Neutral Citation Number: [2018] EWHC 1588 (Admin)

Case No: CO/5321/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2018

Before :

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between :

THE QUEEN (on the application of LAW CENTRES FEDERATION LIMITED t/a LAW CENTRES NETWORK)	**Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**

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Jason Coppel QC and Edward Capewell (instructed by **Public Law Project**)
for the C**laimant**
Fiona Scolding QC and Amelia Walker (instructed by **Government Legal Department**)
for the **Defendant**

Hearing dates: 21 and 22 May 2018

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Approved Judgment

Mrs Justice Andrews:

INTRODUCTION

1. This is a claim for judicial review of two decisions made by the Defendant in connection with the provision of legal services under those Housing Possession Court Duty ("HPCD") schemes which are funded by Legal Aid. The first decision was made on 16 August 2017, when (following a consultation exercise initiated in January 2017) the Defendant decided to reduce the number of scheme areas from over 100 to 47, and to introduce price-competitive tendering for the HPCD scheme contracts. The second decision was made on 12 October 2017, when the Defendant decided to initiate the procurement process by publishing the relevant tender documents.

2. The decisions under challenge were not driven by cost-saving considerations. Indeed, there was internal recognition within the Legal Aid Agency ("LAA") that any savings brought about by the changes would be "negligible". They have not resulted in a reduction in the amount of Legal Aid that is made available to deliver HPCD schemes in England and Wales, which remains in the order of £3.6 million per annum, only 0.2% of the Legal Aid budget. Instead, they have altered the way in which that £3.6 million is divided up between providers of the services, by making the geographic areas for which HPCD scheme contracts are awarded much larger than before – for example, one area covers three whole counties (Berkshire, Bedfordshire and Oxfordshire), another, the whole of Wales.

3. This has meant that in many cases, the successful bidders have had no choice but to deliver the services through agents, although, in common with the principal providers, each agent must hold a mainstream Legal Aid contract for Housing and Debt advice. This requirement ensures that all providers have the necessary expertise. It is also a term of the new contracts that the majority of acts of assistance in any given year must be delivered by the contractor itself.

4. The Claimant contends that the decisions are unlawful because the Defendant failed to properly acquaint himself with the legally necessary information on which they should have been based, and instead proceeded on the basis of an assumption, for which there was no evidence, that the introduction of larger contracts would improve "sustainability". The Claimant's case in a nutshell is that the Defendant failed to make sufficient enquiries, leading in each case to a decision that was both illogical and irrational. Further or alternatively, it is contended that the Defendant failed to comply with the public sector equality duty ("PSED") in section 149 of the Equality Act 2010.

The Parties

5. The Claimant is the national membership and co-ordinating body for a national network of 45 Law Centres, each of which is a not-for-profit (NfP) legal practice and an independent registered charity. Law Centres provide free legal advice and assistance in a variety of civil law matters to financially and socially disadvantaged individuals and communities, according to local needs.

6. The Legal Aid Sentencing and Punishment of Offenders Act 2013 ("LASPO") drastically reduced the areas of law and the types of work for which civil Legal Aid

was previously available. Many firms of solicitors have ceased to do civil Legal Aid work because it no longer provides sufficient income for them. There are areas, such as Cornwall, that are aptly described as "Legal Aid deserts". Even in the rare instances in which it is still available, Legal Aid is unlikely to be sufficient to meet all the needs of the client.

7. Against that background, Law Centres provide an invaluable community resource. They enable some of the most vulnerable members of society to obtain, free of charge, basic legal advice in those areas of law, such as housing, social welfare, and employment, which have the most fundamental impact on their daily lives and wellbeing. The work they do goes beyond addressing the immediate crisis faced by a client and seeks to find a means of addressing the underlying factors which led to that crisis. Thus, for example, the client may receive advice as to how to claim benefits to which they are entitled, which would pay their rent arrears, and help in filling in the necessary forms, which are often bulky and complex. Alternatively, the Law Centre staff may be able to negotiate staged payments of existing debts and provide or arrange for debt counselling to help the client to manage their finances.

8. Each Law Centre generates its own funding, which comes from a mixture of sources; chiefly, Legal Aid contracts, Local Authority contracts, and grants from charitable trusts and foundations. Legal Aid contracts enable Law Centres to represent their clients in courts and tribunals, and thus provide the clients with a means of access to justice that they would otherwise be unable to afford.

9. Prior to the introduction of LASPO, typically Legal Aid contracts would account for around 40% of a Law Centre's income, with 40% coming from Local Authorities and the remaining 20% from charitable trusts and foundations. Since LASPO, the overall income of Law Centres has halved. 11 Law Centres were forced to close as a direct result of the reductions in civil Legal Aid work. Those which survived have stabilised, although all have fewer staff and reduced funding. Thus any decision which would reduce or end the income that a Law Centre presently receives from Legal Aid contracts will self-evidently have a negative impact on its viability.

10. The Defendant has a duty pursuant to section 1 of LASPO to secure that Legal Aid is made available in accordance with part 1 of that Act. Under section 2 of LASPO, the Defendant may make such arrangements as he considers appropriate in order to discharge his functions under part 1.

11. In practice, Legal Aid is delivered through the LAA (formerly the Legal Services Commission), which is an executive agency of the Ministry of Justice ("MoJ"), under the Director of Legal Aid Casework, who is appointed by the Defendant pursuant to section 4 of LASPO. The LAA acts on behalf of the Defendant in commissioning and administering Legal Aid services across England and Wales. All Legal Aid contracts are issued by the LAA.

Housing Possession Court Duty Schemes

12. Although many aspects of housing law were taken out of the scope of civil Legal Aid, it still covers the services provided under a HPCD scheme, which enables individuals who are defending proceedings for possession to obtain emergency, on the day face-to-face legal advice, assistance, and advocacy services at court. The hearings in a

possession list tend to be very short (on average, 5-10 minutes). In some court centres 40-50 cases may be listed in a day. The court will either make an order against the tenant, or give directions for trial, or adjourn the matter for further investigations. The usual aim of the legal representative will be to obtain an adjournment for a short time - typically 14 days - to enable steps to be taken to resolve the matter in a way that prevents the client from losing their home. Such schemes therefore provide a vital service for vulnerable individuals who face immediate homelessness.

13. A HPCD scheme may be operated at or across one or more courts in a particular location. There are a handful of courts around the country, including Guildford, in which similar schemes are funded independently; this case is not concerned with them.

14. As is generally the case with Legal Aid clients, many of the clients who use the HPCD schemes have protected characteristics under the Equality Act 2010. In one area, for example, where around 85% of the clients were in receipt of low income, such that they would qualify for Legal Aid, 31% were classified as disabled. Many users of the service have mental health difficulties. A high proportion are single females with dependent children. The LAA's own statistics indicate that around 62% of those who use the HPCD schemes are female.

