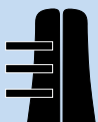




# Mainstreaming Equality: Models for a Statutory Duty Conference Report



THE EQUALITY AUTHORITY  
AN tÚDARÁS COMHIONANNAIS

**Report on conference:**

**Mainstreaming Equality:  
Models for a Statutory Duty**

**Thursday, 27th February 2003**

**A conference organised by the Equality Authority  
in association with:**

**Disability Rights Commission, UK;  
Equal Opportunities Commission, UK;  
Commission for Racial Equality, UK;  
Northern Ireland Human Rights Commission;  
Equality Commission for Northern Ireland;  
Irish Human Rights Commission**

## Foreword

Mainstreaming Equality - Models for A Statutory Duty presents a set of conference papers that open up a debate about the nature of our equality legislation. They highlight the need for change - for equality legislation that not only prohibits discrimination but also requires a planned and proactive promotion of equality.

A new generation of equality legislation is the focus for these papers. The Equality Authority is accorded the function of keeping the working of equality legislation under review and making proposals to the Minister for Justice, Equality and Law Reform for amending these Acts. The Equality Authority has already recommended the introduction of positive duties in the legislation on both the public and the private sectors to promote equality.

This publication is timely. It is published at a time when the equality legislation is under review in order to incorporate European Union equality Directives. The social partners have reiterated their commitment to equality proofing in the 'Sustaining Progress' national agreement. It is a moment when there is significant focus on the Belfast Multi-Party Agreement which contains an important commitment to equivalence of rights north and south.

It is hoped that this publication will contribute a new knowledge base to support the further development of the equality legislation. It makes the case for change and sets out a range of approaches by which to implement such change. A debt of gratitude is owed to all the contributors for this.



Niall Crowley  
Chief Executive Officer  
Equality Authority

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## Welcoming and Opening Address

**By Kate Hayes, Chair,  
the Equality Authority**

What an important moment this is in the pursuit of equality in Ireland. Your presence today in such numbers is testimony to the growing awareness, understanding and commitment that is being invested in equality issues in Ireland. It reflects the widespread consensus behind our pursuit of a more equal society. This is a consensus that is all too often hidden and does not get the public exposure it deserves. It is however a consensus that will bring us to a new quality of life for all in our society.

We stand unique in a European context with the breadth of our legislation and the scope it has to protect people across nine distinct grounds from discrimination in accessing employment, goods, services, facilities, education and accommodation. The three new EU equality directives that are coming on stream hold a potential to further develop and enhance this legislative framework. The Gender Equality Treatment Directive holds a particular promise in the context of this conference with its emphasis on gender mainstreaming. Ireland is well positioned to transpose the new European legislation that comes on stream in the Gender Equal Treatment Directive, the Race Directive and the Framework Employment Directives. This conference in advance of any legislative amendment, will allow us the opportunity to learn from experiences within Ireland, the European Union and beyond in a very timely manner.

