

Justice and Security Green Paper

Equality Impact Assessment

Equality Impact Assessment

Introduction

1. This Equality Impact Assessment (EIA) accompanies the Justice and Security Green Paper, which was published on 19 October 2011 and which will undergo a period of public consultation lasting until 6 January 2012. This EIA is concerned with proposals which are aimed at ensuring that:

- the courts can take fair account of all relevant information, even where some of that information is too sensitive to be disclosed to the public
- executive power can be properly held to account, while enabling the Government to properly defend its actions
- the security and intelligence agencies can continue to work to keep the public safe, without the risk of vital intelligence information or essential international intelligence sharing relationships being compromised
- oversight of the Government's national security activities is independent and fit for the modern age.

2. This is an initial EIA of the potential impacts of the proposals in relation to equality, based on the evidence currently available. Work on the Green Paper will be informed by ongoing consultation with key stakeholders and interested parties. This will allow us to improve our understanding of the potential equality impacts and will inform the future direction of policy development.

3. The EIA assesses the potential effects of the proposed reforms on the elimination of unlawful discrimination, harassment, victimisation and other forms of prohibited conduct, the advancement of opportunity and the fostering of good relations against the 'protected characteristics' of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It is designed to ensure that the Government has due regard to these needs, in accordance with its statutory duties under section 149 of the Equality Act 2010 (the public sector equality duty).

4. We welcome feedback on all the issues raised in this document. Any representations received in response to this initial screening EIA will be used to inform the full EIA which will accompany the Government's response to the consultation. Comments received via the consultation will be considered in the development of the policy.

5. This EIA should be read alongside the consultation document and the impact assessments relating to the proposals.

Legal duties

6. Public authorities in Great Britain have a statutory equality duty under section 149 of the Equality Act 2010. The duty requires the Secretary of State to have due regard to the need to:

- (a) *eliminate discrimination, harassment, victimisation and other conduct which is prohibited by or under this Act;*

- (b) *advance equality of opportunity between persons who share a relevant characteristic and persons who do not share it; and*
- (c) *foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

7. The protected characteristics to which the duty to have due regard now applies following the entry into force of the Equality Act 2010 are:

- (i) age
- (ii) disability
- (iii) gender reassignment
- (iv) marriage and civil partnership (applies to the first limb (a) only)
- (v) pregnancy and maternity
- (vi) race
- (vii) religion or belief
- (viii) sex
- (ix) sexual orientation.

8. These types of discrimination are all defined in Part 2 of the Equality Act 2010.

9. This EIA assesses the proposals in the Justice and Security Green Paper against each of the limbs of the public sector equality duty and by reference to the protected characteristics.

Aims/outcomes

10. The purpose of this EIA is to provide the data and analysis used to flag potential equality impacts. We welcome feedback on the potential impacts identified, and any responses received via the Government's consultation will be appropriately considered when making decisions on options for implementation and to help to identify steps that can be taken to mitigate any potentially negative disproportionate equality impacts and to promote positive impacts. This document is an initial EIA and feedback will be used to inform the full EIA which will accompany the response to the consultation in due course.

Background and context

11. Recent years have seen an increase in the volume, number and range of civil proceedings that examine national security-related actions and sensitive material. In many cases, the facts cannot be fully established without reference to sensitive material. This material cannot be used in open court proceedings without risking serious damage to national security or international relations.

12. At present, the primary means of protecting sensitive material in court is to claim Public Interest Immunity (PII) which, if granted, results in that material being excluded from the proceedings altogether.

13. Recent court judgments (drawing on the European Convention on Human Rights) have also determined that in certain specific circumstances, in particular where the Government is seeking to take executive action against an individual, the Government must disclose a minimum amount of information about the intelligence material relied upon, regardless of the sensitivity of the information.

14. In some contexts legislation allows for closed proceedings to test evidence that would be damaging to national security if disclosed in open court. However, following the recent judgment of the Supreme Court in *Al Rawi*, doubt has been cast on the inherent ability of the court to order such a closed material procedure. In particular, the courts have held that it is not currently possible (because of an absence of statutory authority) to use a closed material procedure to hear a civil claim for damages brought against the Government.

15. In these cases the Government is left with a range of choices which are:

- disclose the material in open court (which could damage national security)
- attempt to defend the case (while being unable to make available relevant sensitive information, which could result in unfairness)
- withdraw an action

- offer no defence
- settle a case by paying compensation (despite being convinced that its actions were lawful).

16. The current situation is potentially unfair to the claimant because the Government may not be able to disclose sensitive material to the other side or in open court which might support the claimant's case.