15. If a Law Centre has a contract to deliver a HPCD scheme, the scheme will often provide the first point of contact between the client and those at the Law Centre who are able to provide them with the necessary advice and assistance to enable the myriad issues which have led to the possession proceedings – such as welfare benefit issues, loss of a job, or family breakdown - to be addressed. Although some clients encountered on the HPCD scheme will be taken on by the Law Centre for follow-up Legal Aid housing advice, this is typically a small percentage: most of the follow-up work carried out by Law Centres is either outside the scope of Legal Aid altogether, or Legal Aid advice would only be available to the client via a remote telephone service. That is far from ideal if the client has a limited understanding of English, or is illiterate, or is someone who has turned up at the Law Centre with a carrier bag full of papers that need to be physically sorted into order and relevance. The Law Centre will be able to provide the client with readily accessible, direct, face-to-face assistance. The continuity of dealing with the same person or people has obvious advantages for the client, not least that it helps to foster and maintain trust.

16. The fact that a Law Centre has a HPCD scheme contract enables it to represent the client's interests from a position of strength, or as one of the Claimant's witnesses put it, "gives it teeth" – opponents will be aware that the client will have representation from someone experienced in that area of the law, and act accordingly. Such representation furthers the interests of justice by saving court time and resources that would otherwise be needed to ensure the fair treatment of litigants in person (and their dependents) facing the imminent loss of their home. Law Centre staff build up a good working relationship with the local court staff and members of the judiciary, often over many years, and the work that they do is much appreciated by those working within the courts and tribunals in which they appear.

17. The existence of a HPCD scheme contract also lends considerable weight to a Law Centre's application for finance from other sources, which funds the work done by its volunteers outside the scope of Legal Aid (referred to in this case as "wrap around"

work). Without such contracts, Law Centres would have more difficulty in securing some of these other funds, which would have a detrimental impact on the scope of services they are able to provide and on the outcomes for the people who seek their help. From a wider social perspective, creating constraints on the services that Law Centres can provide is likely to cause greater strain on the limited resources of Local Authorities, who would have to pick up the longer-term legal and financial burden if the client became homeless and destitute in circumstances in which that outcome could have been avoided (at a fraction of the cost to the taxpayer).

BACKGROUND TO THE DECISIONS

18. Since 2010 the LAA has run a competitive procurement process and awarded separate contracts for each area in which a publicly funded HPCD scheme is operative (though some of the smaller schemes operating in courts within the same locality might be grouped together within one contract area). The last comprehensive civil tendering exercise the LAA undertook for HPCD services was in 2010. Since then, there have been a number of targeted civil tendering exercises to deal with specific issues.

19. Historically, the Department for Communities and Local Government (DCLG) had been responsible for the funding (by means of grants) of around 68 HPCD schemes in courts which were not funded by Legal Aid. These schemes were typically smaller than the schemes already being funded through Legal Aid. The LAA classified a scheme as "small" if there were fewer than 270 acts of assistance per year. Obviously, the lower the volumes of work, the less the providers would be paid under the contract. In 2012, by agreement with the MoJ, the responsibility for funding the DCLG schemes was transferred to the LAA.

20. From April 2013, when LASPO came into effect, the LAA had to tender for contracts in those categories of law which had significantly changed in terms of scope as a result of LASPO. This meant that all Housing and Debt contracts were re-tendered in 2013. HPCD schemes now fell within the Housing (Mainstream) contract specification. Some HPCD schemes were also tendered in April 2013, including all the schemes inherited from the DCLG, as well as those which had previously been funded by aspects of Legal Aid which had ceased to be funded under LASPO.

21. In around 2014, discussions started between the MoJ and the LAA about re-tendering the contracts for all HPCD schemes in 2015, including those which had been re-tendered in 2013. This was a sensible idea, as it would bring the start and end dates of all HPCD scheme contracts into line. It was at that time that the LAA first aired a proposal to consolidate the number of schemes and introduce price-competitive tendering. In the event, for various reasons, the majority of the HPCD scheme contracts were not re-tendered until the 2018 tender, unless an existing provider withdrew and the LAA had to put in place interim arrangements. The 2010 contracts were run on a series of extensions following the expiry of their initial five-year term.

22. In June 2015, the relevant Minister agreed to a proposal to align all Civil Legal Aid contracts, to bring everything under a single contract. However, that plan was put on hold, as was the possibility of a policy consultation on proposed changes to the HPCD scheme contracts, whilst in July 2015 HMCTS launched its own consultation into a further proposed programme of significant court closures.

23. In 2015 there were 117 HPCD schemes covering 167 courts, including those inherited from the DCLG, but the rolling programme of court closures and amalgamations inevitably reduced the numbers. Since then, 33 courts which previously operated a HPCD scheme have closed, and the schemes operating at a further 11 courts have been relocated to different courts within the same town or city which are now hearing the possession lists. The contracts for the HPCD schemes were amended as necessary to reflect these changes. If, as sometimes occurred, the possession list was transferred to a court in a different scheme area in which the HPCD services were already being delivered by another provider, the LAA worked with the two providers to reach a mutually acceptable solution on how the work would be divided between them in future. If they could not reach agreement, the LAA terminated the contract of the provider where the court(s) had closed.

24. By November 2017, there were 64 providers (including 12 Law Centres) delivering 107 HPCD schemes. Since then, a further 9 HPCD schemes ceased to exist when the courts at which they operated closed. Prior to the decisions under challenge, 64% of HPCD scheme contracts were operated by NfP organisations (a fact which is not mentioned in any of the Ministerial submissions). Of these, the 12 Law Centres held approximately 16% of the HPCD scheme contracts and represented 20% of the provider base.

25. The information from HMCTS as to their plans for court closures was factored into considerations of how the HPCD schemes would be delivered under the 2018 Contract. The LAA took planned court closures into account when devising the new scheme areas, but despite this, it was impossible to be certain about which courts were covered in those areas, as the programme of court closures could still change. The LAA were conscious that if HMCTS changed its plans, the new contracts needed to be sufficiently flexible to meet the altered situation on the ground.

26. In April 2016, following the receipt of notice of withdrawal from three HPCD scheme providers, the LAA prepared an internal paper which was used to inform the policy, though it was not shown to Ministers. The document examined the wider issues of HPCD scheme withdrawals, including the reasons given for such withdrawals, and outlined "*future plans to increase sustainability of these contracts*." A table annexed to the paper at Annex A gave details of the providers who had withdrawn from 17 schemes since April 2013 (a 10% withdrawal rate in 3 years). The paper noted that of these, only two also withdrew from their Housing and Debt contracts. At that stage, no attempt was made to compute how much money the providers who withdrew had received from the scheme in the financial year in which they withdrew.

27. The paper stated that there was no evidence to suggest that providers were withdrawing as a direct result of the HPCD scheme fees, which were in place well before 2013/2014 when the LAA started to see providers pull out of the work. The fees had not been cited by providers as a reason. Under the heading "reasons for withdrawal" the document stated that "*anecdotal evidence from providers on the reasons for withdrawal are generally that the contracts are not financially viable, due mainly to the low volume of work in conjunction in some instances with the amount of travel required to cover Schemes.*" (I should explain that travel costs are not reimbursed by the LAA under the contract).

