

NICEM POLICY PAPER NO. 5

EQUALITY DUTIES AND THE BUDGET

INTRODUCTION

Governments around the world all are engaged in difficult political and financial decisions regarding measures to achieve effective recovery at a national level from the global financial crisis. Different approaches are being adopted in different countries based on a variety of factors. In the UK, the Government regards reducing the budget deficit as the country's most urgent issue. What makes this task unique in the UK is that in taking measures for this purpose Government ministers and all Government departments have a legal duty to have due regard to the need to promote race, disability and gender equality.

This briefing paper attempts to outline the relevance of the statutory equality duties to the UK Government's approach to reducing its deficit in particular through the changes to taxation and welfare spending announced in the June 2010 Budget and the further cuts to public spending that will flow from the autumn 2010 Spending Review. The paper has three sections:

- a) a summary of the equality duties within the Race Relations Act 1976 (RRA), Disability Discrimination Act 1995 (DDA) and Sex Discrimination Act 1975 (SDA) and relevant case law;
- b) a brief discussion of the Budget and the forthcoming Spending Review and the relationship with race, disability and gender equality duties; and
- c) some questions to consider.

What are the equality duties and what is required to show compliance

In Great Britain currently there are duties that apply to all Government Ministers and all central government departments and all local authorities, NHS bodies, police authorities etc. under the Race Relations Act 1976 (RRA), the Disability Discrimination Act 1995 (DDA) and the Sex Discrimination Act 1975 (SDA).

Race Equality Duty

S.71(1) RRA says:

“Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need

- a) to eliminate unlawful racial discrimination; and*
- b) to promote equality of opportunity and good relations between persons of different racial groups.”*

A Minister of the Crown or government department is at the top of the list of bodies in Schedule 1A.

Disability Equality Duty

S. 49A DDA says:

- (1) Every public authority shall in carrying out its functions have due regard to—*
- (a) the need to eliminate discrimination that is unlawful under this Act;*
 - (b) the need to eliminate harassment of disabled persons that is related to their disabilities;*
 - (c) the need to promote equality of opportunity between disabled persons and other persons;*
 - (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;*
 - (e) the need to promote positive attitudes towards disabled persons; and*
 - (f) the need to encourage participation by disabled persons in public life.*

s.49B defines a ‘public authority’ as including “*any person certain of whose functions are functions of a public nature*”; there are exceptions but none that would exclude a Minister of the Crown or a government department from this duty.

Gender Equality Duty

S. 76A SDA says

- (1) A public authority shall in carrying out its functions have due regard to the need—*
- (a) to eliminate unlawful discrimination and harassment, and*
 - (b) to promote equality of opportunity between men and women.*
- (2) In subsection (1)—*
- (a) “public authority” includes any person who has functions of a public nature (subject to subsections (3) and (4)),*

(b) “functions”

means functions of a public nature, and

(c) the reference to unlawful discrimination shall be treated as including a reference to contravention of terms of contracts having effect in accordance with an equality clause within the meaning of section 1 of the Equal Pay Act 1970 (c. 41).

None of the exceptions in subsections (3) and (4) exclude a Minister of the Crown or a government department from this duty.

Statutory Codes of Practice issued by the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC), approved by Government and by Parliament explain what these duties mean in practice:

“Four principles should govern public authorities’ efforts to meet their duty to promote race equality:

- a. Promoting race equality is obligatory for all public authorities listed in schedule 1A to the Act.*
- b. Public authorities must meet the duty to promote race equality in all relevant functions.*
- c. The weight given to race equality should be proportionate to its relevance.*
- d. The elements of the duty are complementary (which means they are all necessary to meet the whole duty).” CRE Code para 3.2*

“Public authorities are expected to have ‘due regard’ to the six parts of the general duty. ‘Due regard’ comprises two linked elements: proportionality and relevance. In all their decisions and functions authorities should give due weight to the need to promote disability equality in proportion to its relevance.” DRC Code para 2.34

