PSED Review
Information for Cllr Loveday (revised)

1. How does our process work?

Usually, the public sector equality duty (PSED) is considered when officers are proposing a decision to members. However, it can also be relevant in day to day decisions e.g. considering homelessness and disability, as the *Pieretti* case demonstrates.

In line with the Council's Key Decisions process, the 'triggers', when relevant, can be:

Officer decisions
- Approval of new expenditure below £20k; and
- Acceptance of most economically advantageous tenders/quotations below £20k for goods, materials and services and/or execution of works.

Cabinet Member decisions
- Approval of new expenditure, and tender awards £20,000 to £100,000
- Leader can take a decision valued over £100,000 if there is a genuine reason for urgency

Cabinet Decisions (Key Decisions)
- Anything affecting communities living or working in an area comprising of two or more wards;
- Any expenditure or savings which are significant, regarding the Council's budget for the service function to which the decision relates in excess of £100,000;
- Anything significantly affecting communities within one ward; and
- Anything affecting the budgetary and policy framework set by the Council.

Full Council decisions
All 46 councillors meet to take the major budgetary and policy framework decisions. The Council must consider certain high-level strategic plans. These are:
- Local Performance Plan
- Community Strategy
- Education Development Plan
- Local Development Framework

The annual revenue and capital budgets will be prepared by the Cabinet, consulted upon, reflected in the Forward Plan and then considered and approved by the full Council at the Budget Council meeting in February each year. This sets the level of Council Tax for the forthcoming Municipal Year (May - April).

Planning Applications Committee (PAC) decisions
Determines applications for planning permission including consents for works to listed buildings and properties in conservation areas in addition to authorising enforcement notices.

Licensing Committee decisions
- Considering and resolving all matters relating to the Licensing, Certification and Registration functions of the Council undertaken by the Director of Environment Department.
- Hearing appeals against decisions made by officers carrying out delegated licensing functions
- Determining new applications for licences and variations to existing licences

When equality impact assessments/analyses (EIAs or, in planning reports, EqIAs) are appropriate because the PSED is relevant to the decision, they can assist in fulfilling our statutory duties under the Equality Act 2010 and in demonstrating that we have complied with those duties.

They also demonstrate that we are achieving our strategic policy aim of being the Borough of Opportunity.

How much analysis is required will depend on the decision or policy in hand. Case law has established that having due regard means analysing the impact, and using this to inform decisions, thus demonstrating a conscious approach and state of mind. It has also established that the PSED must be complied with prior to any final decision. Retrospective consideration of the duty will not be sufficient.

The Council has a single post (Opportunities Manager) to advise officers on PSED aspects of decision making and other related matters such as changes in legislation and case law developments. The intranet also gives advice and guidance for officers (Appendices One and Two). The Council has a EIA Policy (Appendix Three), as required by the results of an audit and agreed by the Council's Board (chaired by the Joint Chief Executive with Executive Directors) in 2012.The Council has a EIA Template and Guidance, which is the same for Bi- and Tri-borough decisions. Sometimes it's called a 'toolkit' and it can be found in Appendices One and Two.

Section 08 of the report template for Cabinet, Council, Cabinet Member, Select Committee Reports asks report authors to include equality if it is relevant. The format is the same for Bi-borough and Tri-borough decisions. Please see Appendix Four.

