

# Fair Financial Decision-Making

## 2014 Progress Report Summary



## **What is the aim of this publication?**

The aim of this report is to give an update on the work that the Commission has been doing with Treasury and government departments following on from the publication of the section 31 assessment report *Making Fair Financial Decisions* in May 2012.

## **Who is it for?**

This report has been prepared for government departments, the individuals and organisations that contributed to the original section 31 assessment project, members of the Fair Financial Decisions Advisory Group and other interested parties.

## **What is inside?**

This report covers:

- Background and summary of the section 31 report *Making Fair Financial Decisions*
- Elements of the follow-up work
- Monitoring of issues identified in the section 31 assessment report
- Developments since the section 31 assessment was published
- Conclusions

## **When was it published?**

This report was published in June 2014.

## **Why have the Commission produced this report?**

The Equality and Human Rights Commission promotes and enforces the laws that protect our rights to fairness, dignity and respect. This report is within its remit.

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## The section 31 assessment report

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1. The Equality and Human Rights Commission (the Commission) published the report of its assessment under section 31 of the Equality Act 2006 (s.31 assessment) of HM Treasury's 2010 Spending Review (Making Fair Financial Decisions) in May 2012.<sup>1</sup> The assessment was undertaken with the principal aims of discovering to what extent and in what manner decisions in the 2010 Spending Review were taken in accordance with the public sector equality duties in place at the time, whether there might be improvements in the process of decision-making, and proposing ways in which future such exercises could ensure that spending was better targeted with fairness and transparency at the heart of difficult decisions.
2. The report found that among the large number of measures outlined in the Spending Review, only a small number raised concerns, with six out of nine measures detailed in case studies fully in accord with the duties. The Commission acknowledged the merits of this given the size of the challenge in applying the requirements of the relatively new equality duties to such a significant project, recognising in particular the scale and speed of the 2010 Spending Review.
3. In three cases, however, detailed examination was unable to establish whether or not decisions were in full accord with the requirements of the duties because of a lack of clarity as to where the true site of the decisions lay. The assessment also found evidence of gaps in data and information, hindering impact analysis. It made a number of recommendations for ways of building more effective assessment of the impact on people with different protected characteristics into decision-making processes for Spending Review decisions in the future.

The recommendations were:

- 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.

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<sup>1</sup> <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/section-31-assessment-of-hm-treasury/the-assessment-final-report/>

- 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.

Government was also asked to 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.

Additional recommendations:

- Case law confirms that public authorities need to analyse and understand the impact of proposed policies and decisions on people with protected characteristics at the formative stages of policy development, in advance of the adoption of such policies. For future Spending Reviews HM Treasury should bear this in mind during the early stages of policy development. This allows HM Treasury Ministers to judge what actions would be considered proportionate, and should also inform the prioritisation of objectives and policies.
- All departmental functions or services under consideration for change under future Spending Reviews should be subject to an initial screening for their potential impact on the different protected characteristics as set out under the Equality Act 2010. This would ensure that HM Treasury Ministers are better informed on whether it may be necessary to gather further evidence on which to base their final decision.
- An evidence base relating to current consumption and participation by equality groups would help to reduce pressure within the Spending Review process and to ensure that the focus of analysis can be on the proposed changes. Government could make better use of existing data and improve data collection processes, to help inform policy development and decision-making.
- Ministers should be provided with information about the potential impact of decisions that they are taking. Where complete analysis is unavailable, for example due to data gaps or policy not yet being fully defined, the best possible proportionate analysis should be provided, with the necessary caveats.
- When potential adverse impact is identified for individuals with protected characteristics, consideration should be given at the early stages to mitigation and to the effectiveness of any proposed mitigating actions.

4. The Commission decided that further formal action on the findings of the assessment was not appropriate and the public interest would be better served by developing a programme of action with HM Treasury and others to take forward the recommendations for improvements that would support compliance with the requirements of the public sector equality duty (PSED) in the future. This would include work to ensure that the impact of the 2010 Spending Review on people distinguished by various protected characteristics was being monitored and understood as the measures were rolled out. The Commission received assurances from HM Treasury that both Ministers and officials were fully committed to addressing the concerns set out in the report, and we welcomed this positive response to our findings and recommendations.
5. Since the assessment report was published, the Commission has worked with HM Treasury, government departments and other experts and interested organisations to follow up the recommendations and assess progress on their implementation. We have also worked with a range of organisations to develop the tools to support improved decision-making in the future. In this report we describe the extent of progress on each of the recommendations, where work is continuing, and what needs to happen for the next Spending Review.