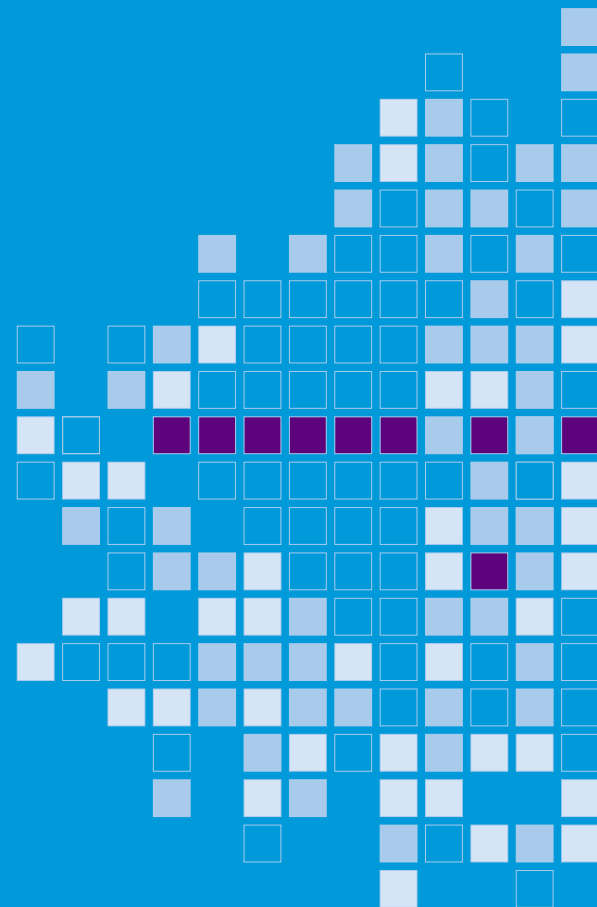
This conference is hosted by The Equality Authority in association with the Joint Equality and Human Rights Forum. This important development brings together the Equality Authority, Irish Human Rights Commission, Equality Commission for Northern Ireland, Northern Ireland Human Rights Commission, Disability Rights Commission-UK, Equal Opportunities Commission-UK and Commission for Racial Equality-UK.

The forum meets twice yearly and provides us all with valuable sources of learning and important opportunities to coordinate and cooperate behind shared objectives. The mainstreaming of equality and a statutory duty to underpin this is one area of shared experience and shared aspirations.

Our equality legislation is enshrined in the Good Friday Agreement. This has brought the Equality Commission for Northern Ireland and the Equality Authority together as colleagues, sharing common experiences and skills in charting the equality agenda on an all island basis. We have already jointly commissioned and published a report by Katherine Zappone on *Charting the Equality Agenda*, and we cooperate on a range of issues on a North-South basis. We recently hosted our annual joint board meeting. Our debates focused on issues of racism, the European Year of People with Disabilities and the interaction between poverty and inequality.

We are also looking forward to hearing from beyond the EU perspective as we welcome the Norwegian Ombudsman Kristin Mile. This event marks a further step towards a new generation of equality legislation. I am already enthusiastic about the outcome of our proceedings because of the calibre of our guest speakers and the expertise that I know to be amongst the attendees. I am also honoured to introduce our most distinguished guest speaker to you, President of Ireland, Mary McAleese. Her attendance today must surely signal how Ireland has developed as a society with a keen interest in the pursuit of equality.

I hope that we can all take away relevant ideas from this conference and take the necessary steps towards this new generation of equality legislation, and towards an effective and high quality mainstreaming of equality.



## Remarks by President McAleese on Formally Opening the Mainstreaming Equality Conference - Models for Statutory Duty

*Dia dhibh a cháirde. Tá an-áthas orm bheith i bhur measc anseo ar an ócáid speisialta seo. Mile bhuiochas díbh as an gcuireadh agus an fáilte a thug sibh dom.*

Thank you for that warm reception and the kind invitation to be part of this important Conference with its focus on Mainstreaming Equality. One of the very heartening aspects of this conference is the partnership it embraces between equality and human rights bodies from both Britain and Ireland, North and South. I extend a big Céad Mile Fáilte, a hundred thousand welcomes to each of you and a special welcome to those who have travelled from abroad even from as far away as Norway to contribute to this debate which without overdramatising, has the capacity to radically alter the lives of so many people for whom the concept of equality is still not a lived, an experienced reality.