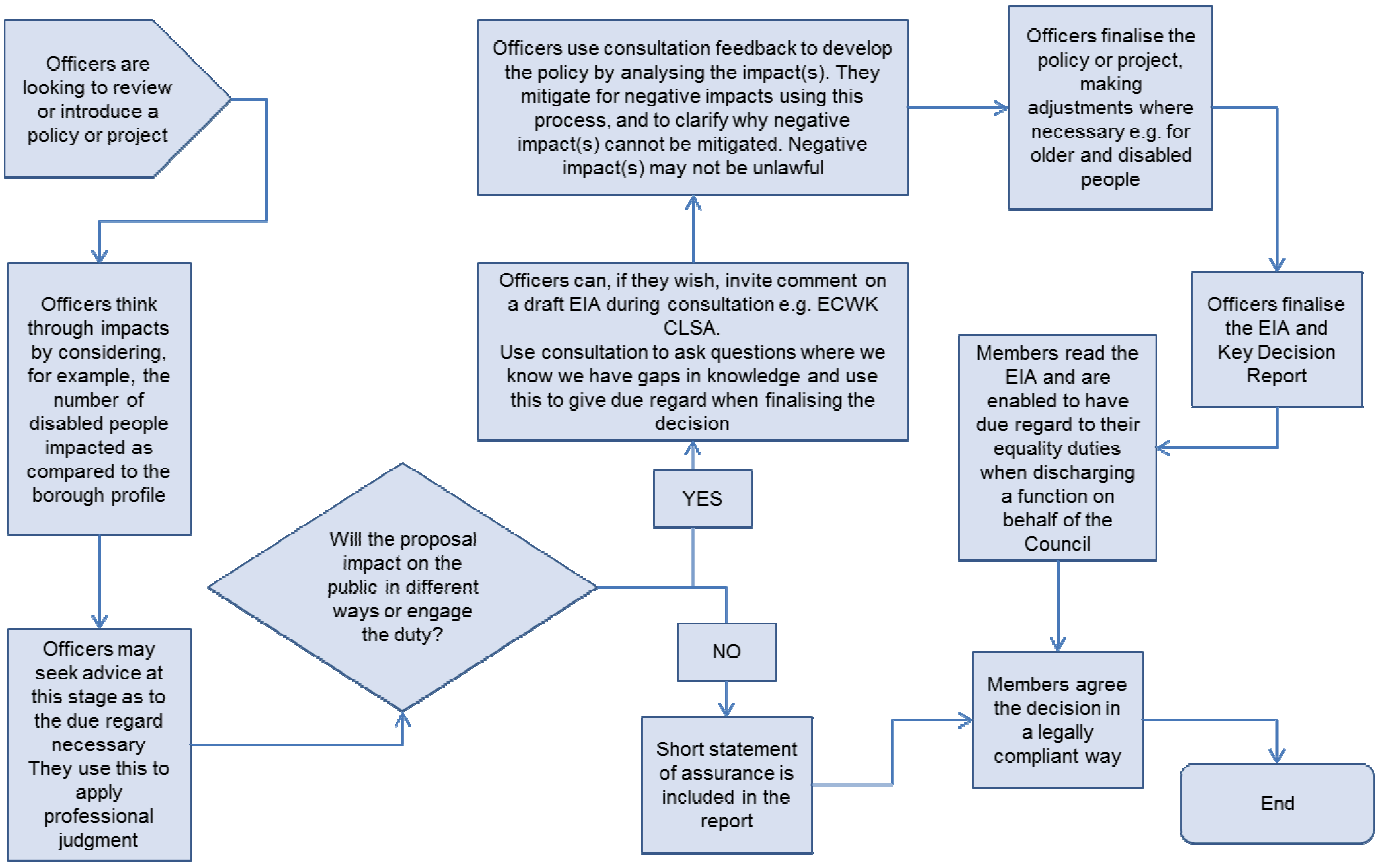
2. The criteria that are applied

When the PSED is relevant, an assessment is made about what response would be necessary and proportionate. For example, an in-depth EIA would be undertaken into the impact of more significant decisions, such as increasing rents or changing Adult Social Care policy. For routine matters, such as entering into a lift maintenance contacts, such an analysis would not generally be necessary.

There is no direct correlation between the financial cost of a decision and the assessment that a more detailed PSED review would be necessary - although it is often the case that higher value monetary decisions would be more likely to impact on protected groups. Formerly, the Equality and Human Rights Commission (EHRC) advised having a two-stage process: an Initial Review and a Full Screening. However, the EHRC no longer advocates any particular system. In LBHF, we have therefore scaled down the scope of the EIA form so that it can be used for decisions that do and do not involve consultation, simply by using or ignoring the consultation section of the form.

This chart shows the process:

Process: enabling members to give due regard to equality of opportunity



If a written EIA is required, there is no standard length of EIA. An EIA will be as long as required to cover the policy or project that is being analysed. There is no set or target in this regard. This helps the author to give a proportionate response, rather than being tied to a set length.

Where costs are low but we still need to consider equality of outcome and impact on council aims, we do consider equality. An example would be the decision in 2012 on the small grants programme (link), where organisations were bidding for small pots of money and the largest that could be awarded was £10K. The Council wanted any successful bidder to deliver projects that supported our corporate aims and in so doing, to advance equality of opportunity and to deliver those projects in an inclusive way. Therefore, the bidders were tested against both democratically mandated aims and PSED at the same time and this was stated in the body of the report. Because the 'bigger' decision on how grants were allocated in general had already been taken in July 2011 and had undergone a thorough EIA and test against our aim to be the Borough of Opportunity (link), and the scheme itself had not changed but was being implemented, the 2012 decision did not need an in-depth EIA and so this is an example of costs being low and having a link to equality, which can be carried out in a sensible and proportionate way that supports our strategic policy at the same time.

3. Number of EIAs undertaken each year

In the calendar year 2012, 60% of formal decisions by the Council's Full Cabinet, 66% of decisions made by Cabinet Members (under their delegated authority) and 64% of these decisions taken as a whole were accompanied by an EIA report. The remaining decisions would have included a short statement to say that equality is not relevant to the decision. The raw numbers are:

Cabinet and Cabinet Member decisions

In 2012, EIAs were carried out on 60% of Cabinet and 66% of Cabinet Member decisions (CMDs)

		Numbers of EIAs carried out between January and December 2012							
Month	**Year**	**Full Cabinet Decisions**	**EIAs carried out**	**% EIAs**	**Cabinet Member decisions**	**EIAs carried out**	**% EIAs**	**Total EIAs**	**% Total EIAs**
january	2012	11	10	91	24	18	75	28	**80**
february	2012	0	0	0	13	8	62	8	**62**
march	2012	16	13	81	17	9	53	22	**67**
april	2012	9	7	78	9	5	56	12	**67**
may	2012	5	3	60	15	8	53	11	**55**
june	2012	3	1	33	15	10	67	11	**61**
july	2012	7	3	43	14	8	57	11	**52**
august	2012	0	0	0	5	4	80	4	**80**
september	2012	5	2	40	26	16	62	18	**58**
october	2012	14	5	36	16	15	94	20	**67**
november	2012	8	5	63	7	5	71	10	**67**
december	2012	10	4	40	5	3	60	7	**47**
Total		88	53	**60**	166	109	**66**	162	**64**
Note: Cabinet member decisions include Leader's urgent decisions.									
60% of full cabinet decisions, 66% of cabinet member decisions and **64% of all decisions** had an EIA carried out on them.									