## Elements of the follow-up work

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### Advisory Group

6. A key step in the follow-up work was the establishment by the Commission of the Fair Financial Decisions Advisory Group. This group is chaired by the Commission's Chief Executive, and its members include officials from HM Treasury and other government departments, other interested stakeholders and expert advisers. The role of the Group is defined in its Terms of Reference as: 'to advise on ways of implementing the recommendations of the Commission's s.31 assessment report: *Making Fair Financial Decisions* and to support the development of efficient and effective ways of assessing impact of proposed spending measures on individuals with protected characteristics as an integral part of good policy and decision-making'.

7. The Group has provided a valuable forum to support the Commission's continuing work by bringing together practitioners within government departments, outside experts and interested groups in an informal setting. This has allowed the discussions to cover a broad range of issues and identify areas for further work.

### Development work

8. The Commission has initiated a number of projects to support its work and provide input to the Advisory Group. These include:
  - The National Institute for Economic and Social Research (NIESR) and Landman Economics are developing and piloting an approach to cumulative impact modelling. A proposed approach to modelling, with a case study of the cumulative impact of tax, welfare and other spending changes in the 2010-15 period on people with different protected characteristics, is being finalised. This project will deliver a report to the Commission in summer 2014 setting out the findings and a proposed modelling methodology.
  - NIESR, with the Social Market Foundation (SMF), has carried out exploratory and development work focusing on ways of implementing the recommendations to improve analysis of the impact of fiscal events on people with different protected characteristics. This took the form of interviews with a number of officials from HM Treasury and other departments on the current process of equality evidence-gathering and decision-making, changes since Spending Review 2010 and the scope for further improvements. There have also been informal discussions with a number of former civil servants, Special Advisers and Ministers to get a broader perspective on how decisions in fiscal events are actually taken in practice, and with a number of academic experts and researchers on how modelling of the impacts on people with different protected characteristics of tax and spending decisions might be possible in practice.
9. The Commission also funded the University of Nottingham to explore monitoring of the impact of welfare measures on people with different protected characteristics. This took the form of a desk-based review, a series of structured interviews and a briefing report for the Commission. The Department for Work and Pensions (DWP) helpfully hosted a discussion for policy leads on the findings and provided additional material to supplement the evidence base.

## Actions by departments

10. The Commission has had regular meetings with HM Treasury officials to discuss progress on the assessment report recommendations and follow-up work. There have also been meetings between the Commission and officials in the Department for Education (DfE), Department for Transport (DfT), Ministry of Justice (MoJ), Department for Communities and Local Government (DCLG), and the DWP to understand the arrangements in place and plans to monitor the impact of Spending Review measures on people with different protected characteristics, and to review early evaluation of those spending measures.
11. There has been good progress on HM Treasury's collection and use of equality evidence for fiscal decision-making, with action taken to address the recommendations.

HM Treasury has started to collect qualitative submissions from departments on key areas of spend. A standardised template has been developed for this purpose for departments to complete and return to HM Treasury. Departments base their submissions on analysis they carry out on the best available data on a case by case basis. In the earliest round, departments identify their six largest areas of spending and classify these, for each of the nine protected characteristics, as:

- a. The spend is underused by or inaccessible to the given group
- b. The spend has an undifferentiated impact
- c. The spend has a significant disproportionate positive impact on the given group
- d. The spend has a significant and very large disproportionate positive impact on the given group.

Departments have indicated that this template is a useful step which helps to give prominence, across government and within their own departments, to equality issues.

12. For work within HM Treasury, a policy 'toolkit' has been created recently, which sets some standard questions and tables aimed at helping teams consider impacts on different groups during policy development. A list of useful sources of quantitative data on equalities has also been produced. These are recent and the challenge now is embedding their use across HM Treasury teams.

13. Qualitative data from departments is aggregated and used as follows:
  - It becomes the first port of call for information HM Treasury requires on equalities.
  - Submissions are aggregated to inform assessments of impacts on different groups of decisions on the overall Departmental Expenditure Limit (DEL) spending envelope (known as the 'DEL screening tool') .<sup>2</sup>
  - It can be used to brief HM Treasury Ministers ahead of meetings with Ministers from other departments.
  - When necessary, this data is supplemented with additional data requests on specific policies being considered.
  - All this informs decision-making during the Spending Review process.
14. This data is also used for the production of a published summary note on impacts on people with different protected characteristics of the Spending Review. HM Treasury's 'Impact on Equalities analysis' report at Spending Round 13 set out a descriptive analysis of the high level impacts of certain measures on people sharing the protected characteristics principally affected (race, age, gender and disability).
15. Consideration of impacts on equality in decision-making for budgets and Autumn statements now also follows a clear process:
  - All submissions made to Ministers in a Budget or Autumn statement context require a statement on the impact of the policy on equality for people sharing different protected characteristics, both at the beginning of the process and at the point where the decision is made
  - Where a measure or other initiative has a significant impact on a particular group, policy leads are expected to explore the impact in detail as part of the policy development process
  - Stand-alone submissions on the equalities dimension are also produced as appropriate when equality issues are identified
  - Each individual tax measure is the subject of a published Tax Information note, which includes an assessment of the impact on equality for different groups of each measure.