I am proud of the fact that Ireland has one of the most modern and comprehensive equality codes in Europe. We have a written Constitution which begins with an assertion that the people of our country seek to promote the common good so that “the dignity and freedom of the individual may be assured and true social order attained”. The section on personal rights begins by saying “All citizens shall, as human persons, be held equal before the law.” We have an impressive raft of legislation designed to promote and vindicate the equality of the individual in many spheres of everyday life. Many of the places where prejudice festers have been outed and a new regime is in place to punish and to prevent discrimination on grounds of gender, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the Traveller community. But if you want to find a simple yet graphic picture of the landscape we aspire to then it would be hard to beat the wording of the

Proclamation of 1916 which states “The Republic guarantees religious and civil liberty, equal rights and equal opportunities to all its citizens and declares its resolve to pursue the happiness and prosperity of the whole nation and of all its parts, cherishing all the children of the nation equally.....” That last phrase “cherishing all the children of the nation equally” is probably one of the best known, most used phrases when the issue of equality is up for discussion. That is the landscape we have to get to.

Every piece of equality legislation, every vindication in the courts or tribunals, every organisation or individual switched on to thinking “Equality” is another stepping stone in the causeway that takes us to that landscape. But there are other stones that are much more problematic, awkward stones, that have to be shifted out of the way if the journey to a decent and true social order is to be completed. They are the hearts of stone that continue to beat out of time with the equality agenda, the hearts that harbour and hand on a huge legacy of attitudes and behaviours which are the breeding ground of blinkered thinking, of bias and of exclusion. Legislation can take us or drag us to the waters of equality, it can even force the reluctant to drink those waters but it can't completely stop the poison, the contamination that leaches out of the human heart into the family, the street, the workplace and the community. That poison kills off opportunity, kills off self-confidence. It can make a Traveller feel small, it can keep a disabled youngster from daring to dream of the best career possible, it can keep women out of board rooms and politics, it can isolate a gay man, it can make an old woman feel overwhelmingly lonely and vulnerable, it can make a coloured family terrified even in their own home, it can make a carer feel no one else gives two hoots. And every time that poison does its worst it robs not only the individual of his or her birthright as a human being, it robs our society of the flood of talent, joy, fulfillment, creativity, and peace of mind that comes from the fullest empowerment of the human person. The poison of contempt, of bigotry, of careless bias, of simple overlooking of the otherness of others, of failure to notice the

humanity of the other and the potential of the other, is utterly wasteful of the greatest natural resource we have on this island and on this earth, human beings, in all their uniqueness and all their difference.

The antidote to that poison is to soften the hardened hearts, to help make them think differently, act differently, to have a more sophisticated understanding of equality issues, to waken up in the morning with a self-critical consciousness of the need to make space for equality in our thinking, to be capable of understanding our own blind spots, to have the principle of equality for others as deeply ingrained in our consciousness as the insistence on equality for ourselves. Essentially the mainstreaming of equality is about mainstreaming change, opening up fresh space in thinking processes, broadening the input into decision making processes, ensuring that silent voices and absent perspectives are not ignored or forgotten, ensuring that subtle prejudices, unacknowledged biases are not allowed to consciously or subconsciously subvert the fairness of outcomes. It is about making equality a habit.

Some years ago a rather well known institution was replacing a valuable, antique hand made carpet which had been damaged to the point of ruin. A committee set about deciding on the replacement. There were experts of all sorts to give advice and the new carpet when it was laid was magnificent in all respects except one and that was the light colour. Within weeks since it was in an area of very heavy traffic and in the days before Scots guarding, it had ugly visible stains. A group of us were commenting on the lack of practicality of the colour when one of the cleaning ladies went past – she stopped and said “a pity no one thought to ask us our opinion.” It could be a metaphor for the concept of mainstreaming for so often failure to address important issues with a skilled, trained eye on the consequences for the equality of all citizens, results in a lopsided world. Build inclusion and equality in from the beginning and get an outcome that is not skewed. Fail to do so and skewed outcomes become millstones around our necks.

