

Making fair financial decisions

An assessment of HM Treasury's 2010 Spending Review conducted under Section 31 of the 2006 Equality Act

Executive Summary

Introduction

This report concerns decisions taken by Her Majesty's Treasury during the Spending Review of 2010. We consider the role of other departments only in the context of their inter-relations with HM Treasury during the Spending Review process and we have not therefore assessed the separate compliance of any other government departments.

The report is an assessment of the extent to which HM Treasury complied with the requirements of the public sector equality duties (PSEDs) in force at the time of the Spending Review 2010. These required public authorities to pay due regard to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity on the grounds of race, gender and disability. The Assessment follows the decision of Mr Justice Ouseley to reject an application for judicial review of the June 2010 emergency budget, in which he asserted that an analysis of the government's spending plans would be better carried out by the Equality and Human Rights Commission (the Commission). A recent similar Assessment of the Scottish Government was found to be a mutually beneficial process.

The Commission has undertaken this Assessment with the cooperation of HM Treasury. Our principal aims were to discover to what extent and in what manner decisions were taken in accordance with the duties; to consider, with HM Treasury, whether there might be improvements in the process of decision-making; and to propose ways in which future such exercises could be more effective, more transparent, and offer greater value for money by ensuring that spending is better targeted.

Equality law does not seek a perfect process, but it does require public bodies to take steps which help them to be fair in their actions, and enables them to be seen to be fair.

The public sector equality duty

The previous duties were consolidated into a single public sector equality duty (PSED) in the Equality Act 2010.¹ The new duty came into force in April 2011. The duty is above all a transparency measure intended to achieve evidence-based policy making, to encourage fairer and clearer decisions in public functions, including the allocation of public money.

¹ The PSED extends the duty to age, religion and belief, sexual orientation, pregnancy and maternity and gender reassignment equality. These are all areas that have not been covered or fully covered by previous equality duties.

The PSED is not designed to prevent necessary decisions being taken by government or other public bodies. Nor is it a way of preventing reductions in public spending. On the contrary, the duty should ensure that public spending is better targeted and that money is spent where it will have the greatest effect. The duties require public authorities to make their decision-making more transparent to the taxpayer, and if challenged, to justify their decisions before a court.

Public bodies are required to analyse the likely effects of policy on the relevant protected groups.² Where there is evidence of an adverse impact on any of the protected groups, the public authority must consider whether that policy is nevertheless justified in the light of wider aims. Even if it is justified, they should consider whether it should take proportionate steps to mitigate or avoid the adverse impact.

Under Section 31 of the Equality Act 2006 (the Act), the Commission has the power to assess and to report on public bodies' compliance with the PSED. The Commission may also make recommendations in connection with such an assessment, and bodies to whom the recommendations are addressed must have regard to them.

Where it decides that a public body has not complied with the equality duties, the Commission has the power to issue a notice requiring them to do so. Alternatively, the Commission may arrive at an agreement on a programme of action with the public body concerned.

The Spending Review

Reducing the fiscal deficit was a declared priority for the incoming coalition government in 2010. Following the May election, it published an Emergency Budget in June which set out a five-year plan to 'rebuild the British economy' and reduce the deficit. The Chancellor announced his spending proposals to Parliament on 20 October 2010.

The Commission has carefully analysed HM Treasury's key decisions and the process by which they were taken. We have benefited from an unprecedented degree of cooperation from ministers and officials, for which we are extremely grateful. This is the first time an exercise of this scale has been conducted under equality law.

In our Assessment we have tried to take full account of the exceptional challenges faced by ministers, in particular the scale and speed of the Spending Review.

Given that most of the measures announced in the Spending Review have yet to take full effect, this Assessment concentrates on the process

² Please see the glossary for an explanation of the term 'protected groups'.

by which decisions were made, specifically: whether HM Treasury met the requirements of the duties in force at the time; whether there was evidence of due regard being paid to the duties; and whether the process might have been improved or better supported in any way.

The Commission will work with the Government Equalities Office (GEO) and HM Treasury to ensure that there is a clear timetable for further scrutiny of the impact of the key measures, as more evidence of their real effect becomes available. Such a timetable should complement the process of post-legislative scrutiny now available to the select committees of the House of Commons.

