



## **Section 75 and the Northern Ireland Budget**

### **The Equality Commission's Advice to the Northern Ireland Office**

#### **The aim of this advice**

This advice note aims to provide practical guidance to the Northern Ireland Office ('the NIO') as to how the duties under section 75 of the Northern Ireland Act 1998, and the NIO's associated equality scheme arrangements, apply when the NIO is carrying out its functions in respect of the setting of the Northern Ireland Budget in the event that the devolved institutions in Northern Ireland, the Northern Ireland Assembly, the Executive Committee and the Northern Ireland Ministers, are not operating. This was the case in respect of, for example, the Northern Ireland Budget that was set by the Secretary of State in April 2023 and subsequently affirmed by Parliament in the Northern Ireland Budget (No. 2) Act 2023.

The issuance of the advice note follows a review of the Northern Ireland Budget process, and of how section 75 applies to it, that was undertaken by the Equality Commission in 2024. The Equality Commission is grateful for the engagement of the NIO in the course of that review and for clarification of the NIO's functions in that regard.

**Note 1 – Assumptions informing the advice note**

As noted, the advice applies in the event that the devolved institutions are not operating at a time in the future. For this purpose, the Equality Commission assumes that the current legislative rules and administrative arrangements that regulate the making of the Northern Ireland Budget will remain unchanged at such a time, except to the extent illustrated by the circumstances in which the Northern Ireland Budget was made in 2023, i.e. with the Secretary of State assuming the executive functions normally undertaken by the Executive Committee and Parliament assuming the legislative functions normally undertaken by the Northern Ireland Assembly.

An associated assumption is that the functions currently performed by the Department of Finance ('the Department') in respect of the making of the Northern Ireland Budget will also remain unchanged, except to the following extent: that the advice and recommendations that the Department provides to the Minister of Finance under the current legislative and administrative arrangements will instead be provided to the Secretary of State. The Equality Commission has issued a separate advice note to the Department in respect of its budgetary functions.

**Note 2: The role of the Northern Ireland departments**

Although this guidance is not directed to the Northern Ireland departments, it still has relevance to their respective functions in the setting of the Northern Ireland Budget at a time when the devolved institutions are not operating, in particular to their role in providing the Department of Finance, the NIO and the Secretary of State with relevant, adequate and timely equality assessments regarding indicative budget proposals for their departments as part of the Budget setting process.

The Northern Ireland departments as section 75 duty-holders in respect of their performance of their own functions, will be obliged to comply with section 75 regarding the information they provide to the Department of Finance, the NIO and Secretary of State at this stage. That matter falls outside the scope of this advice note, but it is enough to say that in compiling that information the departments are obliged to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations.

## **Recommended preliminary reading and viewing**

This is not an elementary or introductory guide to the general legal principles and concepts that underpin section 75, and it is presumed that officials are familiar with these already.

If officials are not familiar with these principles and concepts, or need a reminder, we strongly encourage them to read our associated short guide that outlines and discusses these matters.

- [Short guide to the public sector equality and disability duties \[2015\]](#)

Further written guidance may be found in the [section 75 pages](#) of our website.

We also encourage officials to view the following videos on important aspects of the section 75 duties that we have produced-

- [Equality Screening](#) (20 mins, 15 secs)
- [Equality Impact Assessments](#) (13 mins, 48 secs)

## **The NIO's functions in respect of the setting of the Northern Ireland Budget**

It is acknowledged that when the devolved institutions in Northern Ireland are operating, the NIO performs no functions in respect of the setting of the Northern Ireland Budget that invoke its duties under section 75.