28. When HPCD scheme contracts are entered into, a nominal figure is set for the expected number of cases per year. As the paper mentioned, the data showed that in nearly all the schemes where providers withdrew, the "run rate" (i.e. number of acts of assistance) was below the expected range of 85%-110% of that target figure. Coupled with this, whilst the scope of HPCD schemes did not change as a result of LASPO, changes *were* introduced to follow-up work, which may have resulted in the amount of work experienced not matching provider expectations. (That is a reference to the fact that much of the follow-up work now fell outside the scope of Legal Aid). Linked to the general reduction in civil work across the board, many organisations had undergone personnel changes and/or restructuring, and where this resulted in losing key personnel delivering housing possession work, this had led the provider to decide to withdraw from the scheme.

29. It was therefore proposed to procure larger contracts for HPCD schemes "*in order to make the contracts more attractive and sustainable*". There was recognition that this might result in an *increase* in travel, but the LAA believed the effects of this would be mitigated by the greater volume of work created by larger procurement areas and by the ability to continue to use agents to deliver the work.

30. Confusingly, the word "sustainable" appears to have been used in two different senses. In most of the relevant documents it was plainly being used in the sense of being financially viable, but the civil servants within the LAA who provided witness statements in this case suggest that what they actually meant by "sustainable" was maintaining the service to clients. Whilst there is potentially a link between financial viability for service providers and the ability to maintain the service, the Defendant's case is weaker if the latter meaning of "sustainable" is adopted, since the Claimant's uncontradicted evidence establishes that there were never any practical problems in maintaining the service to clients under the existing HPCD schemes, even when providers pulled out of the contracts.

31. Logically, the theory that a greater volume of work, leading to increased income, would provide an incentive to providers to remain within the system, only holds good if the provider is likely to make enough money from the larger contract to make it attractive. He would only do so if it generates sufficient profit after he has covered any additional costs (including travel costs) and expenses (including administrative expenses) generated by increasing the size of the contract area. However, once he starts sharing the additional fee income with someone else, the chances of his making enough money will self-evidently decrease.

32. There is no explanation given in this, or any other document in which the thinking behind the policy is articulated, of why the LAA thought that larger scheme areas would be regarded as more attractive by providers, if those providers would not be receiving all the income generated from the postulated additional volume of work. Getting local agents to deliver the schemes would potentially mitigate the costs of long-distance travel, but then the *agents* would receive the fees for the services they were delivering. At most, the principals would be getting some payments from the agents of a percentage of the fees to defray their additional administrative costs.

33. That gives rise to the scenario that the same providers would be supplying the HPCD scheme services within the larger contract areas, but none would be significantly better off, because the principal provider would end up with around the same or only

marginally more net income once his increased overheads were met, and the agents would receive less net income for doing the same work. There is no evidence that anyone in the LAA ever thought about, let alone addressed, that scenario.

The Decision-Making process

34. The central justification given to Ministers for the proposed changes namely, that small schemes were already proving to be unsustainable and that providers were pulling out because they were not earning enough money from the HPCD work, was not evidence-based. It was based on assumption or conjecture or, at most, "anecdotal" evidence from a handful of un-named providers, and which was not reflected in the 2016 table recording the reasons for provider withdrawals.

35. On 3 November 2016, a submission was made by the LAA to the Minister of State (then Sir Oliver Heald QC MP) seeking clearance to carry out a consultation on the proposal to consolidate the number of HPCD schemes and introduce price as a criterion in the competitive tendering process. The Ministerial submission included this passage under the heading "Background":

"*You asked the LAA to obtain initial views from the profession on the proposals on HPCDS. The LAA met with the Law Society and the Legal Aid Practitioners Group on 2 November to discuss the HPCDS proposals on a confidential basis. They accepted the case for more sustainable schemes, and agreed with the outline principle of fewer, larger schemes"*. [Emphasis added].

36. Regrettably, that final sentence was both inaccurate and misleading. The true position was that the 2 November meeting was a private briefing about the LAA's intentions, rather than a meeting to canvass views about the merits of the proposition that larger schemes would be more financially viable. Whatever the Minister might have wished, the views of the two named professional bodies (and those of their constituents) on "*the case for more sustainable schemes*" were not sought, let alone obtained, and there most certainly was no agreement, in principle or otherwise, with the "outline principle". Indeed, because the meeting was confidential, the representatives of the Law Society and Legal Aid Practitioners' Group ("LAPG") who attended it were unable to discuss what had been said with their members, and therefore they were in no position to express a view about the proposals.

37. The most that could be truthfully said about the outcome of the meeting was that the representatives of the Law Society and LAPG voiced no objections to the LAA's proposals, apart from suggesting that their constituents were unlikely to accept the idea of price-competitive tendering. However, since their role was just to take note of the information that they were being given, that is hardly surprising. Far from endorsing what the LAA was proposing, as the Minister was led to believe, both professional groups were strongly opposed to it, as the responses to the consultation ultimately demonstrated.

38. Unfortunately, this is not the only misleading passage in the first Ministerial Submission:

Paragraph 10 stated that "*there is a measure of agreement that moving delivery of HPCDS services through fewer larger contracts is needed to ensure sustainability*"

[emphasis added]. This suggested there was a problem with sustainability and that the proposed change was a necessary response to it. However, there was no such agreement, there was no known problem in respect of sustainability (on the LAA's own case fewer than 10% of the providers had "anecdotally" withdrawn from a scheme for lack of financial viability, and all had been replaced), and the "need" to move to fewer larger contracts to ensure future sustainability had not been demonstrated by evidence.

Paragraph 13 stated that "*available data indicates many of the schemes have only small volumes of work and these are unlikely to be commercially viable for providers. This is leading to a lack of sustainability of these services which has been evident in the ongoing incidence of providers pulling out of contracts*". [emphasis added] Other than the fact that many of the schemes had small volumes of work, there was no, or no proper, evidential foundation for those statements.

Paragraph 14 expressly acknowledged that continuity of service had been maintained to date, but "*the LAA are of the view (and professional groups provisionally agree) that the better course is to take the opportunity to consolidate provision into fewer, larger, contracts serving a wider geographic area. Moving to larger contracts we hope will provide for greater sustainability, increased efficiencies in the delivery of services, greater economies of scale and better value for the tax payer"*. No explanation was given for why it was felt that larger contracts would provide for greater sustainability. The statement that professional groups provisionally agreed was untrue. The person who drafted it had translated the absence of articulated opposition into positive support.

39. The Defendant relied on evidence from, among other civil servants, Mr Thomas Bainbridge, the Head of Civil Legal Aid Policy within the MoJ, who was responsible for drafting the consultation document. Mr Bainbridge began the drafting process in September 2016. He says that for this purpose he was provided with documents setting out the policy discussions in 2015 around the proposed approach for tendering HPCDS contracts, and details of the proposed scheme areas. He states that he was "*aware of the rationale for larger areas and the data which indicated that many of the schemes have only small volumes of work and these are unlikely to be economically viable for providers*". The data certainly indicated that many schemes had small volumes of work, but it said nothing at all about whether and if so how this impacted on the ability of the service provider to maintain the service to the clients at court. The lack of economic viability was an assumption.

