

Ceasing discretionary functions and powers – some key issues for public bodies to consider

The key legal questions for public bodies to consider before deciding to cease exercising a discretionary power due to limited resources or other reasons.

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It is unfortunately the case that public bodies are often confronted with very difficult decisions concerning the allocation of limited (and sometimes decreasing) resources. In this situation, a public body might be unable or unwilling to exercise a particular statutory function or power due to a lack of resources or expertise, or because a particular programme or policy is no longer viable or achievable for other reasons. When the function or power is discretionary, there are several important issues for the public body to first consider before it can lawfully decide that it will no longer exercise that function or power for a limited period or indefinitely.

A public body that unlawfully fetters its discretion may open itself up to challenge by way of judicial review. This will usually be on the basis of illegality (by failing to use its powers in the way they were intended) or procedural impropriety (by failing to permit affected persons to influence the exercise of that discretion). In relation to the former, it will generally be unlawful for a public authority not to exercise a discretionary power conferred on it, if doing so would effectively disable it from fulfilling its statutory role. As explained in *Birkdale District Electricity Supply Co v Southport Corp* [1926] AC 355 (at 364): *"If a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties"*. See also *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

Even a time-limited fettering of discretion may be unlawful. For example, in what has been described as a 'textbook case' of unlawful fettering, the Secretary of State for the Home Department was found to have acted unlawfully in adopting a policy whereby the determination of a whole class of older asylum applications was deferred to enable the Department to meet its target in relation to new applications. The decision to postpone the older applications was held to be arbitrary and unlawful and an abuse of power: see *R (on the application of S) v Secretary of State for the Home Department* [2007] EWCA Civ 546.

This is consistent with the case law that has found other attempts by public authorities to limit or control the exercise of a discretion, by self-created rules or policy or otherwise, to be unlawful. Examples include policies to disallow all purely local objections to planning applications for travellers' sites (see *R v Secretary of State for the Environment ex parte Halton DC* [1983] 82 LGR 662) and to refuse applications for council housing made by or on behalf of children of persons deemed to be intentionally homeless (see *Attorney General ex parte Tilley v Wandsworth LBC* [1981] 1 WLR 854). There have also been various cases in different statutory contexts where decisions made by a public body have been quashed on the basis that the public body erred in taking into account, or placing too much weight on, its limited resources (see, for example, *R. v East Sussex CC Ex p. Tandy* [1998] A.C. 714 at 749; *R. (on the application of Kebede) v Newcastle City Council* [2013] EWCA Civ 960; and *R. v Secretary of State for the Home Department Ex p. Limbuela* [2005] UKHL 66).

One option that is often considered by public bodies when under resource pressure is to delegate or outsource the function to another body. However, this approach can also raise complex issues of legality, particularly if there is no express statutory delegation power. It is a fundamental principle of law that a person or body upon whom a function has been conferred may not delegate that function to another person or body unless a power to so delegate can be expressly or impliedly found in the statute. This principle operates as a rule of construction which involves a presumption that a discretion conferred by statute is *prima facie* intended to be exercised by the authority

on which it has been conferred and by no other authority. The presumption may be rebutted by any contrary indication found in the language, scope or object of the statute. Some factors that are important to consider include:

- a. The extent of supervisory control maintained by the public body;
- b. The amplitude of the power, the impact of its exercise upon individual interests and the importance to be attached to the efficient transaction of public business by informal delegation of responsibility; and,
- c. The breadth of the discretion conferred, and the extent to which its exercise involves deliberate judgment.

There are two other matters that are important to keep in mind. First, before a public body decides to cease or change the operation of particular policy or programme it should consider whether it is under a duty to undertake a prior consultation process. Such a duty can be expressed in legislation or implied as part of a public authority's general duty to act fairly, such as where it has expressly promised that it will engage in consultation before making a specific decision or there is a settled and uniform practice of public consultation in relation to the specific power or type of decision in question.

Second, public bodies should always comply with their Public Sector Equality Duty ('PSED') by having due regard to their obligations under the Equality Act 2010. The PSED does not itself curb a public body's powers to take such decisions, but it does require it to confront the anticipated consequences in a conscientious and deliberate way in so far as they impact upon the equality objectives in relation to those with protected characteristics: see *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.

In summary, the key legal questions for public bodies to consider before deciding to cease exercising a discretionary power due to limited resources or for other reasons are:

1. Does the decision not to exercise the discretionary power or function involve an unlawful fettering of discretion?
2. If the decision is made to delegate or outsource, is this consistent with the statutory scheme?
3. Is there an express or implied duty to consult before the decision is made?
4. Has the public body complied with its PSED?

All of these issues can be complex and involve various legal pitfalls. Browne Jacobson's public law team can help guide you through these issues and ensure that whenever difficult decisions have to be made about the allocation of limited resources, they are made lawfully.

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