However, in the event that the devolved institutions in Northern Ireland are **not** operating, the NIO, as the department that supports the relevant decision-maker, the Secretary of State, has the following function in respect of the setting of the Northern Ireland Budget-

**Advising the Secretary of State on the options available to him, including options to mitigate the impact of funding pressures and possible spending reductions on front line public services that could result from any budget the Secretary of State sets.**

The Equality Commission understands that this involves an information gathering exercise by the NIO that begins with a review of information, advice and recommendations, including departmental equality impact analyses, collated by the

Department of Finance as part of its performance of its own functions in respect of setting the Northern Ireland Budget. It is also understood that if the Secretary of State requires clarification of matters raised in the information provided by the Department of Finance that the NIO will engage with the Department and/or with the other departmental Permanent Secretaries to obtain that clarification, for example, by facilitating meetings with the relevant parties, including the Secretary of State. Furthermore, it is understood that the NIO prepares one or more submissions to the Secretary of State that outline his powers and options, including options to mitigate the impact of funding pressures and possible spending reductions on front line public services that could result from any budget that he sets.

It is recognised that the NIO is not the decision-maker in respect of setting the Northern Ireland Budget. The decision-maker is the Secretary of State in the first instance, followed by Parliament in respect of the associated Budget Act.

It is further recognised that the NIO's advice may not be accepted in full, or at all, by the Secretary of State.

The Secretary of State and Parliament are not, however, designated public authorities subject to the section 75 duties. Conversely, the NIO is, and the performance of its advisory function is subject to section 75.

The Equality Commission, therefore, considers that the NIO has a function in connection with the Northern Ireland budget that requires it, as part of its duties under section 75 of the Northern Ireland Act 1998, to conduct screening, and where indicated, equality impact assessment of the advice that it will provide to the Secretary of State. In doing so, this will require the NIO to consider if there are any cumulative impacts that may result from the implementation of its advice or the options it advances, between people in the section 75 categories - see section 6 for advice on considering the cumulative impact of policies.

Further advice in respect of this specific function is given in sections 4-7 of this advice note.

### In-year monitoring

In the event that, at a time when devolved institutions are not operating, any decisions taken in respect of allocating resources during an 'in year' monitoring process are made by the Secretary of State having received advice from the NIO about the options open to him/her. This function of the NIO also engages section 75, albeit at a different time. Advice in respect of this specific function is given in section 8 of this advice note.

### **Proposed policies and the application of equality scheme arrangements**

The Equality Commission considers that the **advice** which the NIO gives to the Secretary of State in relation to the setting of the Northern Ireland Budget constitutes a **proposed policy** (as defined in the NIO's equality scheme) that the NIO has decided to advance.

Consequently, that proposed policy is subject to the arrangements for assessing the equality impacts of proposed policies that are outlined in Chapter 4 of the NIO's equality scheme (see in particular paragraphs 4.1 to 4.3), i.e. the arrangements known as '**screening**' and '**equality impact assessment**' ('EQIA').

The NIO's need to comply with section 75 and its associated equality scheme arrangements when providing advice to the Secretary of State does not prevent difficult decisions being taken (e.g. making proposals, or offering advice, that may subsequently lead to cuts to services), nor does it preclude making proposals, or offering advice, which may adversely affect one group (e.g. women, disabled people, children) more severely than a relevant comparator group (men, people who are not disabled, adults).

The section 75 duties are aimed at influencing decision-makers (i.e. in this case the officials who will decide what advice to offer to the Secretary of State) and require that a process of consideration be undertaken before decisions are taken which could have an impact on the promotion of equality of opportunity or good relations.

It is for this purpose that the equality scheme arrangements exist. They provide the necessary methods for ensuring that such decisions are taken in compliance with section 75. Equality scheme arrangements are not a mere box-ticking exercise. Conducted conscientiously, with rigour and with an open mind, they should enable decision-makers to show:

- that their decisions were properly informed by an assessment of the impacts they have, or are likely to have, between people in the relevant section 75 categories,
- that *the need to promote equality of opportunity* and *the desirability of promoting good relations* were properly taken into account through the consideration of mitigating measures, or alternative policies that would not have those adverse impacts, or that may even have positive impacts,
- that this was done before those decisions were made, and that
- the decision-making process was evidenced, transparent and accountable.