40. Mr Bainbridge said in his witness statement that a key rationale for tendering larger schemes was better to mitigate against the impact on individual HPCD scheme contracts of future court closures. As he put it, "*moving to a procurement area approach, whereby all courts within a specific geographical boundary must be covered by a single contractual provider, means that should work move from one court to another, the impact on the contract may not be as great and that more stable service provision would be maintained providing a better service to [HPCD scheme] clients.*"

41. I find that reasoning difficult to follow, given the way in which the providers and the LAA dealt with the impact of such changes under the existing contracts, as described in paragraph 23 above. Mr Bainbridge does not explain how in practical terms it was

thought that more stable service provision would be maintained in such circumstances by having one provider covering a much larger area, with the assistance of local agents where necessary. Problems would only arise under the existing system if the court to which the work was transferred was not already covered by a HPCD scheme contract, and only then if the provider (or agent) who had provided the services at the court which was closed was unwilling or unable to provide the services at the new one. There was no evidence that this had ever happened.

42. Having a single named provider for a contract covering the wider geographical area might possibly reduce or even eliminate amendments to the HPCD scheme contract if one or more courts within that area ceased to hear possession lists, but it would be unlikely to make a difference to the provision of the services in question. Under the existing schemes there should have been sufficient forewarning to make any necessary contractual and practical amendments before the changes were implemented. If, under the new scheme, two agents, or the provider and one agent, were already providing the services at the two courts concerned, there would still be a need for resolution of whether and how the work would be divided up between them when one court ceased hearing possession lists. On the other hand, if no-one was prepared to cover the court now hearing the possession lists, the problem would be exactly the same as it would be if that situation arose under the existing scheme, save that in the first instance, at least, it would be for the provider rather than the LAA to try and find a solution. Any costs savings to the LAA from the changes were acknowledged internally to be "negligible".

43. The policy consultation was published on 20 January 2017 and closed on 16 March 2017. A deliberate decision was taken not to carry out an Equality Impact Assessment ("EIA") prior to the consultation. Mr Bainbridge said that the LAA did not believe that there was an impact on those who access the HPCD schemes insofar as the *location* of the service was concerned because that was determined by HMCTS, and the client would have to travel to the same court irrespective of whether scheme areas were consolidated or tendered for separately. That is a fair point, but the potentially adverse impact on clients with protected characteristics of making scheme areas much larger was not confined to their having to travel longer distances for the initial court hearing. Mr Bainbridge is silent on the question whether any other potentially adverse impacts on people with protected characteristics were even considered before the consultation; one purpose of an EIA is to find out if they exist.

44. Confusingly, the consultation document erroneously referred to an "Impact Assessment" as having been carried out. Mr Bainbridge helpfully explained that this is a reference to a different type of document from an EIA, which is used for different governmental purposes. An Impact Assessment is used to assess the impact of non-legislative policy changes in accordance with a methodology set out by HM Treasury. In broad terms it sets out the rationale for Government intervention, the policy objectives and intended effects, and the relevant costs, benefits and risks. It is not compulsory to publish an Impact Assessment for policy changes such as this one, though it was originally intended to do so.

45. Mr Bainbridge explained how the error in the consultation document came about. The document was drafted using the MoJ's consultation template, and at the time of drafting, he was expecting that they would also draft an Impact Assessment to publish alongside the consultation. However, the Impact Assessment had to be put on hold

because the tender model had not been developed and without it, such an assessment could not be made. By an oversight, the reference to the Impact Assessment (and what it was anticipated it would say) remained in the consultation document.

46. The consultation document stated that the Impact Assessment "*indicates that those seeking advice and assistance for a Housing Possession Court Duty matter are not likely to be particularly affected. The proposals are unlikely to lead to significant additional costs or savings for businesses, charities or the voluntary sector*". The first statement is only true if consideration of the effect of the proposals on users of the schemes is confined to the continued availability of emergency legal advice and representation at court. Users will continue to be provided with those services – but they were not lacking in such provision under the existing scheme contracts. As to the magnitude of the additional costs to the NfP sector, including the cost impact of providers who were previously contracting directly with the LAA becoming agents, no study had been carried out to assess it. Therefore, the LAA was in no position to express an informed view as to its significance or lack of significance.

47. Paragraph 15 of the consultation document said that "*it would appear that the volume of work within some schemes is not commercially viable*", and that since 2013 it had been necessary for "*13 schemes to be retendered in some way*" which, according to paragraph 16, had "*resulted in an administrative burden for both providers and the LAA"*. The implication was that the administrative burden would be improved by making the size of contract areas larger, whereas in fact the LAA proposed to get over the problem of provider withdrawals by including a provision expressly prohibiting providers from withdrawing from the contract.

48. In paragraph 22 it was stated that around half the current schemes had "*very low volumes of work, presenting low economic viability and attractiveness for providers*". Thus, the assumption that small schemes were economically unsustainable was again presented as an established fact. It was suggested that the proposal to decrease the number of contracts would "*provide for increased efficiencies in the delivery of services, greater economies of scale and better value for the tax payer"*.

49. Even though the erroneous reference to the non-existent Impact Assessment suggested that users of the HPCD schemes were "*not likely to be particularly affected*", the consultation document sought the views of consultees on what impacts the proposals might have on individuals with protected characteristics under the Equality Act. Whilst there is nothing wrong in principle with making such inquiries of consultees, they are not to be treated as a substitute for the decision-maker's own investigations and considerations of such likely impacts.

50. The MoJ received 63 responses to the consultation which were collated, discussed and analysed. As recognized in the published Consultation Response, entitled "Housing Possession Court Duty Scheme, Commissioning Sustainable Services" the overwhelming majority of respondents (i.e. the people actually delivering the services), 48 out of the 63, were fundamentally opposed to the proposals. Only 7 positive responses were received (the remaining 4 consultees expressed no view).

51. Evidence was provided expressly refuting the suggestion that small contracts were not sustainable (in either sense in which that term was used by the LAA). Serious concerns were expressed about the impact on clients. For example, the LAPG pointed

out in its response that there was no necessary link between size/volume of cases and sustainability. It stated that a low volume scheme *would* be sustainable for a provider located close to the court centre with low overheads and good links to other local organisations, and that larger schemes were liable to create higher administrative burdens and associated costs arising out of more complex rotas, the need to employ more fee-earners, greater travel times and the need to arrange for agents to undertake work that the successful bidder could not deliver itself. None of these points was expressly addressed in the Consultation Response.

52. Mr Bainbridge drew out what he described as the key themes of the responses in relation to the specific questions asked in the consultation paper and summarised them within the first chapter of the Consultation Response. That document stated that (notwithstanding the responses) the Defendant "*remained convinced that moving to larger service delivery areas was the appropriate course of action.*" No further evidence or data was relied on in support of the repeated suggestion that current HPCD scheme contracts were not commercially viable and that larger contracts were more commercially attractive. It was suggested that allowing agency arrangements would overcome many of the concerns raised by consultees about extensive provider travel and continued access to local ongoing advice. No suggestion was made as to how to address those concerns that could not be met by using agents.