*“Having due regard means that the weight given to the need to promote gender equality is **proportionate** to its **relevance** to a particular function. In practice, this principle will mean public authorities should prioritise action to address the most significant gender inequalities within their remit, and take actions which are likely to deliver the best gender equality outcomes.” EOC Code para 2.22*

There can be little doubt that setting a national budget affecting all aspects of public income and expenditure, including taxation, benefits and provision of public services, is a function that carries a high degree of relevance for race, disability and gender equality. The DRC Code states:

“When buildings, services and employment practices are designed in a way that fails

to take into account the particular circumstances of disabled people, this excludes and disadvantages them. The same applies when budgets are set for a programme without adequately considering the additional needs of disabled people.” DRC Code para 1.8.

The EOC Code states:

“The duty requires public authorities to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity in all their functions. This includes the high-level functions of a public authority such as business planning, budget allocation, annual reporting and organisational development. These will be particularly important in ensuring that the duty is mainstreamed into the day-to-day workings of the public authority, is not marginalised....” EOC Code para 2.38

Each of the Codes suggests action which should assist a public authority to meet its equality duties, including, in all three Codes, assessing the impact of particular functions or decisions to know whether a function or decision meets the requirements of the equality duties.

The RRA, DDA and SDA each enable regulations to be made imposing specific duties on listed public authorities. The purpose of specific duties under each Act is to ensure the better performance of the general duty. The specific duties require public authorities to prepare race, disability and gender equality schemes in which they identify relevant functions and state how they intend to comply with their duties (often in the form of an equality action plan) and to state their arrangements for (with some variation for race, disability and gender) assessing policies for their equality impact, consulting, monitoring/gathering information. Specific duties under the DDA and the SDA require implementation of the steps outlined in the equality schemes; specific duties under the RRA require detailed workforce monitoring and different forms of monitoring for educational bodies.

The RRA, DDA and SDA read with Part I of the Equality Act 2006 provide for enforcement of the equality duties by the EHRC through a process of notices, known as compliance notices, ultimately enforceable by the courts. To enforce non-compliance with a general duty the EHRC must first carry out a statutory assessment procedure.

Alternatively, failure by a public authority to comply with a statutory equality duty when taking a decision or adopting or revising a policy can be challenged in the High Court by an application for judicial review. Such applications can be made by individuals affected by the decision or policy or by groups or organisations with sufficient interest. Thus, since 2005

the courts have considered a number of cases in which public authorities' decisions have been challenged on the ground that they had been made without having due regard to one or more of the equality duties. One of the measures used by the courts in determining whether a public authority had had due regard to the need to promote race/disability/gender equality is whether there was evidence that the authority had assessed the race/disability/gender equality impact of its proposed decision before that decision was made and acted upon.

For example:

Secretary of State for Defence –v- Elias [2006] EWCA Civ 1293 per Lady Justice Arden:

274 *It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play. I express the hope that those in government will note this point for the future.*

BAPIO Action and Anor (R on application of) –v- Secretary of State for the Home Department and Anor.[2007] EWCA Civ 1139 per Sedley, LJ

Sedley, LJ

3. *"Such a finding does not in any way diminish the importance of compliance with s.71, not as rearguard action following a concluded decision but as an essential preliminary to any such decision. Inattention to it is both unlawful and bad government."*

In *Harris (R on application of) –v London Borough of Haringey* [2010] EWCA Civ 703, the approach of the courts to the obligation imposed by the race or disability equality duties in several other cases was reviewed by Pill, LJ :

9. *It is well established that the duty to have "due regard" involves a "conscious approach and state of mind" (Scott Baker LJ in Brown v Secretary of State for Work & Pensions [2008] EWHC 3158 (Admin), in the context of disability). (See also Davis J in Meany v Harlow District Council [2009] EWHC 559 (Admin) "conscious directing of*

the mind to the obligations", and Munby J in R (E) v Governing Body of JFS [2008] EWHC 1535/1536 (Admin), at paragraph 213, "direct its mind".)