## **Practical guidance on applying equality scheme arrangements**

### **1. Train decision-makers and their support staff**

It is not sufficient for decision-makers (i.e. in this case the officials who decide what advice to offer to the Secretary of State) to have a vague or general awareness of equality issues. When making decisions, they must think specifically about the statutory goals that underpin section 75, i.e. *the need to promote equality of opportunity* and *the desirability of promoting good relations*. They need to understand what terms such as “*due regard*” and “*regard*” and “*equality of opportunity*” entail.

Furthermore, decision-makers and/or their support staff need to understand various practical matters concerning data collection or monitoring, data analysis, and consultations, to enable them to properly complete and understand screening templates and EQIA reports as required.

They will need to be trained on these matters. Equality schemes typically make commitments in respect of this provision – the NIO’s arrangements are outlined in Chapter 5 of its equality scheme. However, training takes time, and should, when possible, be delivered to relevant persons well in advance of when they will need to apply it.

## 2. Remember that the duties are non-delegable

This means that the main duties *to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations* lie upon the relevant decision-maker (i.e. in this case the officials who decide what advice to offer to the Secretary of State).

The decision-maker cannot delegate, or pass on, the fulfilment of the NIO's section 75 duties to their support staff or other advisors.

This ties-in with the need to make properly informed decisions. What matters is what information the decision-makers took into account and what they knew at the time they made their decision. This places a duty on support staff and advisors to ensure that decision-makers are accurately and properly informed. It has been noted judicially that-

*“[Councillors] 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.”*

***R (Domb) –v- London Borough of Hammersmith & Fulham [2009] EWCA Civ 941***

This principle applies not just to councillors, but to all decision-makers who are section 75 duty-holders.

Decision-makers are not necessarily expected to conduct screening exercises or EQIAs themselves – in many cases that may be done by support staff – but are required to pay conscientious attention to the findings of any such exercises before making their final budgetary decisions.

## 3. Begin screening and EQIAs as early as possible

The section 75 duties in respect of a budgetary (or any other) decision must be complied with **before** that decision is made and not merely as a 'rearguard action' following a concluded decision. As equality scheme arrangements, such as screening and EQIAs (and any associated consultation exercises), will take time to complete, then it would be prudent to commence these as early as possible. Make allowance for this when planning the budgetary process and in setting timeframes.

It is recognised that the development of budget proposals is a process that will take a period of time. As a matter of good practice, the Equality Commission recommends that the screening process in respect of budget proposals commence as soon as those proposals have crystallised.

#### **4. Take reasonable steps to make enquiries**

As has been noted, before making decisions section 75 requires decision-makers to be properly informed by an assessment of the impacts that their decisions will have, or are likely to have, between people in the relevant section 75 categories.

Decision-makers are, therefore, under a duty to take reasonable steps to make enquiries about the consequences, or potential consequences, of their decisions.

The UK Supreme Court has noted:

*43. The meaning of the term “due regard” in the PSED [public sector equality duty] was considered in Bridges. The Court of Appeal said at para 181:*

*“We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex.”*

**R (Marouf) –v- Secretary of State for the Home Department [2023]**

**UKSC 23**

It is, however, recognised that such enquiries may not provide sufficient information to enable a comprehensive assessment of all potential impacts of a proposed Budget to be conducted before a decision is made. This is a consequence of the stage in the process at which advice in connection with the proposed Budget is provided to the Secretary of State by the NIO.



The absence of information or assessments which cannot reasonably be obtained or made in the circumstances does not prevent the NIO from proceeding to finalise its advice to the Secretary of State. As the Northern Ireland Court of Appeal has noted-

*[Section] 75 also contemplates, implicitly, that scientifically accurate evidence of the future equality effects of a policy or legislative proposal may not be available. This is consonant with the obligation being one of means and not result.*

**Stach –v- Department for Communities & Department for Work & Pensions**

**[2020] NICA 4**

## **5. Assessing impacts – giving the appropriate level of consideration**

The Equality Commission recognises that decision making in respect of the Northern Ireland Budget is a matter of substantial complexity and is undertaken by way of a process comprising a number of stages.