Ireland has embraced an astonishing level of change in recent years. There is an appetite and

capacity for change that must give great reassurance to those who have been banging the equality drum for a long time. The drum is unlikely to be silent for quite a while to come but it is important to acknowledge that the work of our Equality Authority is taking place in a context that would have been almost unimaginable even a couple of decades ago. Looking back at those decades we can see that the relentless dedication of those committed to the equality agenda has been rewarded with manifest, steady progress which has given renewed hope to those who have to live the fact that we do not yet appear to cherish all the children of the nation equally. How close are we to that landscape which has inspired us for generations? What can we do in this most blessed and privileged of generations, to bridge the gap between aspiration and reality?

A few years ago I met a youngster from a Traveller family who told me with dancing eyes and deep conviction that her ambition was to be a doctor. I want to live in an Ireland where your heart doesn't nearly break when you think of all the obstacles, not of her making, that will stand in her way and make her life journey very, very hard. I am glad to live in an Ireland where that day is getting nearer and nearer but I am impatient, like you for the Ireland with its “true social order” and its children all cherished equally. That impatience is what brings you here to share, to test and to distil your experience and wisdom and insight, and out of that process to quarry the next official stepping stones towards a truly equal world.

I wish you well in that endeavour and I hope that when you leave this conference it will be with a renewed passion for your work, a recommitment to the equality vocation, with many new ideas and many friendships to sustain you on the next phase of this long but life-enhancing journey.

*Go raibh maith agaibh.*

## Mainstreaming Equality Foundations in the Irish Context

By Niall Crowley, Chief Executive Officer,  
the Equality Authority

### Introduction

These are dramatic and exciting times in the pursuit of equality across Irish society. There is a new energy and a new ambition evident among so many different sectors and individuals. New legislation with its coverage of nine different grounds has placed us at the cutting edge of European initiative in this regard. New institutions and new resources are making their contribution.

Yet we know we need to go further. We have legislation against discrimination on the gender ground in the workplace for nearly three decades. Still gender discrimination demonstrates a persistence. It remains the dominant ground in the implementation of the new Employment Equality Act.

We have cutting edge equality legislation. Still we can look to other jurisdictions – and we will during the conference – and know we could go further. A new generation of equality legislation is emerging that combines the traditional prohibition on discrimination with innovative duties on the public and private sectors to be more proactive in the pursuit of equality. Just as we have taken a leadership position on equality issues we find we have some catching up to do. Progress in Northern Ireland is a particular case in point where there is a statutory duty on designated public sector bodies to have due regard to the need to promote equality of opportunity in the carrying out of their functions. This is particularly relevant given the commitment in the Belfast Multi-Party Agreement to an equivalence of rights north and south.

The potential to go further in the development of our equality legislation is clearly emerging. Significant developments are evident on the gender ground as gender mainstreaming becomes a dimension to our National Development Plan. Anti-poverty strategies have

evolved to include a model of poverty proofing in the public sector that includes a focus on inequalities likely to lead to poverty. The social partners through their various institutions have put forward new thinking and new proposals in relation to mainstreaming equality. A constituency committed to moving towards this new generation of equality legislation is slowly emerging.

There is an important external stimulus to change, coming from the European Union, in the new Gender Equal Treatment Directive. The Directive requires members states to 'actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provision, policies and activities' in the areas covered by the Directive. This should provide the basis for a new public sector duty to promote equality in our equality legislation. The Directive also requires members states to 'encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way'. This raises the possibility of a statutory duty tailored to the private sector.

This is the context in which we discuss mainstreaming equality. To date this has been very much a minority interest. However mainstreaming equality is moving centre stage as the key mechanism to address the persistent inequality in our society.

### Mainstreaming

The European Commission recently carried out a survey across the EU members states to explore how officials responsible for formulating and implementing public employment policies, and the social partners, perceived the approach to gender mainstreaming. The results were very encouraging in finding that gender mainstreaming approaches were highly regarded for their capacity to:-

- Focus on the causes of problems.
- Raise awareness and challenge indifference about equality issues.
- Give momentum to deliberations on equal opportunities.
- Sustain a long term approach to equality issues.