A further dip sample of Children's, Community Care, and Housing decisions, and decisions taken by the Chief Whip and the Leader in 2012 showed that many reports stated they had an EIA attached but it was not attached and nor was equality mentioned in the reports. Therefore the true number of CMDs with EIAs attached may be lower than that shown in the table above. The Council has now moved over to a new style of report template which does not ask officers to state on the front if they have completed an EIA.

PAC decisions

In 2012, four PAC decisions stated they had an EIA attached - only two of the four were published (i.e. attached) to the decisions that they related to. All four mentioned equality in the relevant sections of the reports, as did some others where this was relevant to the application:

PAC: number of EIAs carried out in 2012						
Date	**EIA?**	**Equality mentioned?**	**Where?**	**Issue**	**Decision**	**Decisions**
11-Jan-12	No	Yes	p55, para 3.49	Ref disabled access	4-8 Effie Road	1
08-Feb-12	No	Yes	p93 para 3.335	Ref disabled access	Imperial Wharf	2
	Yes (but not pub'd)	Yes	p136 para 3.6-3.26	Ref visually impaired and general impacts	SBM, Peabody, Broadway	3
			p140 para 3.32 - 3.38	EIA: summary		
16-Feb-12	No	Yes	p6 para 9/10 and p106 para 3.192	Ref visually impaired and step free access	Seagrave Road	4
			p80 3.71-3.76	Equality implications of application		
	Yes (but not pub'd)	Yes	p199 para 3.203	Disabled children and play	Ariel Way	5
			p202 para 3.223-3.226	Equality implications of application		
14-Mar-12	No	No				
11-Apr-12	No	No				
15-May-12	No	No				
13-Jun-12	No	Yes	p66 para 3.58-3.63	Ref disabled access	Riverview	6
10-Jul-12	Yes	Yes	p125 3.516-3.523	Ref gypsy/travellers and EQ implications	80 Wood Lane	7
26-Jul-12	No	No				
31-Jul-12	No	No				
12-Sep-12	Yes	Yes	p302 para 5.1-5.9	Ref the EIA and human rights	Earls' Court	8
20-Sep-12	No	Yes	p117 3.62-3.64	Ref access and disability	27 St Ann's Road	9
16-Oct-12	No	No				
13-Nov-12	No	No				
18-Dec-12	Yes	Yes	p76 3.270-3.277	Equality implications of application	Queen's Wharf	10
	No of decisions at PAC	No of decisions per year	No of decisions with EIAs	No of EIAs published	% decisions with EIAs	% decisions with EIAs pub'd
	Av. 7 per agenda	Av. 90	4	2	4.44%	2.22%

Licensing/Licensing Sub-Committee decisions

In 2012, no licensing decisions had EIAs or equality analysis attached. However, two decisions relating to the overall policy and to one application mentioned equality. The application had more information but no analysis of the impacts on women's safety of granting a license to Secrets (a lap dancing club).

Date	EIA?	Equality mentioned?	Where?	Issue	Decision	Decisions
09-Jan-12	No	No				
16-Jan-12	Meeting cancelled	Meeting cancelled				
23-Jan-12	No	No				
03-Feb-12	No	Yes	p3 para 3.2.1	Gender equality and lap dancing and women's safety	Secrets	1
12-Mar-12	No	No				
16-Apr-12	No	No				
23-Apr-12	Meeting cancelled	Meeting cancelled				
27-Apr-12	Meeting cancelled	Meeting cancelled				
30-Apr-12	No	No				
01-May-12	No	No				
21-May-12	No	No				
12-Jun-12	No	No				
18-Jun-12	No	No				
22-Jun-12	No	No				
28-Jun-12	No	No				
11-Jul-12	No	Yes	p34 para 2.8	Equality in general	Licensing Policy	2
16-Jul-12	No	No				
17-Jul-12	No	No				
27-Jul-12	No	No				
30-Jul-12	No	No				
04-Sep-12	No	No				
11-Sep-12	No	No				
28-Sep-12	No	No				
12-Oct-12	No	No				
31-Oct-12	No	No				
07-Nov-12	Meeting cancelled	Meeting cancelled				
28-Nov-12	No	No				
30-Nov-12	No	No				
11-Dec-12	No	No				
13-Dec-12	No	No				
	No of decisions per year (sub and main)	No of decisions with EIAs	No of EIAs publishe	% decisions with EIAs	% decisions with EIAs pub'd	
	38	0	0	0.00%	0.00%	

Officer Decisions

Officer decisions are bound by the scheme of delegation and therefore assumed to be a lower level of risk. There is no further data available on these.

4. Examples of when we would, and when we would not undertake an EIA

As explained above, we no longer use the EHRC approach of having a two-stage Initial Review and Full Screening. However, the depth of the assessment will vary according to the decision that officers are proposing.

In practice, on many occasions the Opportunities Manager will advise that there is no need for an EIA. LBHF can give an example of a recent decision to undertake improvement works on a housing estate at Aspen Gardens, London W6. The Opportunities Manager gave written advice to officers about this decision on 31 January 2013 as follows: *'The whole aim of repairing the lifts is to ensure that those with reduced mobility or who cannot use stairs at all, are able to get about. I would simply summarise the benefits…in the Equality Implications section and not attach [an] EIA… the report is fine without it'.*

In practice, there will be occasions when officers will not understand the requirements of the PSED, or they will not seek advice from the Opportunities Manager or they may seek it too late. This can lead to the completion of unnecessary EIAs or a failure to complete necessary ones.