53. The draft Consultation Response was put before Ministers under cover of a second Ministerial Submission dated 29 March 2017. The Minister was told in that document that the timing was "urgent" as this would enable the LAA to launch the contract consultation and begin market engagement. It was suggested to him that it would be very helpful for the MoJ to write for the necessary clearance on 30 March, *i.e. the following day*. The draft response was an annexure to the Ministerial Submission, but the Minister was not given very long to study it and agree the policy.

54. Paragraph 7 of this Ministerial Submission stated that around half the current schemes had very low volumes of work "*presenting low economic viability and attractiveness for the contract holders".* In paragraph 11 of the Ministerial Submission, the Minister was told, truthfully, that the consultation paper drew criticism for a lack of explanation as to why larger areas would be more sustainable. However, that explanation was not volunteered. Instead, it was proposed that further data on the volume of HPCD scheme cases per court would be provided as part of the tender process (i.e. *after* the decision to go ahead with the proposals had already been made). The Consultation Response stated that "*available data, which will be shared with those wishing to bid as part of the tender process, indicates many of the schemes have only small volumes <u>and are not commercially viable for providers</u>*" (emphasis added). It stated that "*larger contracts will be more commercially attractive, [and] will better accommodate further changes to the courts estate whilst making sure that universal coverage for those needing advice is maintained."*

55. So far as the impact on follow-up work was concerned, the Minister was told in Paragraph 17 that:

> *"a number of respondents were concerned about "follow-on" business, where a client initially engaged through a HPCD scheme contract becomes a client of the firm for a wider range of issues (usually legally aided). It was argued that it is an important feature of the client experience and of market sustainability and that there*

was a risk that the larger areas envisioned could limit the potential for that important source of continuity (for the client) and income (for the provider, or their agent)."

Whilst the focus of the way in which this point was summarised to the Minister was on the commercial provider, at least the point was raised – but there was no attempt to provide an answer to it. The response in paragraph 25 which points to the ability of clients requiring "ongoing housing advice" to choose their provider does not answer the objection. The specific position of the NfP sector and non-legally aided follow up services is not considered, and the Minister was not told that NfP organisations formed the majority of providers under the existing arrangements.

56. The second Ministerial Submission summarises the response to the LAA's request for evidence of equalities impacts. It correctly states that the majority of respondents were of the view that the proposals would disproportionately affect both Legal Aid providers and applicants with protected characteristics. There is no attempt to engage in substance with the articulated concerns, or to explain how, if at all, they could be overcome, other than the bland assertion that for those who qualify for Legal Aid, advice and assistance is available over the phone through the national telephone line and that it is possible to transfer a Legally Aided matter to a more local Legal Aid practitioner. That does not address, for example, the problem of lack of continuity of advice/representation identified by the Claimant.

57. Following publication of the Consultation Response the Defendant held a number of "market engagement events" to discuss the proposals further before finalising them. Following these events, Hammersmith & Fulham Law Centre and Edwards Duthie Solicitors wrote a joint letter to the LAA noting that no explanation had been given as to why contracts in London needed to be consolidated in the way proposed, when there was no problem with the sustainability of current HPCDS contracts in London. They received no satisfactory explanation.

58. The final relevant Ministerial Submission was made on 7 July 2017, to seek the agreement of Ministers to the proposed tender approach. Again, it referred to "*concerns about the ongoing stability of these services*", and whilst acknowledging that continuity of service had been maintained to date, stated that "*the LAA are of the view that this tender offers the opportunity to improve the approach.*"

59. There is no complaint about the nature of the consultation itself, only about the decision to go ahead with the proposals and start the tender process without making further enquiries in the light of the consultation responses.

60. An EIA was only carried out in October 2017 after the consultation had taken place, and then only in consequence of changes to the HPCD scheme wording. The Defendant does not rely on this EIA as evidencing the discharge of his duty as it applied to the policy decision to tender fewer, larger contracts for the delivery of HPCD services.

61. Although the EIA acknowledged the serious concerns raised by consultees about the impact on, inter alia, the elderly, the disabled, those with mental health difficulties, single parents and black and minority ethnic service users, it simply repeated what was said in the Consultation Response about how sub-contract or agency arrangements would overcome many of those concerns (in fact, sub-contracting is not

allowed). That does not take into account the fact that agency arrangements are not compulsory, and so if the service provider decides not to use an agent, the impact on service users cannot be ameliorated in that way. It concluded with the bold statement that "*we do not anticipate any risk in relation to unlawful discrimination*".

THE IMPACT OF THE DECISIONS

62. Not all Law Centres who held HPCD scheme contracts felt able to bid for the new contracts. Seven Law Centres bid for eight tender areas; in some cases, two Law Centres had no choice but to compete against each other for a contract which now covered a much larger geographical area in which they had both previously successfully operated a HPCD scheme.

63. The tender process was conducted with remarkable efficiency and was completed before this case could be heard. In many areas there was only one bidder who met the tender criteria. A small number of scheme areas had to be reconfigured and tendered separately in the light of further changes to the court closure programme that were announced by HMCTS.

64. In early May 2018, the LAA announced the outcome in respect of 40 of the 47 tender areas. The number of providers of services will be broadly similar to the numbers of providers under the pre-existing contracts, but only if the agents are counted as providers. There is only one successful bidder who has not previously delivered services under a HPCD scheme. Only three Law Centres were successful in the tender process, although seven others have been named as agents for other successful bidders. Overall, Law Centres will be delivering only 10% of HPCD schemes and the overall percentage of such schemes delivered by NfP providers has reduced to 46%.

65. Law Centres who have become agents have no security of tenure. There is evidence that at least some of them have been required by their principals to pay them a fee to cover the latter's administrative costs: this may be up to 10% of the Legal Aid fees they receive in respect of the clients to whom they give assistance under the HPCD scheme or schemes within the contract area for which they are responsible. Irrespective of any such fees, the evidence establishes that in consequence of the changes, their income from the HPCD scheme contracts will be severely reduced. For example, in one area in the North of England, a Law Centre which is now delivering the same services as agent is expecting to receive approximately one third of the annual amount it previously received from the HPCD scheme when it was running that scheme as a direct contractor.

66. Although bidders were entitled to reflect any increased cost of delivering the service over a much larger area in the prices they bid at in the tender (subject to a so-called "soft" price cap) in practice, as Ms Scolding QC very fairly acknowledged in the course of argument, even if the price accepted by the LAA was higher than the price that it was previously paying, the net increase in fees for an agent was marginal – as she put it, roughly the equivalent of the price of a well-known confectionary bar for each act of assistance. I am satisfied that this would not suffice to cover the likely *actual* increase in cost to the Law Centre of providing the services in a case where it has become an agent – such as all the extra costs it has been forced to incur in changing its internal systems for reporting and in training staff, and the time spent in reporting to and meeting with its new principals.

67. Another Law Centre which lost out to a commercial provider in the bidding, despite having run the HPCD scheme successfully for over 17 years at a major court centre in the Midlands, has estimated that it will incur a direct loss of approximately £70,000 in direct annual income and stands to lose at least another £10,000 in grants.