The survey found that the concept had been communicated to the officials most directly responsible for public employment policies and equal opportunities. However the concept was less understood elsewhere and there was a challenge to clarify the concept.

Mainstreaming on the single ground of gender has been usefully defined in the Irish context in terms of the 'incorporation of gender considerations into all policies, programmes, practices and decision making so that at every stage of development and implementation an analysis is made of the effects on women and men and appropriate action is taken'. A similar definition had been applied by Chris McCrudden to a wider equality mainstreaming in terms of a requirement 'that government and public bodies should attempt to weave policies of equality and non-discrimination into the fabric of decision making across all spheres of government.'<sup>1</sup>

In Ireland there has been a confusion over different types of mainstreaming. Over the years significant EU and exchequer funds have been committed to pilot projects. This has been accompanied by commitments to mainstream learning from the projects into national policy and practice. Then there have been strategies to mainstream particular groups of people into programmes or areas of provision. Recently for example, there has been a strategy to bring people with disabilities into mainstream provision of labour market programmes. However when we talk of mainstreaming equality we talk about mainstreaming a particular focus into policy making and programme design. The mainstreaming of a focus on equality is therefore about:-

- Establishing clear equality objectives in the particular policy or programme area.
- Assessing the potential impact of the policy or programme at design stage on these equality objectives and on those groups which experience inequality.
- Securing the participation of these groups and their organisation in carrying out this impact assessment.
- Gathering and analysing data to monitor outcomes from this policy or programme.

In Sweden a particular method of gender mainstreaming has been developed. Its value has been defined in terms of :

- Democracy, and specifically the balanced representation of men and women in decision making.
- Effectiveness, and specifically the allocation of resources to meet needs.
- Quality and gender awareness, and specifically a consciousness of whose needs are met.

This establishes a valuable rationale for mainstreaming equality. Further important arguments for mainstreaming equality have also been established including its capacity to::

- Mobilise consensus behind necessary change.
- Achieve institutional change and combat hidden forms of institutional discrimination.
- Prevent the emergence of discrimination and inequalities.
- Fit in with already institutionalised planning and policy making procedures.
- Facilitate evidence based decision making and avoid decisions based on false assumptions or stereotypes.

### Equality

This exploration of mainstreaming establishes a clarity of equality objectives as a key starting point. To thread a focus on equality throughout the policy making process demands a clarity of what is meant by equality.

The social partners have offered a valuable clarity in this regard in a recent report of the National Economic and Social Forum. This report establishes four interlinked objectives that make up our focus of equality. These objectives cover the economic, political, cultural and affective dimensions to equality. They are objectives of:-

- Redistribution, which is concerned with access to employment, income and economic development and with access to education, health and accommodation. This is about change in the situation of those experiencing inequality.
- Representation which is concerned with access to decision making and to the resources necessary for such participation.

This is about those experiencing inequality having a say.

- Recognition which is concerned with difference and diversity and access to an acknowledgment, a valuing and a practical accommodation of one's difference as a member of the groups experiencing inequality. This is about affirming the shared identities of those who experience inequality.
- Respect which is about access to relationships of trust, respect and solidarity in place of practices of harassment, hostility and abuse. This is about changing the experiences of those experiencing inequality.

These objectives provide a valuable framework of the key dimensions to be incorporated into the equality objectives established in mainstreaming equality. They need to be reflected in the tools or mechanisms we deploy in mainstreaming equality.

These are objectives for a multi-ground approach to equality mainstreaming that includes the nine grounds covered by our equality legislation – gender, marital status, family status, age, disability, sexual orientation, race, religion and membership of the Traveller community. Such a multi-ground approach allows for a comprehensive focus on equality that avoids false hierarchies of exclusion and inequality. It offers administrative simplicity in developing integrated approaches to equality that bring forward all grounds simultaneously. Finally it allows for people's multiple identities to be taken into account as no one is easily categorised into a single ground as exemplified by older women, Travellers with disabilities and minority ethnic people who are gay.