Findings

Overall, the Commission found a serious effort by ministers and officials to meet their obligations under the existing equality duties. In particular:

- The government published, for the first time, an equalities overview document, alongside the Spending Review.
- Equality ministers formally drew departments' attention to the requirements of the equality duties.
- As well as gathering equality data and assessing the impact on equality groups, HM Treasury made an attempt to analyse the effects of its proposals on different income groups and sometimes used this as a proxy for understanding impact on protected groups.
- Where they considered it relevant, ministers demanded more and better information about the equality impacts of proposals.

The Commission considers these steps commendable, particularly in the light of the pressures faced by ministers and officials.

However, the Commission found that three underlying factors made the task of formal assessment extremely difficult.

First, this is an unprecedented exercise in an unprecedented economic situation. The PSED is a relatively recent innovation; it is, so far, unique to the UK. It is the first time that any government has had to apply its requirements to such an extensive and significant project conducted in such challenging circumstances.

Second, the Spending Review involved the whole of government. Many decisions involved gathering information and analysis from several departments. Recent case law has made it clear that public bodies must pay due regard to equality, not only in the final policy decision, but to some extent in the process leading up to that decision. Some decisions by the chancellor rested on a series of interlocking assumptions, some

of which were not the responsibility of HM Treasury itself. Some proposals were made in anticipation of future detailed decisions which might formally be regarded as the province of individual government departments. Yet others were *de facto* shared decisions. Against this complex background it appeared to us that it was not always clear who should be responsible for which aspects of certain decisions, at what point the equality effects needed to be set out explicitly, and by whom.

Third, the PSED is an evidence-based duty. An assessment of adverse impact has to rest, not on opinion, but on analysis of likely outcomes for different groups, based as far as is possible on objective data. For such an analysis to be possible, the data sets should be common to all departments; and the data should be applied to a rigorously developed common model to make the analysis reliable. This is not yet the case for every area of policy.

The Commission believes that its recommendations should help to address all of these questions. Our most important proposals for the future fall into the realm of good practice. However, the Act requires the Commission sets out formally its conclusions on the extent and manner to which HM Treasury complied with the requirements of the duties.

Compliance

As part of this Assessment, the Commission carried out a detailed analysis of the process by which decisions were taken for nine of the measures announced in the Spending Review 2010. We also undertook a preliminary assessment of the process for the majority of other measures in the Spending Review 2010, not including those excluded under 'public good' (please see Chapter 3 of full report).

While we did not analyse these measures in as great detail as the nine measures listed below, initial assessments indicated that the decision-making process by which they were taken met the requirements of the PSEDs. Overall, we conclude that amongst the large number of measures outlined in the Spending Review only a small number raised concerns.

Out of nine detailed case studies, we found that six were fully in accord with the PSEDs.

We were able to satisfy ourselves that HM Treasury was fully in accord with the requirements of the PSEDs in the following instances:

1. Removing Child Benefit from households with a higher rate taxpayer
2. Reform of Legal Aid

3. A £2.5 billion Pupil Premium for disadvantaged children
4. Removal of mobility component of Disability Living Allowance (DLA) from claimants in residential care homes
5. Council Tax Benefit: 10 per cent reduction in expenditure, and localisation
6. Time-limiting the contributory Employment and Support Allowance to one year for those in the Work Related Activity Group

In the circumstances – the scale of the exercise, the speed of its execution and the novelty of the process – this is a creditable record.

In three cases, the Commission's detailed examination was unable to establish whether or not the decisions were in full accord with the requirements of the duty because of a lack of clarity as to a) where the true site of the decisions lay, and b) whether or not some decisions were the responsibility of other government departments or the government as a whole.

These were:

7. **Introduction of a household benefits cap** – there is no evidence of any gender analysis or equality screening of the measure provided to HM Treasury ministers prior to the announcement of the measure on 4 October.
8. **Bus Service Operators Grant (BSOG)** – the potential impact on people with disabilities was not included in the advice provided to HM Treasury ministers.
9. **Replacing Education Maintenance Allowance with local discretionary funds** – there was no reference to ethnicity, disability or gender in information provided to HM Treasury ministers.