Where costs are low, but we still need to consider equality of outcome and impact on council aims, we do consider the PSED. An example would be the decision in 2012 on the small grants programme (link), where organisations were bidding for small pots of money and the largest that could be awarded was £10K (see above).

Where we are making a decision that will affect the public in different ways, it would be expected that officers give consideration to the impacts so that members can be advised appropriately (see the flowchart above). More in-depth EIAs include the following:

- Direct Payments Policy (link) and the EIA (link)
- Revenue Budget and Council Tax Levels for this fiscal year Item 41.5 (link) and the EIA (link)
- Earl's Court Redevelopment Item 50 (link) and the EIA (link)

- Taxicard Item 81(link) and the EIA (link)
- Housing Revenue Account and Rent Increases Item 154 (link) and the EIA (link)

5. Training

Training on PSED is mostly targeted according to need and priority. It is often given through 1:1 coaching by the Opportunities Manager, as well as through briefing teams at their meetings. For example, the planning team has had three briefings since 2010. In December 2012, the tri-borough Adult Social Care team had a briefing from the Opportunities Manager, and plans are in place for a similar session with the new public health team.

In April, May and July 2011, the Opportunities Manager and the Assistant Director for Legal & Democratic Services gave training seminars to Directors and Assistant Directors responsible for frontline service delivery. It covered the 'whole picture' of decision making, including consultation, case law and the PSED. This included senior managers in all departments except the corporate centre. All senior managers, including those who did not attend on the day, were sent the information that their colleagues had been given via the presentations.

In January and February 2012, the Opportunities Manager and the Assistant Director for Legal & Democratic Services gave an updated, open-invitation training seminar to those who advise on decisions and policy making in RBKC and LBHF. Attended by over 30 staff in RBKC and 50 in LBHF, the seminar gave some useful guidance to officers on the challenges that other public bodies had faced in 2011 when taking difficult decisions.

In February 2013, the open training seminar sessions were reprised and further updated, and delivered by the Bi-Borough Director of Law and the Opportunities Manager. 15 officers attended the LBHF session, and 20 attended the RBKC session.

In 2012 and 2013, a survey of attendees was carried out, and we asked the question: *'has this session helped you understand some of the issues that can lead to a successful legal challenge?'*. 100% of attendees in both organisations in both years answered 'yes'.

Training is also available from the e-learning module on the intranet covering the steps involved in carrying out EIAs; and via the departmental representatives on the working group for equality. This group was previously involved in work to fulfil legal requirements of the Single and Disability Schemes, but is now a virtual group which helps to disseminate messages to departments.

6. Large EIAs.

Earls Court West Kensington CLSA

This very large report set out the structure of the Conditional Land Sale Agreement (CLSA), an agreement which would grant an option to the Capital and Counties Properties plc group of Companies (Capco) to include Council owned land including the West Kensington and Gibbs Green Estates (the Estates) in a comprehensive redevelopment scheme. The report also included an analysis of the statutory and wider consultation on the Council's proposal to enter into the CLSA with Capco. It totalled 401 pages, with the EIA making up 31 of those, or 7.7% of the decision, which was worth £105M.

In terms of officer time, it is slightly difficult to quantify, as the regeneration team was careful to involve the Opportunities Manager for advice and guidance at the right time. They also gave a reasonable amount of notice and time to get back to them. However, the Opportunities Manager has attended around eight formal meetings between March 2011 and despatch for Cabinet in August 2012. Two of these were to do with the legal threat of Judicial Review.

Support has involved iterations of the EIA, as well as sifting through consultation responses to scan for equality issues that were raised, as many were. A total estimate of time over this period is about 15 to 17 working days of support.

Tenancy Agreement
The 2011 Localism Act and associated guidance that has followed, allows local authority landlords to issue fixed term tenancies following adoption of their Tenancy Strategy. To carry this out in LBHF, we needed to change the Tenancy Agreement as only 'lifetime' tenancies could previously be issued. As part of this, the impacts on victims of domestic violence (mostly women and children) and the impacts on people with disabilities needed to be considered. The EIA was far less work – around two working days of support from the Opportunities Manager – as this followed the Scheme of Allocations (see below) and borrowed from that analysis. Therefore less support was required as a lot of the work had already been done. The EIA accounted for around 43% of the report.

Scheme of Allocations
This decision was one part of four parts to a decision taken on the Housing Strategy. The Scheme of Allocations significantly increased the proportion of social housing lettings allocated to working households and those making other contributions to the community. It also promoted the Local Lettings Plans to produce more balanced communities. It changed the inefficient Housing Register to clarify who would in future, qualify for Housing and restricted access to the Register to those who have a reasonable chance of being housed.

This policy required an evidence base for change and so advice was given by the Opportunities Manager at an early stage in November 2011, as to what kind of evidence would be required. Additionally, the Disability Forum sent in their comments including evidence and their view on what kind of evidence we should take into account. This was gathered and passed back to the officer in charge of the policy. That officer drafted the EIA and this was sent to the Opportunities Manager for comments, which were provided. This was an iterative process that happened until despatch for Cabinet in September 2012. Around seven working days of support would have been provided by the Opportunities Manager on this. The EIA accounted for 16% of the report.