### Tools

The key tool to be deployed in mainstreaming equality in public sector policy making or programme design is the equality impact assessment. The Equality Authority has been developing a model for such an impact assessment that involves:-

- a. A screening exercise to identify which groups require to be a focus within the impact assessment. This exercise uses a set of simple

statements of diversity about each of the different grounds. The particular policy or programme is assessed in the light of these statements to identify if this diversity has practical implications for the policy or programme. If it does, the ground to which the statement applies is to be included in the impact assessment.

- b. A data gathering exercise to provide a more complete picture of the diversity to be accommodated in the policy or programme for the grounds included in the impact assessment. This involves gathering data and information on the situation, experience and identity of the group. The situation of the group refers to data on areas such as economic status, health status, education status and accommodation status. The experience of the group refers to the relationships of these groups with the wider society and the issues that arise. The identity of the group refers to issues of values, beliefs, perceptions, aspirations and means of communication that are shared and specific to the group. In this way an understanding of the various dimensions to equality and diversity can be gathered.
- c. An assessment of impact where the policy or programme is explored, using the data and information gathered, for its capacity to accommodate diversity across the relevant grounds and to realise equality objectives.
- d. A consultation exercise with people from within the grounds and their organisations in conducting this assessment of impact and responding to its conclusions in terms of policy or programme redesign.

The challenge in developing this particular tool is to maintain a simplicity that assists its application without creating an exercise that is only tokenistic. Mainstreaming equality is an approach that needs to evolve and develop over time. As such the tools required need to evolve from a relatively basic level and to develop, as the capacity to apply them grows and develops. This capacity requires planned investment in terms of ensuring:-

- The necessary human resources and expertise are available to mainstream equality.
- Skills are developed within the organisation to apply the tools for mainstreaming equality.
- A wide commitment to and understanding of equality mainstreaming goals and objectives is developed within the organisation.
- An effective contribution can be made by the organisations within those communities experiencing inequality to the equality impact assessment process.

The key tool to be deployed in mainstreaming equality in the private sector is the equality action plan. The Equality Authority has developed work in this area through a programme of equality reviews and action plans. This is funded under the equality for women measure of the National Development Plan by the Department of Justice Equality and Law Reform. This programme had also found further important support from the social partners through the Equal Opportunities Framework Committee established under the Programme for Prosperity and Fairness and is to be continued in the new national agreement currently being considered by the social partners. This programme should provide important learning for equality planning at the level of the enterprise.

Equality Reviews and Action Plans involve a review process that explores policy, perceptions, practices and procedures for their impact on equality for employees across the nine grounds and for their contribution to a workplace culture of equality. A range of quantitative and qualitative methodologies are used including analysis of available data, surveys and focus groups. The findings of the review form the basis for an action plan to enhance equality in the workplace.

Equality reviews need to explore all the key areas such as:-

- Job advertising and interview processes
- Pay terms and working conditions
- Promotion processes
- Working terms and conditions

They also need to examine the equality infrastructure within enterprises such as equality policies, policies and procedures in

relation to sexual harassment and harassment, equality and diversity training, flexible working arrangements and the allocation of responsibility for equality issues.

An equality action plan will identify steps to be taken across all these areas to enhance workplace equality in terms of outcomes and cultural change. Again simple templates will need to be developed out of the experience of the programme being implemented. Simple templates should allow enterprises to develop their own action plans tailored to their own circumstances but still to a standard that makes a real difference. Again the templates should be able to evolve as the capacity to apply them grows and develops.

### Legal Status

The final issue to be established is the importance of a legal status to be accorded to mainstreaming equality. This moves mainstreaming equality from being a voluntary concern to becoming a statutory duty required by legislation.

This is where we can usefully look to the experience in other jurisdictions. This experience should not only establish a rationale for this legal status but should also provide us with a range of options from which to establish a particular model for such a legal status.