Pill, LJ went on to consider the facts in *Harris* and concluded:

39. *I have come to the conclusion that the section 71(1) duty was not discharged by the council when granting this planning permission. ...*
40. *Not only is there no reference to section 71 in the report to committee, or in the deliberations of the committee, but the required 'due regard' for the need to "promote equality of opportunity and good relations between persons of different racial groups" is not demonstrated in the decision making process. "Due regard" need not require the promotion of equality of opportunity but, on the material available to the council in this case, it did require an analysis of that material with the specific statutory considerations in mind. It does not, of course, follow that considerations raised by section 71(1) will be decisive in a particular case. The weight to be given to the requirements of the section is for the decision maker but it is necessary to have due regard to the needs specified in section 71(1). There was no analysis of the material before the council in the context of the duty.*
41. *I would allow the appeal and quash the permission.*

The Court of Appeal handed down its decision in *Harris* on 22 June 2010, coinciding with the Chancellor's Budget statement. The Chancellor's legal advisers would not have had the opportunity to draw to the Chancellor's attention yet another ruling by the Court of Appeal overturning a decision by a public authority because the decision makers had failed to have due regard to the elements of their statutory equality duty.

The importance of decision-takers being informed of the obligations under the equality statutes was emphasised by HH Judge Mackie in *R (on application of Chavda and others) –v- London Borough of Harrow* [2007] EWHC 3064 (Admin) (para. 40)

"There is no evidence that this legal duty and its implications were drawn to the attention of the decision-takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes.... The Council could not weigh matters properly in the balance without being aware of what its duties were.

"It is important that Councillors should be aware of the special duties the Council owes to the disabled before they take decisions."

The obiter comments by Sedley,

LJ in *R (on application of Domb and others) –v- London Borough of Hammersmith and Fulham* [2009] EWCA Civ 941 raised then what could be said to be now the key issue under discussion (although the circumstances and the scale are not the same):

78. I agree that this appeal fails; but I do so with very considerable misgivings because the appeal itself has had to be conducted on a highly debatable premise – that the prior decision of the local authority that council tax was to be cut by 3% had to be implemented. Once this was given, the only practical choice for social services was going to be to raise the eligibility threshold or to charge for home care....

79. Members are heavily reliant on officers for advice in taking these decisions. That makes it doubly important for officers not simply to tell members what they want to hear but to be rigorous in both inquiring and reporting to them. There are aspects of the evaluation, quoted by Rix LJ, which strike me as Panglossian – for example the ignoring of actual outcome in favour of "planned outcome" and the limiting of consequential risk to the possibility that charges would not be introduced – and parts of the report to members which present conclusions without the data needed to evaluate them.

*80. But these lose significance against the backdrop of a predetermined budget cut. The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, **there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties?** (emphasis added) But it is not the issue before this court.*

Northern Ireland equality duty

The Northern Ireland Act 1998, giving effect to the Good Friday Agreement and establishing devolved government for Northern Ireland, includes a duty to promote equality on nine grounds which applies to public authorities when they are carrying out functions relating to Northern Ireland.

Section 75 of the Northern Ireland Act 1998 states:

(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—

(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

(b) between men

and women generally;

(c) between persons with a disability and persons without; and

(d) between persons with dependants and persons without.

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

The definition of ‘public authority’ in s.75(3) includes all departments and other public bodies providing public services in Northern Ireland.

Schedule 9 to the 1998 Act prescribes in some detail the obligations of public authorities, which include to prepare an equality scheme and submit it to the Equality Commission for Northern Ireland (ECNI) for approval. A Scheme must set out, *inter alia*, the authority’s arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity.

Schedule 9 assigns to the ECNI the duty of investigating complaints alleging that a public authority has failed to comply with its equality scheme; the ECNI can issue a report in which it can recommend that the public authority in question should take certain steps.