Children's Centres
Following a period of consultation with local residents, it was proposed that the Children's Centres in the borough should be reconfigured into a Hub/Spoke/Satellite model. The proposed six Hub centres were to focus their work on the principles of the former Sure Start Local Programmes, with an emphasis on vulnerable families, work readiness for parents, school readiness for children and parenting skills whilst a series of 10 spokes/satellites were to deliver a universal offer for all families with children under the age of 5. The EIA accounted for 28% of the report.

The Children's Centres Judicial Review is a useful example of the costs that can be incurred because it was quite an unusual case and still cost a lot to fight and win. It is worth including here because we have the figures and the timeline.

The matter began as a challenge to the entire Children's Centre programme on 9th May and was all over on 1st July. In itself that is very unusually quick. From the outset it was clear that very intensive work would be required so LBHF followed a private practice model and had a team of lawyers involved. In house were Michael Cogher, Jade Monroe, Joel Kirkwood and Kevin Beale. Counsel was Tim Kerr QC and Amy Rogers of 11kbw.

The matter was heard on 1st July and the claimant withdrew their case (which we were geared up to oppose in full) in court on the first morning, based upon agreed service provision at an individual centre which pretty much reflected what we had intended to provide anyway.

The claimant was legally aided and so no award was made as to costs, so LBHF had to pay its own costs even though we won.

Legal costs were as follows:

Tim Kerr and Amy Rogers - combined fees £34,626
In house lawyers (mainly Head of Children's and Community Services) - combined cost £22,484

There were also minor disbursements and this does not count the very significant cost in officer time for one Assistant Director, one Head of Service, and the Opportunities Manager. The Opportunities Manager estimates that she spent one working week in total on matters to do with the EIA for the report and then on the claim. This includes meeting the client, revisions to the EIA, and drafting a witness statement. It is likely that the other officers spent more time on the claim as they had more grounds to cover in the other witness statement, which they both worked on together.

7. Budget decisions

LBHF was threatened with a judicial review (JR) challenge to our 2011/12 budget in correspondence in March 2011, after the decision had been taken and after council tax and business rates bills had been sent out. With assistance from counsel we resisted vigorously and the challenge to quash the budget fell away by mid-March 2011.

See Appendix Five for the letter from the claimant in March 2011, and Appendix Six for the response from LBHF.

LBHF was again threatened with a JR challenge to our 2012/13 budget in correspondence which began in January 2012. Again, with assistance from counsel we resisted vigorously and the Opportunities Manager conducted the first EIA for the budget (link) which informed the report to Full Council (link). The challenge to quash the budget fell away by mid-March 2012.

However, the claimant's solicitors still sought to bring a JR on the basis that the budget decision was unlawful in allegedly not having due regard to the Council's public sector equalities duties in deciding to reduce the rate of council tax. They no longer sought to quash the budget but sought a legal determination that could then be used against LBHF and other authorities in respect of future council tax decisions.

The deadline for bringing a JR application passed on 29th May 2012 and officers heard no more from the claimant on this matter, although in March 2012 that we were put on notice our future budgets would be scrutinised for equality implications, in particular, the implications and impacts on older and disabled people arising from savings in Adult Social Care (see Appendix Eight)

See Appendix Seven for the last letter from the claimant, and Appendix Eight for the LBHF response, to which we received no reply.

In 2012, the Opportunities Manager agreed a process for scanning the budget for equality implications in partnership with the Bi-borough Director of Finance and Legal colleagues. This process supported the already agreed process and set of deadlines for setting the budget and was adopted by the Council's Board of Executive Directors, which is chaired by the Joint Chief Executive. The approach was incremental, with a proportionate amount of work to be done at each stage of the budget setting process, which analysed savings as the proposals were developed.

This enabled Council officers to present the equality implications of each department's savings and growth proposals alongside the revenue items at each Scrutiny Committee and a section on

PSED was included in each budget report. This in turn gave the opportunity for councillors to ask questions about those revenue items. The report to Full Council (link) included the salient points from the EIA (link).

Unfortunately, one of the most significant aspects of the 2012 Budget, namely the Council's 3% council tax reduction, could not be included because of the late timing of the announcement government financial settlement.

However, overall the process was a success in terms of avoiding legal challenge. We did not receive any letter before action in respect of the 2013 budget, notwithstanding the above letters and two previous threats of challenge in 2011 and 2012.

8. List of actual PSED legal challenges and outcomes

Actual challenges	Outcome
Home Care Charging	Challenge that we failed to discharge our equality duties, as well as other grounds, failed at the Administrative and High Courts. Criticism that we could have been clearer with Members about equality implications was taken on board by LBHF
Shepherd's Bush Market Supplementary Planning Document	Quashed but not because of equality, as this ground did not succeed (link)

9. Threatened PSED legal challenges and outcomes

Threatened challenges	Outcome
Conditional Land Sale Agreement (CLSA) with developer EC Properties to include the West Kensington and Gibbs Green estates in the planned redevelopment of the wider area (worth £105M)	Application for Judicial Review rejected (link)
Earl's Court West Kensington Opportunity Area Supplementary Planning Document	Currently called in for Judicial Review but helpfully, the equality grounds have been dropped.
Compulsory Purchase Order at Shepherd's Bush Market to facilitate regeneration	We have made the CPO. Closing date for objections was 02 April. We have just received the responses and representations from CLG, and the case unit there have logged them and passed the file to LBHF, which our legal advisor and referencing agent are reviewing at the moment to see if there is any action we need to take prior to a public inquiry in Sept 2013. Initial indications are that there are 400 responses. It is not yet known if these are from those who are statutory respondents or those with an interest, or a mix. It is also not known if equality is a feature in any of the objections.
Shepherd's Bush Market Planning Application	The hearing on 15 and 16 July. Equality is not a ground.
Council Budget under threat of Judicial Review (worth £200.8M)	A third and consecutive challenge was expected following correspondence in March