68. A further consequential effect of schemes that were previously run by NfP organisations being taken over by firms of solicitors, is that the latter will not necessarily be willing or able to provide the "wrap-around" follow-up services that the Law Centres have traditionally provided, for which the firm would not be paid. Even if they can provide some follow-up, for example in the form of Legal Aid housing advice, the firm's office may well be located many miles away from the client's home, and the cost of travelling there, as opposed to dropping in to the local Law Centre, may be prohibitively expensive.

69. Of course, the firm may refer the client to a Law Centre or other NfP organisation for the provision of such wrap-around services. The person providing the on-the-day service at court will not necessarily contact that organisation on the client's behalf (though some of them may). The client may well be given a list of telephone numbers to ring and left to his or her own devices. Law Centre staff will not only know who to contact but will make the call themselves. In many instances there is a real danger that the client will not obtain the holistic service previously available, or will be put off by the lack of continuity of dealing with the same people. Moreover, the Law Centre may not be able to offer the same range of services falling outside the scope of Legal Aid to a client referred to it by a firm of solicitors providing the HPCD scheme service, because the severe reduction in its Legal Aid income will have a detrimental effect on its ability to raise funds from other sources.

70. Whilst paying lip-service to the valuable work done by Law Centres, the Defendant's position is that, as the tendering process was not about the provision of such wrap-around services, the detrimental impact that the decisions and their consequences may have on them cannot be a relevant legal consideration. The duty under LASPO is concerned purely with the provision of Legal Aid. The client who had access to services under the HPCD scheme under the previous contracts will still have access to *those* services under the new scheme, and that is all that matters.

71. Ms Scolding submitted that one difficulty with taking wrap-around services into consideration is that commercial providers might then have cause for legitimate complaint that the process would be unfairly weighted in favour of the NfP sector (although, ironically, the draft Impact Assessment in this case revealed that the LAA was aware that it could be said that the tender process was inherently skewed in favour of commercial providers). As for the Law Centres who lost out in the bidding, Ms Scolding pointed out that it is in the nature of a competitive tendering process that there will be some winners and some losers, and that most of the new contracts were awarded to incumbent providers. In answer to this, Mr Coppel QC observed that the LAA's attitude demonstrates an awareness of the cost of everything and the value of nothing.

72. It is important, in a case such as this, to bear in mind the limitations of the Court's jurisdiction, which is one of review. Matters of policy are not for the Court, and whatever one might think of the merits of the decisions under challenge or of their consequences, it is no part of the Court's function to express a view about them. I

have read a lot of evidence in this case about the practical impact of the decisions on individual Law Centres and their clients, and it paints a very dispiriting picture: but very little of it is relevant to the issues that I must decide. The Court is only justified in granting relief if it is demonstrated, on the balance of probabilities, that there has been one or more material public law error. If the decision was one that the Defendant was entitled to reach on the evidence before it, there is no basis on which the Court can or should interfere.

THE LAW

73. There was no dispute between the parties as to the applicable legal principles, which are well known. The duty of a decision maker to take reasonable steps to acquaint itself with relevant material is derived from the decision of the House of Lords in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014. It is often referred to as the *Tameside* duty.

74. Where, as here, a decision maker has a wide discretion conferred by statute, it is for the decision maker to decide (a) what factors are relevant or irrelevant, (b) what weight is to be put on them, and (c) the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such, subject only to *Wednesbury* review: see *R(Khatun) v. Newham LBC* [2005] QB 37 at [35]. As Laws LJ observed in that case:

> "*The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable … authority could have been satisfied on the basis of the inquiries made.*"

75. The only area of legal controversy related to the extent of the *Tameside* duty of inquiry in a case such as this. Mr Coppel relied on *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin) as authority for the proposition that the extent of the inquiry required by a decision-maker depends upon the context of the decision, and may be an onerous duty where the consequences of the decision are significant. He submitted that here, the court is concerned with policy decisions about the provision of state-funded legal advice to some of the most vulnerable people in society, and that in that context the duty of inquiry was an onerous one and that the court should be astute to ensure that it has been properly discharged.

76. Ms Scolding submitted that the *Refugee Action* case was very different in nature and that this was not a case about cuts to service provision; therefore, in the absence of clear and cogent evidence of irrationality, the court should not interfere. In my judgment, it is unnecessary to resolve this point, because even on Ms Scolding's approach a Defendant cannot satisfy its *Tameside* duty by making no relevant inquiries at all, or by confining its inquiries to reliance on "anecdotal evidence" from, at most, a handful of former service providers.

77. Ms Scolding also sought to rely upon observations of Sales LJ in *Birmingham City Council v Wilson* [2016] EWCA Civ 1137 at [37], that:

> "*where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to*

the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to which Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously are acting perversely".

78. It is important not to take those observations out of context; they were addressing the very different situation in which a statute provides for certain facts to be established as part of the decision-making process. The case concerned the duty of a local authority under s.184 of the Housing Act 1996 which, in line with its public law *Tameside* duty, was to take reasonable steps to inform itself of matters relevant to the assessment of a homeless single mother's housing application, and to do so in a manner that was compatible with the PSED. The mother had sought administrative review of a decision to offer her and her children accommodation in a high rise flat. The review officer held that the accommodation was suitable. The suitability of the accommodation was the central question of fact which the local authority was required by the statute to assess and determine.

79. The issue in the case was whether the review officer had failed to make further inquiry in relation to evidence that was said to raise a "real possibility" that one of the respondent's children was disabled, which would have been a factor bearing on the issue of suitability. The Court of Appeal asked whether the review officer had subjectively considered whether the evidence raised such a "real possibility", and if so, whether he had reached a *Wednesbury* irrational decision that it did not.

80. This case is not dealing with an analogous situation. LASPO does not require the Defendant to make a specific fact-finding about the sustainability or viability (in any sense) of HPCD schemes. This is a case about the straightforward application of *Tameside* principles. The question here is whether, having rationally chosen viability/sustainability as a relevant factor, the Defendant had obtained sufficient information on that topic to enable him to make a lawful decision that there was a problem and that it was necessary (or desirable) to move to bigger scheme areas to overcome it, and whether he had gone about his inquiries in a manner that was compatible with the PSED.

THE CLAIMANT'S CASE

GROUND ONE: BREACH OF TAMESIDE DUTY/IRRATIONALITY

81. The first ground of challenge turned on the narrow question whether the Defendant had any, or any sufficient evidence, without making further enquiry, to justify the key premises on which the policy was founded, namely, that small schemes were not economically viable or sustainable, and that moving to larger scheme contracts (that could be divided between multiple providers) would improve their sustainability.

82. Mr Coppel relied on the observations of Sedley LJ in *R v Parliamentary Commissioner for Administration ex parte Balchin (No 1)* [1998] 1 PLR 1 at 13E-F that:

"what the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic".

He submitted that the decisions to fix something that was not obviously broken in the first place, were based on a flawed and/or un-evidenced justification which "did not add up". It was assumed by the Defendant that because schemes were small, they were not viable, and that was an illogical assumption made without any, or any sufficient, supporting evidence.