This being so, it is to be borne in mind that:

*What is ‘due regard’ in one case will not necessarily be ‘due regard’ in another. It will vary, perhaps widely, according to circumstances: for example, the subject-matter of the decision being made, the timing of that decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences, and so forth. When the decision comes at an early stage in a series of decisions, and will not fix once and for all the impacts on people with protected characteristics, the level of assessment required to qualify as ‘due regard’ is likely to be less demanding than if the decision is final or permanent. This may especially be so if the decision is also experimental, and is itself conducive to a more robust assessment of equality impacts later in the process.*

**R (Sheakh) -v- Lambeth London Borough Council [2022] EWCA Civ 457 at**

**[56], cited by the Supreme Court in R (Marouf) -v- Secretary of State for the Home Department [2023] UKSC 23 at [45]**

As a general observation, when assessing the likely impacts of any policy decision, including a budgetary one, the regard due to *the need to promote equality of opportunity* and *the desirability of promoting good relations* will vary from case to case depending on

all of the relevant circumstances, including the stage that the decision-making process has reached.

The amount of regard to the *equality of opportunity* and *good relations* goals that is owed in any particular case is a function of **relevance** and **proportionality**.

As a rule-of-thumb, the greater the scale of a proposed policy or decision (e.g. the closure of, or the making of significant cuts in funding to, a much used public service) and the greater its relevance to the promotion of equality of opportunity or good relations (e.g. the service benefits many vulnerable people in relation to their health, welfare, education or employment opportunities), then the greater the degree of consideration of the likely impacts, and of any potential mitigating measures that might be taken to avoid or reduce them, which will be needed to comply with the duty.

*“In a case where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high.”*

**R (Hajrula) -v- London Councils [2011] EWHC 448 (Admin)**

In the case of setting budgets, and especially if the proposals are likely to lead to cuts in the funding of important services, a high level of consideration is likely to be needed. As noted above, the NIO has a function of providing advice to the Secretary of State, including on options to mitigate any adverse impacts that the Budget may have between people in relation to the section 75 categories, and the NIO must have due regard to the need to promote equality of opportunity in carrying out that function.

The discharge of that duty to have due regard when carrying out the function of advising the Secretary of State will require an understanding on the part of the NIO of the impact that the proposed Budget may have. This will include the cumulative impacts of the proposed Budget within and across departments, where those can reasonably be identified – see below.

This means that it will not be enough for the NIO to collate information from the Department of Finance and the other Northern Ireland departments, and associated

equality impacts assessments, and merely to pass that information to the Secretary of State without consideration or comment.

In carrying out its function, the NIO will have the benefit of information received in the course of an information gathering exercise from the Department of Finance and each of the other departments about pressures, priorities and potential impacts. It will have the benefit of an assessment of that information by the Department, undertaken with recognition that the impact of proposals may be cumulative.

In the event that, having received and considered that information, the NIO considers other or further information is required in order that it is adequately informed, the NIO will be required to seek such information.

In this way the NIO's advice to the Secretary of State will be informed by its discharge of its due regard duty. Relevant documentation generated in this process should be made available to the Secretary of State for consideration.

## **6. Considering the cumulative impacts of policies**

Many policies do not operate in isolation and their effects may interact with others either to alleviate the disadvantages experienced by vulnerable people, or, conversely, to compound those disadvantages.

For example, increases in bus or rail fares will affect all service users, but may have a disproportionate adverse impact on disabled people who cannot travel by other means for reasons related to their disabilities. That impact on them may be exacerbated by cuts made simultaneously to disability benefits which may reduce the income of those disabled people.

This kind of interaction between policies is more likely to be seen where proposed budgetary decisions would have implications for and across a number of policy areas.

Given this, it will be necessary for the NIO when advising the Secretary of State in respect of the Northern Ireland Budget for a particular year to make itself aware, in so far

as it is reasonably able, of the interaction of those proposed policies and of their potential (negative or positive) cumulative impacts.

The exercises of screening and equality impact assessment, as outlined in the NIO's equality scheme, are flexible enough to encompass the assessment of such cumulative impacts, where such impacts can reasonably be identified. It is not necessary for the exercise undertaken to be expressly named as 'cumulative screenings' or 'cumulative equality impact assessments'.