The Court of Appeal in Northern Ireland, in *Re Application for Judicial Review by Peter Neill* [2006] NICA 5 (8 March 2006), held that in that case, in which Mr. Neill sought to challenge the failure by the Northern Ireland Office to comply with its equality scheme, the statutory complaints procedure rather than judicial review should be used. The Court of Appeal accepted that “*there may well be occasions where a judicial review challenge to a public authority’s failure to observe section 75 would lie*” but declined to define situations where such a challenge might arise, advising that in their view that issue is best dealt with “*on a case by case basis*”.

The Northern Ireland equality duty will apply to decisions by the Northern Ireland Executive in relation to the proposals for cuts to public services and public employment which it puts forward within the Spending Review (discussed more fully below).

The Budget and forthcoming Spending Review

The Chancellor of the

Exchequer was reminded very clearly of his duties to promote race, disability and gender equality in determining cuts to public spending by the new Minister for Women and Equalities, the Rt. Hon. Theresa May MP, in her letter dated 9 June 2010. This letter was sent and should have been received and noted well in advance of the Budget on 22 June 2010. The Minister for Women and Equalities advised:

“...there are real risks that women, ethnic minorities, disabled people and older people will be disproportionately affected....It is therefore important that Departments individually consider the impact of savings on different equality groups before taking decisions. I also think we also need to take a collective view on the cumulative impact of cuts and whether any action should be taken to spread the impact more equitably, to avoid widening inequality

“....it is legally required under the existing race, disability, and gender duties to consider this when forming policy. Moreover it is recommended that Departments do the same in relation to older people, LGB and T people and people of different religions as the new public sector equality duty in the Equality Act 2010 will extend this requirement to all groups when it comes into force in April 2011.

“If there are no processes in place to show that equality issues have been taken into account in relation to particular decisions, there is a real risk of successful legal challenge....

“This does not stop us taking the tough decisions necessary but we will need to show that we have considered the equality impacts. “

Regretfully there is no evidence that the Chancellor or other Ministers in relevant departments have heeded the Minister’s warning, and, as has been well publicised, the Fawcett Society has now embarked on exactly such a legal challenge. On 30 July 2010 the Fawcett Society lodged papers in the High Court seeking leave to apply for judicial review of the Treasury’s failure to consider the impact on women of its deficit reduction measures before finalising the cuts that form the major part of the Budget.

The Fawcett Society will not have been short of evidence to support its argument for pre-Budget gender equality assessment, including the letter by Theresa May; the findings in a report by the House of Commons Library publicised by Yvette Cooper MP and further evidence collated by the Women’s Budget Group illustrate the disproportionate adverse impact on women which the changes to benefits, taxes and state pensions and anticipated cuts to public sector services and public sector employment are likely to have.

There is parallel evidence that disabled people and most ethnic minority groups will face similar or greater hardship under the tax and benefit changes in the Budget, as the Minister for Women and Equalities advised.

For example, the particular negative impact on Black and minority ethnic women was highlighted in the detailed report by the Women's Budget Group:

“These groups of women are more likely to live in poor households and so will be harder hit, on average, than white women. Women of Pakistani and Bangladeshi origin tend to have larger or extended families, so they will suffer from the capping of housing benefits for properties with more than three bedrooms and will be hit by the decision to only pay the Sure Start maternity grant to the first child”.

Disabled people and most ethnic minorities have significantly higher rates of unemployment than their able-bodied and/or white counterparts. This means that they are less likely to gain from changes to taxes and benefits targeted to support people on low wages, but are more likely to be penalised by the rise in VAT and major cuts to welfare spending, including new conditionality of job seekers allowance, reduced eligibility for tax credits and new restrictions on entitlement to, and rates of, housing benefit.

The proposed medical assessment for all Disability Living Allowance claimants is likely to result in serious hardship for very many disabled people. The Government has described the proposed assessment as a way to “reduce dependency and promote work” (ignoring the fact that DLA is paid to meet additional living costs of people in work to enable them to work and to people in education as well as to people who are not able to work).