83. I asked Ms Scolding where the evidence was to justify the finding that small schemes were not economically viable (and that it was necessary to replace them with larger schemes). She was unable to show me any direct evidence to that effect. However, she submitted that such an inference could be legitimately drawn from the data relating to those providers who had withdrawn from the scheme, summarised in a table exhibited to the evidence of Ms Beedell, a Senior Commissioning Manager within the LAA. Of course, that data only related to a minority of service providers: 90% of the scheme contracts, irrespective of size, were operating without any apparent difficulties.

84. Ms Beedell gave evidence about all the pre-existing HPCD scheme contracts where there were changes of provider between 2011 and 2017. This demonstrated that in all cases where there was a withdrawal by a provider in between tenders, the LAA used measures such as "expressions of interest" or interim tenders to find alternative providers or awarded the contract to a previously unsuccessful bidder who was ranked next in the tender process. Therefore, there was no problem in providing continuity of service to clients during that period.

85. As to economic or financial sustainability, although there were 30 changes in that period, five areas featured twice, and so only 25 contract areas were affected. In Guildford, the provider withdrew because they found out about the independently funded scheme that was operating there. 8 changes were brought about because the incumbent provider failed to re-tender or was unsuccessful on re-tender in 2013. 6 other withdrawals were brought about by office closures or want of staff. In 3 further areas the provider decided to withdraw from *all* Legal Aid work, not just from HCPD schemes. Whilst that could give rise to a legitimate inference that the provider was not making enough money from Legal Aid, one can draw no logical inference about the role that the HPCD scheme contract played in their decision to withdraw, let alone assume that re-arranging scheme areas to allow for a greater amount of HPCD work would be a sufficient incentive to make such a provider change its mind about resuming Legal Aid work generally.

86. In the remaining areas, no reason at all was recorded for the provider's withdrawal, so the suggestion that they dropped out because the HPCD contract was insufficiently lucrative to make it worth their while is pure speculation – and, as will be seen, is demonstrably wrong in some cases. The "anecdotal evidence" referred to in the body of the April 2016 paper, is not referred to in any of the statistical tables.

87. The LAA carried out no calculations of the financial value of the HPCD scheme contracts to the providers until after the hearing of the claim for judicial review, when I was belatedly provided with a witness statement from Ms Gemma Jordan, a commissioning manager within the LAA, supplying figures for the value of the schemes in Ms Beedell's table in the year of withdrawal and (where applicable) the previous year. Ms Jordan's evidence showed that in some cases the scheme value in the financial year before the provider withdrew was more than in the year in which

the provider withdrew, whereas in other cases, such as Aylesbury/High Wycombe, and Cambridge, the value to the provider had significantly increased in the year of withdrawal. There is no obvious pattern. If that exercise had been carried out before the policy was formulated, it might have given some pause for thought about whether it was right to leap to the conclusion that those providers who gave no reason for withdrawal did so for financial reasons.

88. Indeed, one of the areas in which no reason for withdrawal is recorded in the table, Lambeth, was a large scheme which according to Ms Jordan's evidence generated almost £80,000 worth of income in the year of withdrawal. Another area, Telford in Shropshire, features twice in the table. There were no successful bids in the April 2013 tender. In that year, the contract provided income of only £13,136 but the provider did not withdraw; the contract was one of those re-tendered following LASPO. In the subsequent year, when the incumbent provider *did* withdraw, the contract yielded income of £54,351. The table records that the contract was then awarded to an interested provider in a non-neighbouring area. In another area where the reason for withdrawal is not recorded, Maidstone and Medway, the scheme area appears to have been a new one (re-drawn in 2013) as there is no income recorded for the year prior to withdrawal. The income in the year of withdrawal was £33,141.

89. In one of the smallest of the schemes, Cambridge, where there were only 73 acts of assistance in the previous year and 163 in the year of withdrawal, the reason given for provider withdrawal was loss of the relevant staff member due to organisational re-structuring. Yet two other providers expressed an interest in taking over the contract, and the contract was awarded to one of them. Indeed, in all the areas where the annual income from HPCD schemes was small – less than £10,000 in some cases – including those in which providers withdrew for no recorded reason, the LAA was able to find an alternative provider. What the LAA did not have, as Mr Coppel put it, was a cohort of people saying: "HPCD schemes are too small, if only they were bigger."

90. There is no evidence that the LAA ever considered what percentage of the income from Legal Aid work given to the provider who withdrew, the HPCD scheme income represented. Ms Scolding submitted that it is reasonable to infer that where the income from the scheme was less than £10,000 it was unlikely to be sustainable given the overheads incurred in running an office and paying staff, but the legitimacy of that inference depends on numerous factors, including other income being generated by the provider, none of which was investigated. As Mr Coppel pointed out, nobody would open an office just to carry out HPCD schemes. Ms Scolding also submitted that the fact that providers were giving up fairly quickly was an indication that schemes were insufficiently lucrative – but there is no evidence from any of the civil servants involved that they drew that inference from the timing of withdrawals.

91. Whilst the conclusions that small schemes were not financially viable and larger schemes were likely to be more economically viable for providers are ones that *might* be reached by a rational decision-maker, following a proper evidence-based inquiry, they are not so obvious that they can be assumed to be right without making any investigation of the financial impact of the proposed changes, which is what the Defendant did. As the Claimant (and other consultees) pointed out, larger schemes are likely to cost more to staff and administer; and if agents were used as a means of mitigating the cost to a provider of long-distance travel which would not be reimbursed, the additional fee income for the provider from the larger volume of

work, which was supposed to defray the additional costs or make the contracts more attractive, will not be received by him. Indeed, as I have already explained, the introduction or retention of agents undermines the rationale for the change, as they deprive the new provider of most of the extra fee income which is the supposed incentive for taking on the larger contract.

92. No attempt was made in this case to work out the actual figures, let alone to carry out any form of financial modelling before the decisions under challenge were taken. That did not need to be an expensive or sophisticated exercise involving outside consultants. Even the kind of exercise belatedly carried out by Ms Jordan might have been informative.

93. I am therefore driven to the conclusion that this decision was one that no reasonable decision-maker could reach on the state of the evidence that the LAA had gathered and in the absence of further inquiry. On the basis of such evidence as it had gathered, the LAA had no justification for leaping to that conclusion. Once the results of the consultation were obtained, there was enough information to give the LAA pause for thought about its assumption that bigger is better; but it took the risk of proceeding with the recommendation to the Minister without addressing the points made about the absence of evidence that existing schemes were not financially viable or that increasing the size of the areas covered by HPCD scheme contracts would be an improvement. The only response that was suggested was that data would be provided to bidders when the policy decision had been made. Whilst data could be provided about the size of the pre-existing schemes, no data was available to connect small schemes with lack of viability.

94. The Claimant therefore succeeds on this ground. The Defendant failed to discharge his *Tameside* duty of inquiry and the decisions he reached in the absence of any evidence to support it were fatally flawed.