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<sup>2</sup> DEL spending is planned and set at Spending Reviews. Departments receive separate DEL resource and capital budgets.

16. Overall, these developments represent a substantial amount of progress in HM Treasury's approach to equality compared to the situation in recent years when both analysis and policy consideration of equalities at fiscal events was at best ad hoc. The volume and quality of analysis has improved, with the introduction of some systematisation, particularly for individual measures. The changes introduced go some way to ensuring that collection and consideration of equality evidence is now an integral and ongoing part of the Spending Review process, with clear expectations on departments for baseline evidence and impact analysis.
17. In assessing the extent of change, context is important. Spending Reviews inevitably involve a large number of decisions, in a complex process which has several iterations and in which dialogue between the Treasury and spending departments will cover both broad spending envelopes and some of the larger individual decisions by which departments will live within their means. HM Treasury runs a process that enables the government to make overall budget allocations to departments. That involves a dialogue between the Treasury and departments about the steps departments plan to take to live within budgets and, where appropriate, plans for new investments so that departmental Ministers agree the budget allocation given to them. But the key decision at this point is the broad departmental budget allocation. In this process, HM Treasury meets its PSED responsibilities by making an assessment of the potential impact on people with different protected characteristics and providing appropriate advice to HM Treasury Ministers to enable them to make those decisions.
18. Departments will then conduct their own planning processes to determine precisely how allocated budgets will be used and are responsible for the specific spending decisions and hence the PSED responsibilities in relation to these decisions. HM Treasury is therefore responsible for advising Treasury Ministers and ultimately the government as a whole on the broad allocation decisions. Departments are responsible for the more detailed decisions on how the resources they are given are used in the specific policy areas for which they are responsible. At some level these specific measures will differ from some of the broad propositions that informed the original budget allocation decision as circumstances change, new ideas emerge, or the government adjusts certain proposals. Each decision-making stage could raise equality implications. The Commission believes it would be helpful to map this process and where PSED responsibilities lie for decision stages more explicitly to benefit decision-makers,

who can then see clearly where and when they need to ensure they have adequate information available to discharge their responsibilities.

19. Overall, the Commission welcomes progress made by HM Treasury on ensuring that equality evidence informs the decisions taken in the Spending Review process. We recognise that these developments represent a step change, with more attention now than at Spending Review 2010 or previously to the importance of understanding the impacts of proposed measures on people with different protected characteristics.

## **Monitoring of issues identified in the s.31 assessment report**

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20. Overall, our work with departments has found that monitoring of the impact of Spending Review 2010 measures is in place and that impact on people with different protected characteristics forms some part of this. National evaluation will usually be in the form of commissioned studies by departments. Those responsible for policy implementation, such as local councils, also play a key role in understanding and dealing with impact as the policies are rolled out and the effects are felt by local people.
21. We have also found evidence that understanding the impact on people sharing different protected characteristics is helping to shape policy, avoid negative impacts and extend positive benefits. Examples of good practice include:
  - Mitigations introduced as the policy is being finalised and implemented as a result of assessments of impacts on different groups – e.g. DWP’s 2012 equality impact assessment extended exemptions and support arrangements prior to the implementation of the benefit cap.
  - Additional mitigations introduced after implementation to widen the reach of the policy - e.g. extension of the pupil premium to include those registered as eligible for Free School Meals at any point in the last six years; also consideration of how people eligible for but not claiming Free School Meals (ethnic minority families are over-represented in this group) can be targeted.

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- At local level, anecdotal examples of where consultations on proposals for local council support schemes have widened the reach to bring in other groups, and where councils are targeting families to move them into work, in line with the policy intention, e.g. Manchester, Leeds.
  - Similarly, while some local transport authorities have reduced services and withdrawn non-statutory concessionary bus fares for disabled people and pensioners, other local transport authorities (e.g. Norfolk) have worked hard to mitigate the impact of changes to the Bus Services Operators Grant (BSOG) on those most likely to be affected by a reduction in bus services.
22. However, PSED requirements for ongoing consideration of the impact of policy decisions are not widely recognised by departments and need to be more formalised as part of monitoring and evaluation planning. More systematised collection and sharing of evidence between central government and local councils and other delivery arms would ensure that departments are able to provide evidence of impact on equality as part of submissions to HM Treasury for decision-making in future Spending Reviews (see Section 3 for monitoring of the Spending Review 2010 measures).