Almost daily since the Budget was published the media report a new assessment of showing how some aspect of the Budget will disproportionately disadvantage ethnic minorities or disabled people or women. For example on 10 August the *Guardian* published findings by the National Housing Federation that the cut in the rate of support for mortgage interest from 6.08% to the Bank of England's Average Mortgage Rate (3.67%) could result in loss of their homes and loss of independence for up to 60,000 disabled people.

There is no suggestion from any of the commentators or equality advocacy groups that the coalition Government intended to disadvantage particular vulnerable groups when devising measures to reduce the deficit. What has become increasingly clear, however, is how prescient the Minister for Women and Equality was in her pre-budget letter to the Chancellor of the Exchequer, since a large number of the measures within the Budget now appear very likely to have a disproportionate adverse impact on women and/or disabled

people and/or ethnic minorities. Arguably if equality impact assessment been carried out on the various elements of the Budget before it was finalised, the Chancellor could have continued with his proposals but he would have done so in the knowledge that many were likely to create disproportionate hardship for certain groups; to comply with his race, disability and gender equality duties, he would have been expected to justify failure to review and/or modify at least those proposals for which the evidence of significant disadvantage on the basis of race or disability or gender is clear and incontrovertible.

As no such impact assessments were carried out there has, to date, been no justification for the adverse impact of any of the proposals, save the overall urgency of reducing public spending.

Strictly it is inaccurate to say that no equality impact assessment has been carried out. In June 2010 HM Treasury and HM Revenue and Customs alongside main Budget documents published a supplementary document headed “Impact Assessments” in which they evaluated the likely impact (small firms impact, competition impact, environmental impact etc.) of three proposals:

1. Changes to the Tax-based Venture Capital Schemes and Enterprise

Management incentives (This relates to tax relief to investors in small companies that otherwise have difficulty raising finance and tax advantages to some employee share options, to help smaller companies recruit and retain the staff they need to grow. The changes are needed for compliance with the European State Aid Risk Capital guidelines and EU fundamental treaty freedoms.)

The equality impact assessment (without reference to evidence) stated:

“Race equality, disability equality, gender equality and human rights

An initial equality impact assessment has confirmed that the changes have no negative impacts.”

2 Excise: Modernisation and Compliance Check (This proposal relates to the joining of different tax and duty regimes and is intended to ensure that HMRC has powers that can be used effectively to tackle large scale excise frauds and retain sufficient safeguards for legitimate traders and businesses)

“Equality Impacts have been considered as part of the consultation process for these proposals. This has been done in conjunction with the customer units, and reviewed with external stakeholders. It indicates that these proposals:

- will have no significant race equality impact.

- will have no significant disability equality impact.
- will have no significant gender equality impact.”

3 Change to the standard rate of VAT.

The impact assessment did not include any assessment of the impact on race, disability or gender equality.

Two Stages

The June Budget included cuts targeted at welfare spending with an expectation of saving £10bn by 2014/15. As indicated above, these changes to various benefits – including changes to benefit rates and formulae for up-rating, conditions of eligibility, pensions and tax credits -- have been and continue to be exposed as conflicting with statutory duties to promote race, disability and gender equality.

The bulk of savings, however, is to come from cuts to public services and public sector employment. All government departments are now preparing their proposals for achieving substantial cuts (suggest both 25% and 40% cuts??). The Government's plans are likely to mean the longest and deepest sustained period of cuts to public service spending since the Second World War. However until the Spending Review in October it will not be known which public services will be maintained, at what level, and which will be cut back, how severely or deleted altogether.

The Spending Review will set departmental expenditure limits for every Government department. It will also cover areas where the risk is taken by the Exchequer including savings and reforms in areas such as social security, tax credits and public service pensions.