We are aware that in each of the nine case studies, including these latter three, HM Treasury considers all its actions wholly sufficient and in accordance with the Act. In essence HM Treasury ministers and officials have argued that where the decision was the responsibility of HM Treasury they took appropriate steps to establish due regard; and where they did not take such steps, it was because the decision was not the responsibility of HM Treasury.

The Commission does not doubt that the ministers and officials consciously and actively sought to fulfil the duties. But we do not believe that the government as a whole has fully grasped the way in which case law has elucidated the requirements of the PSED over recent years.

In the three cases in which we feel we cannot establish whether or not HM Treasury were fully in accord, it may be that further study might reveal that some aspects of decision-making fell awkwardly between HM Treasury and other departments; or that the way in which the whole process worked meant that there might have been better documentary evidence if the government had been able to manage the process at a more normal pace. In any event, we do not consider that any of the shortcomings we have identified merit either further examination, or invocation of the formal means of censure or compliance open to us at this stage.

In addition to these three cases, the Commission's analysis suggests that for future such exercises, improvements could be made in the early stages of the decision-making processes in order to meet the requirements of the PSED more completely:

- Decisions as to whether an equality analysis is necessary in relation to the funding envelope for a whole department should be based on consideration of equality criteria relevant to protected groups. Other tests, for example, whether the department is the provider of a public good, should not pre-empt such consideration.
- Decisions such as which departments to prioritise and which to protect from spending cuts, might be more manageable and transparent if they were expressly based on their significance to a small number of defined equality objectives for the Spending Review. In this case, such objectives would probably have been derived from the Government's own declared Fairness Agenda.

We have also been assured by HM Treasury itself that both ministers and officials are fully committed to addressing the concerns we set out in this report. The Commission considers that this is a positive response to our findings, and is itself fully committed to working with government and others to building on what is good and remedying what could have been done better.

This will not just be a matter of bureaucratic box-ticking. Failure to ensure that the duties are observed has recently led to otherwise valid decisions being successfully challenged by, for example, Council Tax payers. As a consequence public bodies have been forced to revisit policies, at substantial cost to the taxpayer and inconvenience to those who work in and use public services.

Good practice

The report highlights several instances of good practice, for example:

- Publication of an equalities overview document.
- Exemption of recipients of DLA from the household benefit cap, as a mitigating action.
- Use of screening tools for Annually Managed Expenditure (AME) measures.
- Department for Transport data submission to HM Treasury.

These are described further within the main body of the report.

However, in some cases a more detailed and purposeful equality effect analysis might have resulted in better targeted spending programmes, for instance:

- A more thorough and detailed consideration of the impacts of the Pupil Premium might have allowed for a more refined approach to its distribution – concentrating funds on groups of pupils whose performance most needed improvement.
- A thorough analysis by age would probably have provided stronger evidence for the government's case for the pace of deficit reduction.

Next steps

The Board of the Commission considers that further formal action is not appropriate and the public interest would be better served by developing a programme of action with HM Treasury to ensure they are fully in accord with the requirements of the duties in future.

The Commission believes that future compliance and good practice in cross-government Spending Reviews could be better assured by:

- Greater transparency, including clear HM Treasury guidance on data and analytical requirements for the whole of government.
- Common rules to allow easier sharing of equality data within government, such as standardised data collection rules.
- Authoritative sources of advice and support for government departments on equality impact analysis.
- The development of a common model of analysis to predict the likely equality effects of policy.

The government should also consider:

- A single point of government responsible for monitoring and assessing the cumulative impact of future Spending Reviews and budgets.
- Independent and authoritative equality analysis of public spending policies. Since this task would conflict with the Commission's statutory role to monitor and assess non-compliance with the PSED, this role might be undertaken by a body such as the Social Mobility and Child Poverty Commission.

The Commission will also work with HM Treasury and other government departments to ensure that the impact of the 2010 Spending Review on protected groups is understood as the measures are rolled out over the next two to three years.

The full report can be found at: www.equalityhumanrights.com.

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