GROUND 2 – BREACH OF THE PUBLIC SECTOR EQUALITY DUTY

95. The most pertinent provisions of Section 149 of the Equality Act 2010 are as follows:

> *(1) A public authority must, in the exercise of its functions, have due regard to the need to…*
>
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it…*
>
> *(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to: -*
>
> *(a). remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
>
> *(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it…"*

96. The relevant principles relating to the exercise of the PSED are adumbrated by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [25]-[26] and were endorsed by Lord Neuberger in *Hotak v Southwark LBC* [2016] UKSC 30 [2016] AC 811 at [73]. The duty is personal to the decision maker, who must consciously direct his or her mind to the obligations; the exercise is a matter of substance which must be undertaken with rigour, so that there is a proper and conscious focus on the statutory criteria and proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them. Whilst there is no obligation to carry out an EIA, if such an assessment is not carried out it may be more difficult to demonstrate compliance with the duty. On the other hand, the mere fact that an EIA has been carried out will not necessarily suffice to demonstrate compliance.

97. As to the proper approach to be taken by the court, a useful and elegant summary is to be found in the earlier judgment of Elias LJ in *R(Hurley) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) at [78], a passage that was expressly approved in *Bracking*. As he concluded:

> "*the concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria… the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognize the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.*"

98. Mr Coppel submitted that it was incumbent on the Defendant to give careful, rigorous and open-minded consideration to the particular situation of the NfP providers, such as Law Centres, that serviced the majority of the existing HPCD scheme contracts, and the likely impact upon their clients, many of whom have protected characteristics, when discharging the PSED. There was a real risk of negative equality impact from the proposals because of their damaging effects on NfP providers and their clients. Yet no-one undertook any inquiry into how NfP providers would be affected, and what this might mean in practical terms for their clients. Ministers were not even told that most HPCD service contracts were currently being provided by the NfP sector; without such information, they could not possibly apply their minds to proper consideration of how the decisions might impact on the services provided to clients with protected characteristics by such organisations.

99. The way in which the LAA approached the discharge of the PSED flows from Mr Bainbridge's facile assumption that if the users of the service were still going to be able to access legal advice and representation at court when the scheme areas were re-drawn, the PSED would not otherwise be engaged. Mr Coppel contended that that approach was too narrow. It is accepted by the Defendant that a significant number of those using the HPCD schemes have protected characteristics, though the inquiry that led to that concession was only carried out retrospectively. There is no evidence that it even occurred to the LAA prior to the consultation that if a Law Centre could not bid for a larger contract, or bid and failed, or could only act as an agent, the financial impact might be to force closure or, at the very least, further curtail the "wrap around" services which actually addressed the causes of the crisis leading to the possession application, would plainly have an adverse effect on its clients. When evidence of this impact was provided in the consultation responses it was not properly engaged with.

100. Ms Scolding's response that the number of clients with protected characteristics will be the same irrespective of whether the provider is a solicitors' firm or a NfP organisation, with respect, misses the point even if it is correct (the Claimant takes issue with that analysis). It is beyond argument that users of the HPCD schemes disproportionately have protected characteristics; the impact of the decisions under challenge is that some of them will get a worse service overall because whilst they will get the same assistance as before at court, they will not have the same access to the follow-up "wraparound" services which local Law Centres were providing to them under the previous system. Whilst that problem might be tempered to some extent if the Law Centre is an agent for the new provider, it will not be if the Law Centre closes or lays off more staff because of the adverse impact on its income. There is no obligation on the provider to use an agent, and the NfP agent will not have the same income from the HPCD scheme as it did before.

101. Whilst Ms Scolding could fairly point to the fact that the impact on "wrap around" services for vulnerable clients and the potential outcome that they might end up homeless when that could have been avoided, was not the main point highlighted in the consultation response, and that the focus appeared to be on the cost and practicalities of travel, it does not follow that the Defendant or the civil servants advising him could ignore it with impunity. Many of the arguments on this topic raised by the consultees were mentioned, but not directly addressed.

102. That does not mean that the decision maker could not reach a lawful decision that had such an adverse impact, or which took the risk of causing such an impact; but the PSED requires that he must take that decision in the knowledge of its potential effects on those with protected characteristics and after having given them due consideration. That did not happen in this case.

103. The only evidence of any assessment of the equality impact of the decisions under challenge was the "equality statement" contained in the consultation response, and that did not consider these matters. Nor did it purport to address all the equality concerns raised by consultees. In the light of the scant information with which the relevant Ministers were provided, they cannot personally have had due regard to the relevant equality impact issues. The Ministerial Submission of 29 March 2017 contained less analysis and information than the "equality statement" in the draft consultation response, and the final Ministerial Submission of 7 July 2017 said nothing at all about the PSED.

104. In my judgment if, as is the case, there is a real risk that in consequence of the restructuring of scheme areas, clients using the HPCD service will no longer have the same access to the "wrap around" services that are not covered by Legal Aid and which may make all the difference to whether they end up homeless and destitute, that is something that the Ministers should have been made aware of, and should have given due regard. I accept, of course, that the concept of "due regard" is not the same as a requirement to give PSED considerations any specific weight. Weight is a matter for the decision maker alone.

105. However, in this case, I regret to say that the evidence falls a long way short of demonstrating that any Minister (in person) gave due regard to the equality impact of the proposed changes. This is because the information collated by the LAA and placed in summary form before the Minister failed to identify in sufficiently

unambiguous terms all the adverse effects that the proposed changes could have on users of the service (whose constituents contain a disproportionate number of people with protected characteristics under the Act). It portrayed the potential for agency arrangements as the cure for all ills, which it patently is not, and it failed to spell out what could happen if an agent were not used, or what the position would be in respect of those matters it had identified for which the ability to use agency services would not provide an answer.

106. Paragraphs 30-32 of the Ministerial Submission of 29 March 2017 are brief, and they are superficial. In my judgment they are woefully inadequate to bring home to the decision-maker all the information necessary to enable him to discharge the duty. The fact that the Minister was sent a copy of the draft Consultation Response as an attachment to that Submission does not make the Defendant's position any stronger. I have already mentioned the fact that the Minister was asked to provide an answer within 24 hours, which would hardly have been sufficient time to carry out a proper consideration of PSED factors even if he had been fully and properly briefed, which he was not. Therefore, the second ground of challenge to the decision is also made out.

WHAT RELIEF SHOULD BE GRANTED?

107. Ms Scolding urged the Court, even if it came to the conclusion that the decisions were unlawful, not to quash them and remit them for reconsideration as a matter of discretion because of the administrative inconvenience and prejudice to third parties (including those who successfully tendered) that this could cause. She submitted that declaratory relief would suffice to mark the finding by the Court that the decisions were not lawfully taken. However, she felt unable to submit that even if the Defendant had gone about things in the right way, the same decisions would have been reached.

108. I do understand the Defendant's position, given that the tender process is now complete, and the new contracts have been awarded; but a wrong should not go without a remedy save in very exceptional circumstances, and this is not the type of case in which to deny the successful Claimant the normal order. If there had simply been an assumption made without evidence that small contracts were not financially viable, and the evidence in support of that assumption had emerged in the course of the proceedings, and there had been no breach of the PSED, then I might have been more sympathetic to Ms Scolding's submission. As things stand, I cannot accede to it. The decisions must be quashed and the matter remitted to the Defendant for reconsideration.