17. There has been a growth in civil cases where individuals seek sensitive information held by the British Government, often for use in legal proceedings overseas. Often the information sought has been received from overseas partners through intelligence sharing relationships that are vital for protecting UK national security. While the individuals seeking information are often facing, or have faced, very difficult circumstances, court-ordered disclosure of this information is raising real doubts that the UK can respect the undertakings of confidentiality on which intelligence sharing is based. This erodes trust, and could have a damaging effect on national security generally.

18. In summary:

- the courts are often not able to take into account key information and, in extreme cases, may not be able to hear a case at all
- the Government may have to drop executive action against people who pose a real danger to the British public, or settle out of court with a significant cost to the taxpayer
- intelligence sharing relationships with key partners, and therefore the UK's security and interests, may be threatened
- sensitive information may have to be disclosed without sufficient safeguards in place, which could damage national security.

19. The Green Paper seeks to identify ways of resolving these issues, and to give the courts better and more reliable frameworks for handling these difficult cases in civil proceedings. The Green Paper makes proposals on ways to safely increase the amount of information put before the courts where the need arises, reducing the need to exclude material by means of PII.

20. The Green Paper takes as its starting point mechanisms already available in the UK courts – such as the procedures in the Special Immigration Appeals Commission and the role played by Special Advocates in various contexts. It examines whether more use can be made of these mechanisms in other non-criminal contexts and what changes could be made in order to enhance procedural fairness.

21. Similarly, the Green Paper examines whether more can be done to ensure that any minimum disclosure requirements in closed material procedures are put on a sustainable and predictable footing. The Supreme Court's recent judgment in *Tariq* is taken into account. In this case the court found that the stringent levels of gisting¹ required in control order cases do not apply in employment cases. The Paper considers whether better safeguards could be put in place that recognise both the need for an individual to be able to access relevant information in certain circumstances, and the need to provide better protections to UK national security.

22. Alongside these issues, the Green Paper proposes options for strengthening independent intelligence oversight arrangements, particularly looking at options for improving the credibility and effectiveness of the Intelligence and Security Committee and the Intelligence Commissioners.

¹ In closed material procedures, a summary of closed material (a 'gist') is provided to the individual whenever it is possible to summarise that material without disclosing information contrary to the public interest. The AF (No.3) disclosure requirement in control order cases goes further than this and requires the Government to give the individual sufficient information about the allegations against them to enable them to give effective instructions to the Special Advocate representing their interests in the parts of proceedings they are excluded from, even if disclosure of that information is damaging to the public interest.

Aims and outcomes for the policy

23. The Green Paper makes proposals to ensure that, in the full range of civil proceedings:

- the courts can take fair account of all relevant information, even where some of that information is too sensitive to be disclosed to the public
- executive power can be properly held to account, while enabling the Government to properly defend its actions
- the security and intelligence agencies can continue to work to keep the public safe, without the risk of vital intelligence information or essential international intelligence sharing relationships being compromised
- oversight of the Government's national security activities is independent and fit for the modern age.

Methodology and evidence sources

24. There is currently no systematic recording of how these issues affect groups with protected characteristics. The conclusions drawn are therefore based on other data, specifically court judgments. The cases referred to in the Green Paper have been identified because they represent key judicial rulings relating to the issues discussed in the Paper.

Stakeholder consultation and engagement

25. During the consultation period the Government will consult broadly on the proposals, including with representative groups, and seek further views and evidence of the impact of the proposals on the protected characteristics.

Analysis

26. Many of the recent cases which illustrate the challenges posed by the use of sensitive information in civil proceedings have been taken by men from the following racial groups: Asian, Middle Eastern, North African; and from the following religion: Islam.

27. At this stage, while this demonstrates a differential impact, further evidence of the potential impact on groups with protected characteristics is required.

28. The proposals on extending closed procedures seek to improve fairness by ensuring that all relevant information can be taken into account by the courts and will be available across the civil justice system generally.

29. No firm proposals have been made in respect of inquests, but it is clear that changes could have a significant impact in Northern Ireland, affecting inquests into the deaths of a broad range of individuals from across the community, including members of the security forces, civilians and paramilitaries.

30. Given that the conclusions above are based on a small sample of cases and that the proposals have a potentially very broad application, it is unclear at this stage whether the patterns of impact identified above will continue. Further analysis is needed.

Annex A: Evidence

There is currently no systematic recording of how these issues affect the protected characteristics. The cases referred to in the Green Paper have been identified because they represent key judicial rulings relating to the issues discussed in the Paper. However, they may not be representative of all relevant cases or future cases likely to be affected by the proposals. Further evidence is sought as part of the consultation process on the proposals.

Cabinet Office
22 Whitehall
London SW1A 2WH

Publication date: October 2011

© Crown copyright 2011

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/
or email psi@nationalarchives.gsi.gov.uk.

This document is also available from our website at www.cabinetoffice.gov.uk

Ref: 406595/1011