If evidence of the likely cumulative impacts of budget proposals is apparent, then it must be considered.

### **7. What if the consequences of a budget are not apparent immediately?**

The consequences of a proposed Budget, should it take effect, may be apparent immediately. For example, it may expressly and unequivocally propose that a particular public service will close, or that its funding will be reduced significantly.

Where this is so, screening / equality impact assessment should be undertaken in respect of that proposal.

These exercises must entail consideration of any mitigating measures that might be adopted to reduce any adverse impacts that may result from the proposal. This is particularly relevant to the NIO in respect of its function of advising the Secretary of State about options to mitigate any adverse impacts between people in relation to the section 75 categories that the Budget may have. In so far as the NIO, having considered information received from departments and the Department's assessment thereof, considers other or further information is required in order that it is adequately informed, it will be required to seek such information.

Where the consequences of a proposed Budget cannot immediately be identified with sufficient clarity, even with reasonable steps taken to make enquiries, a detailed assessment of those consequences clearly cannot yet be made. In such circumstances, it will suffice for the NIO to bring the potential for adverse impact to the attention of the Secretary of State.

However, a detailed assessment of impact may wait until such time as the consequences of the proposal crystallise, at which time it will be the responsibility of the implementing department (i.e. Health or Education, as the case may be) to conduct the associated impact assessment. This will be a requirement of the section 75 duty on the relevant department.

In respect of a budget setting context, it has been noted judicially that-

*90. Careful consideration of the factual context is necessary in any public law challenge. It is always necessary to carefully examine the precise nature and extent of a decision and the surrounding circumstances. If the budget decision under challenge is sufficiently far removed from a final decision affecting the provision of an element of a service, then there is nothing wrong in principle in not undertaking a detailed assessment of the impact until specific policies have been formulated. The distance may be because the budget is sufficiently high level or, as in the case of a [medium term financial plan], not set in stone. Indeed, when setting a high level national budget it would often (but not invariably) be difficult to compile a sufficiently detailed consultation document or undertake a focussed impact assessment (although as conceded in **Fawcett** it may be both possible and necessary for certain elements). Also if, as in the **JG and MB -v- Lancashire** case, the door remains open, following the future result of a targeted consultation, to avoid any cut and thus any reduction in services at all, and/or to gain funding from another service, again there is nothing wrong in principle in not undertaking a detailed assessment of the impact until the result and impact of the consultation is known. However, due regard under the PSED (and if necessary consultation) ... must be essential preliminaries to any significant, sufficiently focussed, and in financial terms apparently rigid, decision to impose a reduction in spending, even if taken as part of the setting of "a budget".*

**R (KE & others) –v- Bristol City Council [2018] EWHC 2103 (Admin)**

## **8. Remember that the duties are continuing – ‘in-year’ monitoring**

Finally, even though there is an onus on the NIO, as on all section 75 duty-holders, to comply with the section 75 duty before and at the time that they make important decisions, they are also obliged to continue having due regard to *the need to promote equality of opportunity* and regard to *the desirability of promoting good relations* afterwards.

This is especially important in a budgetary context where changes in financial circumstances may allow for “in-year” adjustments to departmental or programme budgets, which in turn may allow the adverse impacts of earlier decisions to be mitigated.

This would be particularly relevant to the NIO in the event that it is required to give advice to the Secretary of State in relation to any decisions he may have to make in respect of an ‘in year’ monitoring process.

In such circumstances, the continuing element of the section 75 duty would oblige the NIO properly to inform itself about adverse impacts of decisions made previously, in order that it might provide advice to the Secretary of State as to how to mitigate such adverse impacts should subsequent improvements in financial circumstances allow for it.

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### **Further information and advice**

For further information and advice, please contact the Equality Commission’s **Advice and Compliance Division** at-

**Equality Commission for Northern Ireland**  
**Equality House**  
**7 - 9 Shaftesbury Square**  
**Belfast**  
**BT2 7DP**

**Telephone: 028 90 500 600**

**Email: [information@equalityni.org](mailto:information@equalityni.org)**