The Spending Review Framework provides the following guidance for this process:

1. The review of capital spending will involve departments considering how their assets can be managed more effectively including privatisation and contracting out “where assets do not need to be held in the public sector” (para 3.6)
2. For other areas departments will be asked to provide a full assessment of the unit costs of key public service outputs.
3. Departments will be asked to reduce administrative spending by at least one third.

4. Government will use the Spending Review to progress devolution of power and financial autonomy to local government through simplifying funding and reducing centrally driven reporting requirements.
5. The Spending Review will also determine the level of funding to the devolved administrations of Scotland, Wales and Northern Ireland.

Structure:

- A. Public Expenditure Committee (PEX Committee) senior Cabinet Ministers to advise the Cabinet on the high level decisions in the Spending Review:
 - Chancellor of the Exchequer
 - Chief Secretary to the Treasury
 - Foreign Secretary
 - Minister for the Cabinet Office and Paymaster General
 - Minister of State at the Cabinet Office

The PEX Committee will consider:

- The Government's approach to cross cutting issues including public sector pay and pensions and local government expenditure;
- the key objectives for each department to ensure sufficient prioritisation has been taken ... and that the quality of key frontline services will be protected; and
- the strategic issues, for example, reform of the welfare state. (para 4.11)

In the autumn the PEX Committee will advise the Cabinet on allocations for departments.

B. The Cabinet Secretary and Permanent Secretary to the Treasury will chair an officials committee at Permanent Secretary level "to build the Government's collective understanding of the issues...and discussing cross-cutting issues" (para 4.9)

C. "To deliver this [the allocations for departments] the Government knows that it will require the input of the brightest and best individuals to achieve the optimal outcome in this Spending Review. Therefore it will form a Spending Review Challenge Group of experts – both from within government and outside – to act as independent challengers and champions for departments throughout the process. Their remit will be to think innovatively about the options for reducing public expenditure and balancing priorities to minimise the impact of public services." (para 4.14)

The membership of the Spending Review Challenge Group was announced on 4 August 2010. The list of 38 “civil service leaders complemented by a handful of external experts” includes not one senior civil servant from the Government Equalities Office, nor any external expert on equality. In the light of Theresa May’s letter this omission is surprising and disappointing. It seems to suggest that innovative thinking about options for reducing public expenditures need not include thinking about the equality impact of different options despite statutory obligations to do so.

Thus until October it is each department that is making plans for cuts to services and employment. Each Government department is expected to have either separate race, disability and gender equality schemes or single equality schemes covering those characteristics and possibly others such as age, religion or belief or sexual orientation, all of which are likely to commit the department to meeting their duties under the RRA, DDA and SDA. Compliance with these duties should mean that before putting forward their proposals to the PEX Committee each department would have carried out equality impact assessments of different options, revising or modifying proposals where the evidence indicates disproportionate adverse impact on race, disability or gender equality.

Ministers who sit on the PEX Committee will have to decide which areas to cut and which to preserve. Ministers have now been advised of their statutory duties under the RRA, DDA and SDA. Before taking decisions that will profoundly affect the lives of everyone living or working in the UK they need to be aware of the likely impact on race, disability and gender equality and how any adverse impact can most effectively be mitigated. The ruling in *R (on application of Chavda and others) –v- Harrow* mentioned above, in which the court stressed that decision takers could not “weigh matters properly in the balance” without being aware of their legal duties, is directly relevant to the critical decisions which the PEX Committee will be required to make.

Some questions to consider

1. What are the benefits and risks of litigation?

Case law provides some guidance as to what is necessary for compliance with the duty to have ‘due regard to the need to promote equality of opportunity’, and there is no evidence that that has taken place in relation to the welfare spending cuts in the June Budget.