	2012, however it did not materialise. We had also spent time getting this right when drawing up the budget and officers had support in doing this.
Children's Centres	Case dropped by the claimant on the steps of the high court
Direct Payments Policy	We carried out a thorough EIA and the threat did not materialise
King Street Regeneration	The application was put into abeyance. Equality was not a strong feature of the opposition to the scheme.

10. Examples of inappropriate EIAs

As explained above, it is clear that on occasion the process does mean that officers can err on the side of caution – leading to apparently silly processes. For example, an exempt decision taken in January 2013 was to refurbish air handling units and associated controls at Fulham Mortuary. It is understood that Cllr Loveday has already provided the PSED working party with a copy of this. The work was essential because the existing systems were in excess of 25 years old and at the end of their economic serviceable life. An officer carried out an EIA in which in they simply stated the following against all protected characteristics:

'This is a maintenance/refurbishment technical contract and it will not have an effect or impact on this protected characteristic'

Officers are not bound to seek advice and did not do so in the case of the air conditioning for Fulham Mortuary. Had they done so, they would have been advised not to carry out an EIA as it was plainly not necessary, relevant, or beneficial in that case. However, this EIA would have taken around five minutes to complete and has not resulted in a cost to the Council.

Occasionally there have been other occurrences of officers doing too much. For example, when officers were planning to go out to consultation again on our Home Care Charging (FACS) in summer 2011, they started to draft an EIA on the decision to consult. The Opportunities Manager advised that this was not necessary but that officers would have to consider the ways in which the consultation and consultation materials would be made accessible, given fact this would affect people with a range of disabilities and their carers. Ultimately, it was decided not to proceed with this consultation.

11. Impact on timescales for decision making

When officers plan their work and follow the process above, there is no impact as they are prepared. For example, the Opportunities Manager has been supporting one of the ASC Commissioners on a tri-borough procurement exercise. This will let services to support carers and is quite complex as it involves younger people and adults, and tri-borough and single borough services. During the time that work has been carried out, the tri-borough authorities (along with all other local authorities) have received some of the datasets from the 2011 Census. This means that officers have had to re-check the data used in case there were any relevant changes to the contracts. The award of contract(s) will provide:

Lot	Service Description
1a	Carers' Hub - Advice, Information, Advocacy and Support Service in the City of Westminster
1b	Carers' Hub – Advice, Information, Advocacy and Support Service in the London Borough of Hammersmith and Fulham

2	Young Carers' Support Service – in the City of Westminster; in the London Borough of Hammersmith and Fulham; and in the Royal Borough of Kensington and Chelsea
3a	Home support and short breaks service for adults, children with disabilities in the City of Westminster
3b	Home support and short breaks service for children with disabilities in the London Borough of Hammersmith and Fulham

For ECWK CLSA, there was delay when the Opportunities Manager was waiting for the analysis of consultation responses from the client department, as this was needed to see what the impact would be - especially as it was known that there were concerns from older and disabled people. This delay was in the region of a week, and ultimately the Opportunities Manager helped the client department to assess the consultation data for the purposes of the EIA - but also this helped them to write the consultation report.

The EIA was recognised as an important document because of issues raised during consultation. The Opportunities Manager therefore worked on it, with the ECWK Project Officer and counsel. For this reason, the final form of EIA was settled by counsel. However, this did not hold up the signing of the CLSA.

In the Children's Centres case, LBHF averted a delay to the overall decision by pressing for a 'rolled up' judicial review hearing as we wanted to be able to sign our contracts in early July to sustain service provision. Where delay had occurred prior to the decision being taken in April 2012, this was because advice about the supporting work to this decision given by the Opportunities Manager had not been taken on board and there was a lack of interaction/response from the client department. When the EIA arrived, it needed a lot of work and there was a difficulty in turning this around in time for publication.

What has happened outside LBHF?

Earlier this year, the Opportunities Manager at LBHF conducted a review of several decisions by other authorities that had been subjected to challenges on PSED grounds. This was undertaken as part of a risk analysis to assess (i) the potential delays that could occur to major projects in the event of LBHF facing such a challenge (ii) the potential costs involved (iii) how LBHF could 'get it wrong' (iv) how LBHF could 'get it right'. We have been asked to provide a summary of this work to the PSED Steering Group.

There are a number of issues that can arise when consulting on, and proposing decisions to members – even where Councils are using the decision making process in the correct way (*Brent*). As one might expect, such issues are not resolved without costs or delay.

How long can a decision be delayed?

Below is a table estimating the delays that might have resulted from cases where PSED failure was a ground advanced to support other, more substantial grounds. These do not include consultation time or any time prior to the decision being formally taken, and they do not include officer time in dealing with a legal challenge.

