

## Conclusion

There is evidence that some trusts here are in the process of tightening up their eligibility criteria. Before decisions are made it should be borne in mind that Trusts owe special duties to the disabled. Under equality legislation the rights of people with disabilities should not only be respected but should be done so visibly. trusts should be able to show through documentation and records that throughout the policy making process due consideration has been given to the rights of people with disabilities.

The Law Centre's Community Care Unit is happy to give advice on this matter.

*For any queries arising from this briefing, please contact the community care unit of Law Centre (NI) on the advice line (028 9024 4401) or, in individual cases, please feel free to refer a client directly.*