An application for judicial review of a decision by a public authority can be made to challenge the decision-making process and, for the present purposes, to challenge whether due regard

had been had to

race/disability/gender equality in making a particular decision. If the High Court agrees that the decision making process was unlawful it can quash the decision, but it is not bound to do so. In many of the successful judicial review applications under the RRA and DDA, by the time the case is heard the public authority will have carried out some form of retrospective equality impact assessment; while this fails to satisfy compliance as defined in the case law (see *Elias* or *Bapio* above) this may be sufficient to satisfy the court which will make a finding of breach of the equality duty but will leave the decision in place. Thus a judicial review may secure a delay to a decision taken without due regard to equality and, at best, both delay and some modification, but cannot prevent it.

There are some real concerns that where the decision relates to the core of what the new Government describes as its first priority a legal challenge based on breach of a statutory equality duty may not achieve its purpose. There is a risk that such a challenge not only may not succeed but could also result in legal precedents which would make equality duty challenges of policy decisions in the future far more difficult.

2. Is campaigning the better option? Will it have sufficient impact?

As discussed above, in plain speech, the worst is yet to come. The swingeing cuts to departmental budgets will have a devastating effect on public services and public sector employment. Like the cuts to welfare spending, but potentially even more so, the outcome of the Spending Review will disproportionately disadvantage women, ethnic minorities and disabled people.

These decisions have not yet been taken. Each Minister and each Government department is subject to the RRA, DDA and SDA equality duties. Each department now has, or should have, its own equality scheme(s) setting out how it will comply with these duties. Further each Minister, including those appointed to the PEX Committee, has been reminded of the implications of their equality duties by Theresa May in her 9 June letter.

Therefore the law is in place, and no one within Government is deliberately setting out to flout the law. Rather it is the urgency which the Government has given to its spending cuts that appears to over-ride all other considerations. As stated above, applications for judicial review can impose some delay, so for that reason legal challenges should remain on the agenda. However in the weeks leading up to the October Spending Review final decisions have not yet been made. So there is a small window of opportunity for civil society to take up Theresa May's mantle and call on each Minister and each group of senior civil servants in each Government department to give appropriate weight to equality issues before as they form plans to cut services and public sector employment – before critical decisions are made. Similar demands should be made to the Chancellor and other members of the PEX Committee.

While the 'stick' to support such demands would be the threat of legal challenge if the statutory equality duties are ignored, emphasis should be given to the 'carrot', namely that assessing equality impact is a benefit not a burden, especially when spending must be cut, since it enables public authorities to identify how their services can be better targeted and more effective – in budget terms, how they can get best value for their (limited) money.

To assist this process civil society should also call for at least one senior official of the Government Equalities Office to be added as a full member of the Independent Spending Review Challenge Group to ensure that that Group's innovative thinking will incorporate ways in the Spending Review to avoid adverse impact on race, disability or gender equality.

3. Who should be part of this campaign?

The above recommendation is that these are issues that should engage "civil society" generally; they are issues too great to be left to small, often poorly resourced, equality NGOs.

Trade unions have a vital role to play - not only to protect the jobs and welfare of their members but also to protect the quality of the public services their members are expected to deliver. No one benefits when vulnerable groups are faced with increased hardship.

Like trade unions, organisations representing bodies within the public sector, for example the Local Government Association/IDeA, the Association of Chief Police Officers, the NHS Confederation, will be concerned about the ability of those they represent to provide appropriate and professional services.

Voluntary sector organisations that provide services under contracts or grant funding arrangements with public sector organisations need to be engaged - not just to save their funding but because of their experience they understand the importance of ensuring that services are provided consistent with proper consideration of equality.

Finally, it would seem to be essential that the Equality and Human Rights Commission (EHRC) should become publicly engaged in these crucial matters alongside civil society. While it is important for the EHRC to continue to work behind the scenes to influence Ministers and officials, it is equally important for the EHRC to be seen to be challenging Government decisions that experts across different fields have identified as disproportionately disadvantaging vulnerable groups protected under equality laws. The EHRC has a range of enforcement tools which it should not be shy to brandish when raising issues of non-compliance with Ministers and Government departments.

13 August 2010

Barbara Cohen