

# Red tape or responsible thought?

Robin Richardson

(An earlier and slightly shorter version of this article was published as a blog post on Tuesday 20 November at <http://leftcentral.org.uk/2012/11/20/tory-hate-and-red-tape-equality-impact-assessment-and-analysis/#comments>.)

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## Equality impact assessments and analysis

On Monday 19 November the prime minister made a speech to the Confederation of British Industry (CBI) in which he said the government is going to abolish equality impact assessments (EQUIAs).<sup>1</sup> This was confusing or misleading, for the decision to abolish equality impact assessments was in effect taken on 8 April 2010, namely several weeks before Mr Cameron entered Downing Street two and a half years ago. That was the day the Equality Act 2010 received royal assent. EQUIAs ceased to be required in England (but not in Scotland and Wales) from 6 April 2011, which was the day when the new public sector equality duty (PSED) established by the Equality Act came into effect.

Said the prime minister:

'Consultations, impact assessments, audits, reviews, stakeholder management, securing professional buy-in, complying with EU procurement rules, assessing sector feedback,— this is not how we became one of the most powerful, prosperous nations on earth. It's not how you get things done. As someone once said, if Christopher Columbus had an advisory committee he would probably still be stuck in the dock.'

With regard to the second item on this list of bureaucratic burdens, impact assessments, the prime minister said:

'Take the Equality Act. It's not a bad piece of legislation. But in government we have taken the letter of this law and gone way beyond it, with equality impact assessments for every decision we make.

'Let me be very clear. I care about making sure that government policy never marginalises or discriminates I care about making sure we treat people equally. But let's have the courage to say it, caring about these things does not have to mean churning out reams of bureaucratic nonsense. We have smart people in Whitehall who consider equalities issues while they're making the policy. We don't need all this extra tick-box stuff.

'So I can tell you today we are calling time on equality impact assessments. You no longer have to do them if these issues have been properly considered. That way policy-makers are free to use their judgement and do the right thing to meet the equalities duty rather than wasting their own time and taxpayers' money.'

However much they may dislike what they call red tape, politicians cannot call time on requirements that do not in fact exist. So why did the prime minister make this announcement to the CBI? Were he and his speechwriters simply mistaken about the requirements of legislation? Were they recklessly using the term 'equality impact assessment' as a way of over-simplifying the requirement in the Equality Act that public authorities should have due regard? Were they making a populist gamble that nobody in the audience, and nobody in the media, would know or care about the truth? And a gamble on the inability of people who do know the truth to make their voices effectively heard? Whatever the prime minister's motivations and levels of awareness, what are the likely effects of his statement?

Such questions are in the background of this brief article. Mainly, the article contains an explanation of what the legislation does entail, and of how it has evolved. Incidentally, the explanation given by news organisations such as the BBC,<sup>2</sup> presumably based on a background briefing note provided by Downing Street staff, was extremely inaccurate and inadequate. So, even more so, was the explanation provided by Conservative Home.<sup>3</sup>

## Origins and development

EQUIAs have never been part of primary legislation, and have never directly affected the private sector, namely the sector in which the CBI plays such a dominant part and to whose representatives the prime minister was speaking. They were introduced by one of the specific duties entailed by the Race Relations (Amendment) Act 2000, and subsequently extended to issues of disability and gender. There was never a set way of conducting them. For example, contrary to what has been alleged by critics, there was never a standard form to be filled in. What the law required – first for ethnicity and then subsequently for disability and gender – was that public bodies should have ‘due regard’ for equality. The concept of due regard was clarified in a landmark legal judgement in 2008.<sup>4</sup> The judges in that case went out of their way to stress that having due regard does not necessarily involve producing a document called an equality impact assessment.

The Equality Act 2010 involved the abolition of the specific duties associated with legislation pertaining to disability, ethnicity and gender, and extended the essential and central concept of due regard (section 149 of the Act, previously clause 148 of the Bill, and before that in various sections of the previous legislation for disability, ethnicity and gender) to six further categories. The government ceased its previous discourse about equality assessments, since this was perceived to have become a way of referring to mechanistic form-filling and implied the production of a specific type of document. It chose instead to talk about open-minded and rigorous *analysis*, in line with the landmark legal judgement mentioned above.

## Impact analysis

In the House of Lords a spokesperson for the coalition<sup>5</sup> explained in autumn 2011 that ‘public bodies must ensure that they have the right information to hand about equality issues to make informed choices and decisions and to ensure that this is rigorously considered before and at the time decisions are taken’. [In a workbook for civil servants](#) updated in February 2011 and again slightly in January and April 2012,<sup>6</sup> the Department for Education (DfE) valuably and clearly explained the concepts of due regard and impact analysis in these terms:

‘Having due regard means that we need to think in advance about the potential implications of our decisions, seeking not just to eliminate negative outcomes but also thinking about potentially positive ones. We also need to be able to demonstrate – ideally proactively, or otherwise if challenged – that we actually have paid due regard to the duties.

‘One important way in which public bodies, and especially government departments, demonstrate that they have taken due regard is through equality analysis – analysing what we do and how we do it so that we are clear about the impact on equalities, and so that we take action as a result of our analysis in order to promote equality.’

In essence, the DfE stated that conducting an equality analysis of a proposed new policy involves asking two questions, each accompanied by a follow-up question. These are:

‘Could this policy, or does this policy, have a negative impact on one or more of the dimensions of equality – could it increase inequalities that already exist?’