Public Body	Decision Date	Judgment Date	Delay
Isle of Wight Council	8 Feb 2011	11 Nov 2011	9 months
Sefton Council	16 Dec 2010 (effective 1 April 2011)	9 Nov 2011	13 months (or 7 months)

Leicestershire County Council	7 March 2011 effective 1 April 2011	02 Dec 2011	9 months or 8 months
Pembrokeshire County Council	28 April 2011 (proceedings began)	16 Dec 2011	9 months
London Councils	Consultation: 03 Sept to 10 Nov 2010 London Councils Leaders' Committee: 14 Dec 2010 (decision in principle) Budget decision: 26 Jan 2011 Letter Before Claim: 15 Nov 2011 Permission to proceed: 13 Jan 2011	Hearing: 27 Jan 2011 Judgment: 28 Jan 2011	2 months
Secretary of State for Education	5 July 2010 (Statement to Commons)	11 Feb 2011	7 months
W v Birmingham M, G, H v Birmingham (FACS)	Adoption of Business Plan: 1 March 2011 ASC Policy: 14 March 2011 Application for JR: 25 Feb 2011 Permission for joint rolled up hearing: 02 March 2011	Hearing: 14, 15, 18, 20 April 2011 Judgment: 19 May 2011	2 months
Rahman v Birmingham (grants)	Nov 2010	31 March 2011	4 months
London Borough of Brent	27 April 2011	High Court: 13 Oct 2011 Court of Appeal: 19 Dec 2011	8 months

What does a JR cost?
It has been reported that Somerset County Council spent £70K fighting a JR over its library closures, which it lost [Guardian: 2012]. The Council's legal costs were sub-categorised as follows:

- £24,573.38 for internal solicitors' fees;
- £44,034.08 for external counsels' fees; and
- £135.00 for court fees

This came to a total of £68,742.46. Other associated costs were travel and accommodation for people attending legal hearings which totalled £2,590.78.

A Case Study: Getting it Wrong
Isle of Wight (IoW) FACS Eligibility Criteria

This concerned changes that the Council proposed to their FACS (Fair Access to Care Services) eligibility criteria. At one point in the summer of 2011, there were over 20 JRs in the system on the subject of FACS alone.

IoW proposed to change their FACS eligibility criteria from: *critical substantial and moderate but likely to deteriorate within 2 or 3 months to critical or substantial if no services provided*, to: *critical plus those with substantial needs where the Council would meet those needs that placed them at the greatest risk of not being able to remain at home and be safe*. They consulted on this, however, their consultation was found to provide insufficient information to enable those consulted to give intelligent consideration and an intelligent response to it [§118].

Further, the consultation was deficient in detail with regard to users affected, as well as deficient in detail of costs and potential savings [§118]. The judge also found that IoW had unintentionally breached national guidance by adopting *'an over-elaborate set of additional criteria'* [§92]

IoW had five different versions of their new proposed policy and criteria. They consulted on version three and carried out an EIA on this version. However, the final new FACS policy and criteria put to Cabinet for adoption was version five, which was '*significantly different'* [§125]. Because the EIA was not revised accordingly, it did not assess the impact of the policy before Cabinet [Ibid.]. The judge recorded:

'Thus, although the EIA was provided to Members, it did not provide the analysis and the information which Members of the Council needed in order to discharge adequately their s.49A DDA 1995 duty'

[§126].

It was submitted that the EIA did not provide enough detail and deviated from the Council's own guidance on EIAs. The result was that it failed to help the Council demonstrate due regard to the PSED on in a number of ways, and the judge agreed with all flaws identified:

a) *'No evidence based information about the specific impact on disabled people of the proposals*
b) *Did not explain the nature of 'substantial' needs that would be excluded from funding by the revised eligibility criteria*
c) *Did not explain what the detriment would be to disabled people*
d) *Did not state how many disabled people would be detrimentally affected*
e) *Suggestions made in the EIA for mitigating the effects of the proposal were therefore made without a proper understanding of the potential detriment'*

[§122].

Further, it was submitted that the Council did not comply with its own guidance on EIAs because it was not an evidence-based assessment. There was no information about service users in it, or any quantitative or qualitative data relating to the consultation (a requirement of the Council's own guidance). Finally, mitigating actions were based on insufficient assessment, and were *'too vague and generalised'* [§124] (e.g. signposting to other sources of support).

It was predicted that the decision would enable the Council to make savings of £1.5M. The actual savings were £54K.

A Case Study: Getting it Right
Brent's Transformation of Libraries

This was a landmark legal case not least because it was seen as a test case regarding other, similar decisions being taken in numerous local authorities. Claimants challenged Brent regarding their duties arising from the Public Libraries and Museums Act ('PLMA') 1964 and the PSED. Brent won in the High Court and in the Court of Appeal. The Claimants' application to take this case to the Supreme Court was rejected in early 2012, when it was reported there was *'no arguable point of law'* [BBC News: 2012].

The report to Cabinet acknowledged the two main sets of duties that the Council had to have regard to, when deciding on the 'Libraries Transformation Project' ('LTP). The judge held that these had been presented to members in such a way that *'no complaint can be made'* [§37]. Difficulties in the consultation process were given by officers in their report, which set out the problems they had experienced with obtaining views that were representative, and with obtaining views that concerned aspects other than library closures [§40] e.g. fewer, better, more modern libraries.

