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Our Ref:
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Dear Stella

COMMITTEE MEETING 8 DECEMBER 2015 – RURAL NEEDS BILL

At its meeting on 8 December 2015, the Committee requested further clarification on a suggestion to include a requirement within the Rural Needs Bill that “where adverse impact is identified, public authorities should take reasonable steps to mitigate such impacts”.

This issue was raised in the responses to the public consultation on the policy proposals for the Bill and, at that time, DARD sought legal advice on the implications of such a provision. Following the issue being raised in the oral and written evidence that the Committee received on the Bill, DARD has taken further legal advice.

The legal advice has indicated a number of difficulties with this proposal:-

- There is a difference between, on the one hand, considering whether the implementation of a policy or strategy might have an adverse effect and considering whether mitigating actions might be appropriate and, on the other hand, a duty on public authorities to take mitigating measures.
- A duty on public authorities to take mitigating measures would require public authorities to carry out their functions in a particular way, i.e. it would restrict the discretion of public authorities to take decisions about how it exercises its functions.
- Rural Proofing is not intended to promote any particular objective in relation to rural areas. Rather is it a means whereby public authorities systematically consider whether any given policy or strategy is likely to have a different impact in rural areas because of particular circumstances or needs; make a proper assessment of those impacts, if they are likely to be significant; and consider whether to adjust a policy or strategy to meet the rural needs and circumstances. The language used in legislation must, therefore,

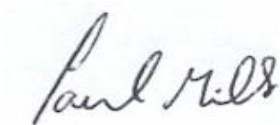
be appropriate for this purpose but not distort overall policy making by making benefits for rural areas itself a policy objective or subject of a duty.

- As a comparator, there is extensive case law which deals with how the section 75 and other public authority equality duties are applied. It is clear from this that a duty to have “due regard” in the context of such a duty does not mean that the policy adopted must achieve a particular goal or outcome. It is a means of providing the appropriate levels of consideration.
- A “due regard” duty therefore already includes an obligation on the public authority to consider what, if any, mitigating measures may be taken where a particular policy that it decides to proceed with has adverse impacts on rural needs. But a duty to take such measures goes well beyond this.
- If there is a duty to take mitigating measures, there must also be a corresponding right to them. It would likely be a matter for the Courts to determine whether mitigating measures should have been taken or were sufficient and the Courts would likely view it as an objective test. This would further restrict the judgement of the public authority.
- There is a distinction between changing a policy or strategy so that discrimination does not apply and taking mitigating measures. Mitigating measures, by definition, lessen the impact of the discriminatory measure. But taking mitigating measures would not be necessary if the discriminating measure itself was not applied. Equally, such a duty would also imply that there are appropriate mitigating measures in all instances when in many cases there will not be. So the existence of the duty to take mitigating measures might itself distort the public authority’s choices between not proceeding with a policy which did have adverse impacts and proceeding with that policy but taking mitigating measures.

At its meeting on 8 December, the Committee agreed to propose an amendment to clause 1 to change the wording of the duty from “consider” to “due regard”. As pointed out above, if the duty were to be framed in this manner, it would be implicit within that duty for a public authority to consider what mitigating actions might be taken in instances where there is an adverse impact. This would provide an appropriate level of consideration but would not require that the policy adopted must achieve a particular goal and would avoid the difficulties highlighted above.

I should be grateful if you would bring this letter to the attention of the Committee.

Yours sincerely



Paul Mills
Departmental Assembly Liaison Officer