'If so, how can we change or modify it, or minimise its impact, or justify it?

'Could this policy, or does this policy, have a positive impact on equality, by reducing and removing inequalities and barriers that already exist?

'If so, how can we maximise this potential?'

### **Repeal of section 149?**

Analysis with such questions in mind is required by Section 149 of the Equality Act. Theoretically Mr Cameron could repeal Section 149, providing his Lib Dem partners have no objection. However, they contributed much intellectual backbone to the legislation when it was passing through parliament, particularly in the House of Lords, and it is impossible to imagine they would cooperate in a move to axe it.

Also, there would need to be no effective resistance from the millions of people who are directly protected by the Act – they constitute well over three quarters of the population in entirely obvious ways, and potentially everyone without a single exception. First reactions to Mr Cameron's speech from the Trades Union Congress, the Fawcett Society, the Runnymede Trust, Disability Rights UK and several other disability charities show that resistance would be substantial.<sup>7</sup> Also it is clear there would be well-informed opposition from the legal profession,<sup>8</sup> and that the move would be legally contested in Wales<sup>9</sup> and Scotland,<sup>10</sup> since in these jurisdictions the specific duties relating to the Equality Act are slightly different from those which operate in England.

It is inconceivable that the prime minister will attempt any sort of repeal of Section 149 before the next election. The CBI knows this, and so do the prime minister's own backbenchers. By uttering empty threats he diminishes his authority with his own supporters, and invites derision from his opponents. His empty announcement also invites the suspicion that it is not so-called red tape that he dislikes but the Equality Act itself, and the principles and values which it enshrines. No doubt some of his supporters are pleased to see and hear him making thus a coded attack on the Act, and no doubt there are civil servants here and there who are pleased to receive this signal that they need not always abide by the rule of law. Many Conservative voters, however, and many civil servants, must be alarmed and sad.

The Equality Act received all-party support throughout the passage of the preceding Bill through parliament in 2009 and early 2010. Section 149 is one of the Act's most precious components. Analysis of the possible consequences of a proposed policy with regard to equality, as commanded by the Act and interpreted by the courts, enables and empowers civil servants and the courts to say, on occasions, 'No minister!' Or even, indeed, 'No, prime minister!' Section 149 of the Act must never be repealed.

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<sup>1</sup> The text of the prime minister's speech is at <http://www.number10.gov.uk/news/speech-to-cbi/>

<sup>2</sup> <http://www.bbc.co.uk/news/uk-politics-20389297>

<sup>3</sup> 'Equality Impact Assessments ride off into the sunset. We won't miss them.' <http://conservativehome.blogs.com/thecolumnists/2012/11/jill-kirby-equality-impact-assessments-ride-off-into-the-sunset-we-wont-miss-them.html>

<sup>4</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2008/3158.html>. The clarification of 'due regard' is summarised at paragraphs 90–96.

<sup>5</sup> Baroness Verma on 6 September 2011, 3.08 pm:

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<http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110906-0001.htm>

<sup>6</sup> The DfE workbook on equality analyses is at  
<http://www.education.gov.uk/aboutdfe/policiesandprocedures/equalityanddiversity/a0077522/equality-analyses-equias-workbook>

<sup>7</sup> There is fuller information in the following documents:

'Government changes to equality laws are reckless', Trades Union Congress  
<http://www.tuc.org.uk/equality/tuc-21680-f0.cfm>

'Cameron's comments on equality are hugely irresponsible', Fawcett Society  
<http://fawcettsociety.org.uk/index.asp?PageID=1293>

'Cameron declares law but forgets the troops', Runnymede Trust  
<http://www.runnymedetrust.org/blog/187/359/Cameron-declares-war-but-forgets-the-troops.html>

'Disability Rights UK is appalled by Government's decision to abolish equality impact assessments'  
[http://www.disabilityrightsuk.org/equalityimpactassessments.htm?utm\\_source=twitterfeed&utm\\_medium=twitter](http://www.disabilityrightsuk.org/equalityimpactassessments.htm?utm_source=twitterfeed&utm_medium=twitter)

'Charities slam PM's plans to dismantle equality safeguards', Civil Society  
[http://www.civilsociety.co.uk/governance/news/content/13830/charities\\_slam\\_pms\\_plans\\_to\\_scrap\\_consultations\\_and\\_equality\\_assessments](http://www.civilsociety.co.uk/governance/news/content/13830/charities_slam_pms_plans_to_scrap_consultations_and_equality_assessments)

<sup>8</sup> 'The quick and the dead in Britain's global future' by Helen Mountfield QC,  
<http://ohrh.law.ox.ac.uk/?p=662>

<sup>9</sup> 'Jane Hutt reaffirms commitment to equality impact assessments in Wales'.  
<http://wales.gov.uk/newsroom/equalityanddiversity/2012/6782229/?lang=en>

<sup>10</sup> The law and requirements in Scotland are set out at length in  
[http://www.equalityhumanrights.com/uploaded\\_files/Scotland/PSED\\_in\\_Scotland/assessing\\_impact\\_and\\_the\\_psed.doc](http://www.equalityhumanrights.com/uploaded_files/Scotland/PSED_in_Scotland/assessing_impact_and_the_psed.doc)