Annex 2: Unworkability of the scheme

Q1: Is the guidance in the Code of Practice sufficient to help you meet the duties imposed on public authorities by Part 7 of the Immigration Act [2016] and set the necessary standard of spoken English? If not, please suggest what additions are necessary.

We approach these issues briefly, given the illegality of the measures, from the perspective of Equality and Diversity (E&D) professionals.

The first issue is, where is the Equality Impact Assessment (EQIA) for these provisions? A 'fact sheet' on the measures asks the question, 'Isn't this discriminatory? It replies, 'Absolutely not.' This is an extraordinary assertion to find in a Government document, particularly as the measures are directly and indirectly discriminatory in EU and UK law (and also contravene EU free movement principles).

It goes on to say, "The Code of Practice will provide further guidance on how a public authority should exercise this duty in light of its obligations under the Equality Act 2010." In fact, the draft Code only mentions direct discrimination and neither indirect discrimination nor the public sector equality duty.

In the absence of an EQIA, the Government has no idea whether there will be any adverse impact on any of the protected grounds.

Secondly, we are unclear about the justification for these measures. The only meaningful explanation is that it is a 'manifesto commitment'.

Thirdly, there is no evidence base to support this initiative or a meaningful assessment of costs. In the Impact Assessment (IA), there is one example of customer-facing public sector worker who was deployed on grounds of language proficiency and examples from the NHS which are already covered by language proficiency requirements. There is also a highly dubious analysis of census data. There are references in the IA to 'very few cases' etc. If so, what is the point of this legislation?

Fourthly, it appears that the Cabinet Office is attempting to use a consultation on a draft Code of Practice to collect evidence which should have been collected, and then assess costs, before the proposal was brought into statutory form.

Fifthly, the option choice in the IA is misconceived. It is suggested in the IA that the consultation will provide an opportunity to consider the viability of Option 2 (non-regulatory approach) but it does not do so. More particularly, there ought to have been an option of giving a ministerial power in the Bill to make regulations on this scheme, rather than including it in primary legislation.

Sixthly, it is impossible to set standards in the blanket fashion proposed, other than for public sector employers continuing to do what they already do. The Minister of State talks about a 'high standard of English', the Bill refers to 'fluent', which is 'interpreted' to mean 'adequate' and various educational standards are suggested without sufficient regard to the nature of the job being undertaken. Surely, if a public

sector employer had, though staff appraisal etc, any concerns about language proficiency, training or redeployment would naturally occur?

And yet, the standards are to be ‘enforced’ by any member of the public who gets a notion that the language proficiency of a public sector worker is ‘inadequate’?

Seventhly, the scheme introduces an unprecedented form of regulation into the labour market in the public sector. It was thought that it is Government policy to reduce regulation in the labour market, not introduce an unnecessary and unworkable scheme. Presumably, if the ‘Red Tape Challenge’ is re-introduced, this unwanted and divisive scheme will be the first to go?

It is unprecedented as it attempts to introduce an extraordinary exercise in ‘citizens’ complaints’ which has no parallel in UK employment law or UK administrative law, eg through Ombudsman procedures.

Eighthly, the implementation of this scheme will be a nightmare for E&D professionals. There is a danger that public sector employers will be deterred from employing those for whom English is not their first language, or those with speech impediments, whatever their nationality or origins. Some public sector employers may apply standards of language proficiency over and above that which are necessary for customer-facing jobs. Personal animosities, either within the workplace or outside it, may precipitate complaints. In particular, it opens the likelihood of racists, xenophobes and other miscreants making complaints because a worker ‘sounds foreign’.

It is difficult enough for E&D professionals to uphold E&D policies in the workplace, promote good E&D practice and protect employers from tribunal cases and other litigation. These proposals open up fresh opportunities for divisive attitudes in the workplace, and in the provision of public services, and also extensive litigation, on direct discrimination, indirect discrimination and harassment claims.

Finally, for those E&D professionals who work outside England, these provisions are bemusing. Northern Ireland is excluded, without explanation, Scotland will only be subject to the scheme in relation to reserved powers but the public sector in Wales is fully covered, although the provisions appear to be addressing largely devolved matters.

There is an indication that Legislative Consent Motions will be required from the Scottish Parliament and the Welsh Assembly, which hopefully will not be forthcoming, particularly in Wales, where the measures appear to be even more chaotic to implement than in England.

Even if these provisions could be re-fashioned to avoid the illegalities set out in Annex 1, the obvious solution is to grant ministerial authority to make regulations on this matter, so that legal advice can be taken on them and a minimal degree of evidence collection, EQIA and consultation conducted.