## Developments since the s.31 assessment report

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### The review of the PSED

23. In May 2012 the government announced the outcome of the 'red tape challenge' spotlight on equalities. This included a decision to bring forward the scheduled reviews of the PSED general and specific duties to begin shortly. An independent review group was established to undertake this work, under the chairmanship of Robert Hayward. The review group completed its work in summer 2013 and its report and the government response to its proposals were published on 6 September 2013.
24. The report's recommendations could be summarised as:
- The Commission should produce shorter, more bespoke guidance clearly setting out what is necessary for compliance.

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- Public bodies should not collect diversity data unless it is necessary for them to do so.
- The Commission and the Information Commissioner should work together to provide greater clarity on the role of data and its collection.
- Public bodies must ensure they adopt a proportionate approach to compliance and not seek to 'gold plate'.

The government agreed with the recommendations, including that a full evaluation should be undertaken in 2016 when the PSED will have been in force for five years.

25. The Commission was an observer on the review group and, in responding to the report, the Chair of the Commission made three principal points:
- The Commission would respond positively to the conclusions on data and, as suggested, work with the Information Commissioner.
  - The Commission continued to believe, as it had fed into the review group, that the most effective step to reduce gold plating by public bodies would be to produce a statutory code of practice on the PSED which would offer much greater confidence to public bodies than guidance can on what was actually necessary for compliance.
  - The Commission entirely shared the broad objectives of ensuring the PSED is implemented effectively and with minimum costs and bureaucracy.

### Independent Living Fund judgment

26. In November 2013, the Court of Appeal handed down a judgment overturning the government's decision to close the Independent Living Fund.<sup>3</sup> The Court found that there was insufficient evidence of compliance with the PSED. The Commission had intervened in the case brought by several disabled claimants in order to clarify what is required for a public body decision-maker to show that proper consideration has been given to the impact of a proposal which affects people sharing a particular protected characteristic. The judges decided there was insufficient evidence that the very grave impact on some of those affected was properly brought to the Minister's attention, despite officials having been clearly informed of the possible impacts not only by service users but also by local authorities.

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<sup>3</sup> The Independent Living Fund is a government-funded programme currently providing support to enable nearly 19,000 severely disabled people in the UK to live independent lives in the community.

27. Subsequent to the judgment, the government conducted a new analysis of the impact on different groups of closing the Fund, on the basis of which a decision was made to resume plans to close the Fund on 30 June 2015. After that date, responsibility for supporting Fund-users will fall on individual local authorities.

Key points from the judgment are:

- An important ‘evidential element’ is the recording of steps taken by the decision-maker.
- The relevant duty is on the Minister or other decision-maker personally – they need to know the full facts and it is not enough to say that officials had the information.
- Ministers must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before adoption of the policy.
- The ‘Brown’ principles apply – there must be awareness of the duty; the duty must be fulfilled before and at the time the policy is being considered; the duty must be exercised in substance, with rigour and an open mind, it is not about ‘box-ticking’; the duty is non-delegable; it is a continuing duty; and it is good practice for the decision-maker to keep records.
- A general regard for equality issues is not the same as having specific regard – equality issues must be examined closely. Considerations of equality of opportunity, where they arise, should be placed at the centre of formulation of policy, side by side with all other pressing circumstances.
- Officials must be ‘rigorous in both enquiring and reporting’ to the Minister or other decision-maker.
- The court can determine only whether ‘due regard’ has been had to the impact of a proposed policy on equality for different groups; it is not the role of the court to make a judgment on the appropriate weight given to the duty in relation to the policy or the outcome; it is not for the courts to decide on the merits of public decision-making.
- Public authorities should be properly informed before taking a decision and, if the relevant material is not available, there is a duty to acquire it, frequently meaning that some further consultation with appropriate groups is required.

## Conclusions

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28. There has been good progress made by HM Treasury in the collection and use of equality evidence to support Spending Reviews and fiscal decision-making and implementation. These improvements are to be welcomed. The next stage is to embed them across government and to secure a more consistent and joined-up approach to the assessment of the impact of spending and fiscal decisions on equality for people with different protected characteristics.
29. This report sets out areas of further improvement which the Commission will continue to discuss with HM Treasury and other stakeholders. These areas include:
  - a. Clarifying a single point within government with formal responsibility for monitoring and assessing the cumulative impact of future Spending Reviews on people sharing different protected characteristics.
  - b. Continuing to make improvements in the quality of data collection and use in order to support the assessment of impacts on different groups.
  - c. Developing a cumulative impact modelling methodology for use with future Spending Reviews and fiscal events.
  - d. Considering building on the report on equalities impact that HM Treasury published alongside the Spending Review 2013, by producing brief summary reports alongside fiscal events.
  - e. Improving scrutiny of impact on different groups by: (a) extending the role of the Independent Challenge Groups for Spending Reviews to include equality as one of the issues they look at, and (b) identifying an independent body to scrutinise the impact of Spending Reviews and fiscal events on people sharing different protected characteristics.

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