It was submitted that the Council unlawfully ignored the role that community groups could play [§69-84] and this was not upheld. The Council did not do this, and did keep an open mind as to how services could be delivered by outside organisations. With regard to savings, the judge held that it would not be wrong for the Council to insist that the same level of savings had to be achieved [§76-77]. The Council had to have regard to the desirability of delivering the service by appropriate means, which it did. The judge determined that:

'…the Claimants' real contention is that the Council was not prepared to go along with alternatives that cost it money. That was not the only basis for its conclusion on the alternatives. But even if it had been, there is nothing unlawful under s7 in that respect. The duty is to have regard to the "desirability" of securing provision of services by other "appropriate means". The Council did just that. It concluded for sound and legitimate reasons that it was not desirable, and the alternative means were not appropriate.'

[§80]

It was claimed that the Council did not provide sufficient information and did not tell consultees how it would appraise submissions for alternative models of running the service, thus rendering the consultation so unfair as to be unlawful. Both of these claims was rejected on the evidence submitted by the Council to the Court [§85-91]. It was also claimed that there was an unlawful failure to assess needs under s7 of the PMLA. This was also rejected on the Council's evidence [§92-117].

It was determined that the Council had had regard to the continuing duty of the PSED [§123, 125] and that this was not a *Kaur* case [§121]. There were no final decisions made before April 2011 [§82]. It was alleged that there had been a breach of the equality duties, and among those submissions was one of particular interest, namely, that the Council had indirectly discriminated against Asian service users. This was also rejected on all three examples that were submitted, one of which is given here:

'But the Asian users of the libraries were not proportionately more disadvantaged or indeed advantaged than non-Asians. 76% of Asian users and 76% of non-Asian users use the libraries that remain and 24% of Asian users and 24% of non-Asian users use the libraries that will close. Moreover, once accurate figures were used, and the effect removed of using rounded figures for the purpose of further calculations which magnified the effect of the roundings, the Claimants' analysis showed that the percentage of users of all Brent libraries who were Asian and the percentage of users of the six to be closed who were Asian differed by 0.04.'

[§147]

For the sake of brevity, this judgment is not given here in detail. In the Court of Appeal, all grounds were unanimously rejected. It was found that:

- The pool of users to which Brent had had regard, was the right one (library users, and not the whole Borough). As such, indirect discrimination was not upheld [§82-83, §89, §101]
- Brent had regard at a formative stage, with the PSED in mind from the outset, all relevant matters were part of the decision making process [§103]
- Brent had regard to the Public Libraries and Museums Act 1964 [§78]
- The consultation process was conducted and reported in full [§80]
- Cabinet was expressly reminded of the PSED and had regard to it, and did not put it to one side [§84]
- There was no duty to consult on an EIA [§103]
- There was no duty to conduct an EIA before the proposals were formulated and put to the public [§84]

With regard to the EIA, and factors the Council should have also assessed (as submitted by the Claimants), the judge determined that:

'…an air of unreality has descended over this particular line of attack. Councils cannot be expected to speculate on or explore such matters ad infinitum, nor can they be expected to apply the degree of forensic analysis for the purpose of an EIA…which a QC might deploy in court'

[§102]

References

Cases

R (Bailey and Ors) v London Borough of Brent Council [2011] EWCA Civ 1586 (link)
R (Bailey and Ors) v London Borough of Brent Council [2011] EWHC 2572 (Admin) (link)
R (East Midlands Care Limited) v Leicestershire County Council [2011] EWHC 3096 (Admin) (link)
R (Hajrula) v London Councils [2011] EWHC 861 (Admin) (link)
R (JM & NT) v Isle of Wight Council [2011] EWHC 2911 (Admin) (link)
R (Luton & Ors) v Secretary of State [2011] EWHC 217 (Admin) (link)
R (Mavalon Care Ltd & Ors) v Pembrokeshire County Council [2011] EWHC 3371 (Admin) (link)
R (Rahman) v Birmingham City Council [2011] EWHC 944 (Admin) (link)
R (Sefton Care Association & Ors) v Sefton Council [2011] EWHC 2676 (Admin) (link)
R (W) and R (M, G and H) v Birmingham City Council [2011] EWHC 1147 (link)
R (Pieretti) v London Borough of Enfield [2010] EWCA Civ 1104 (link)

Media

BBC News, *Brent library closures: Supreme Court rejects appeal bid*, http://www.bbc.co.uk/news/uk-england-london-16876820, 03.02.2012 (accessed 14.02.2012)
Guardian, *Council spent £70,000 fighting judicial review of library closures*, http://www.guardian.co.uk/society/2012/jan/24/council-judicial-review-library-closures, 24.01.2012 (accessed 14.02.2012)

Appendices

Appendix One: EIA or EqIA Tool

LBHF EqIA or EIA Tool.doc

Appendix Two: EIA or EqIA Guidance

EqIAor EIA Guidance.doc

Note: Appendices One and Two (above) are also known as a 'toolkit'

Appendix Three: EIA or EqIA Policy

Policy for Completion of service delivery EI

Appendix Four: Report Template

Universal report template 21 Novembe

Appendix Five: March 2011 letter from claimant

Appendix Five March 2011 Claimant.pdf

Appendix Six: March 2011 LBHF response to claimant

Appendx Six March 2011 LBHF.pdf

Appendix Seven: March 2012 letter from claimant

Appendix Seven March 2012 Claimant.

Appendix Eight: March 2012 LBHF response to claimant

Appendix Eight March 2012 LBHF.pdf