The experience in Northern Ireland offers a telling rationale for such a legal status. The statutory duty to promote equality came out of the voluntary approach to Policy Appraisal and Fair Treatment. The Standing Advisory Committee on Human Rights was requested by Government to conduct a formal review of the operation of the Fair Employment legislation and other government policy in this area. They recommended that the Policy Appraisal and Fair Treatment approach needed to be put on a statutory basis so as to create an open and transparent model of equality proofing. They concluded that 'the implementation of PAFT has been inadequate to the task of giving effect to the aspirations expressed for it'.

A legal basis to mainstreaming equality makes

for greater effectiveness. It ensures the policy cycle of policy thinking and policy making completes the full circle with policy implementation. A legal basis ensures quality in approaches to mainstreaming equality. It makes for a coherence of approach across a wide range of policy and practice areas and allows for a coordination in the proactive pursuit of equality. It ensures standards are applied to the process. It makes the approach a requirement for all rather than the flagship of the progressive few.

The EU Gender Equal Treatment Directive provides the key rationale with its requirements to mainstream gender equality in public sector policy and to encourage planned and systematic approaches to gender equality in the private sector.

While it is early to be in any way definitive about the model for a statutory duty, it is useful to establish some of the key elements. A legal status to mainstreaming equality should include:-

- Clear goals such as realising full and effective equality and addressing material inequalities between certain named groups.
- A requirement that approaches to mainstreaming equality should include the participation of those who experience inequality
- A role for the Equality Authority, as an independent body in establishing, and keeping under review, standards and approaches to be applied in mainstreaming equality.
- Clear sanctions where there is a failure to mainstream equality adequately and appropriately.

### Moving Forward

In concluding it is useful to establish how we can move forward most effectively to a position where mainstreaming equality is a reality. In seeking to move forward it is first useful to set out the goals – to establish what needs to be achieved. Six such goals need to be agreed:-

- To introduce equality mainstreaming into the public sector through equality impact assessments of policies and programmes.
- To introduce equality mainstreaming into the private sector through equality action plans at the level of the enterprise

- To develop a multi-ground and integrated approach to mainstreaming equality. This would incorporate gender and the other eight grounds covered by our equality legislation. It would integrate an equality and a poverty focus.
- To identify and put in place the most appropriate model for a statutory duty to give a legal basis to equality mainstreaming in the public and private sectors.
- To invest in a capacity for equality mainstreaming in the public and private sectors. This would include the development of tools to support mainstreaming, training to create competencies in mainstreaming and to build an awareness of and commitment to mainstreaming approaches. It also entails creating a wider pool of expertise that can be drawn on in developing and applying approaches to mainstreaming equality.
- To develop data gathering and analysis to address the significant data gaps that exist across the nine grounds of our equality agenda.

In seeking to achieve these goals we need to build on the foundations that are already in place. Four such foundations hold particular potential. These are:-

- The gender mainstreaming work that has been carried out under the National Development Plan on foot of EU regulations governing the Structural Funds. The transposition of the Gender Equal Treatment Directive should give an important stimulus to this initiative. The transposition of the Directive into our equality legislation should establish a legal basis for equality mainstreaming in the public and private sectors. Its transposition should go beyond the gender ground to include all nine grounds of the equality legislation in establishing this statutory duty.
- The National Anti Poverty Strategy and the development of poverty proofing guidelines being applied by the public sector. These guidelines already require that particular attention should be paid to inequalities which may lead to poverty. The age, gender, disability, race, sexual orientation and Traveller grounds are named. A new Office for Social Inclusion has now been established which should give a

new impetus to the implementation of poverty proofing. One of the tasks of the new office is to develop new guidelines and to tailor them to particular policy areas. This development should integrate poverty and equality considerations in terms of objectives set and in terms of the proofing process established. The new guidelines should provide the methodology for integrated approaches to poverty and equality mainstreaming. Such an integration is important to ensure these processes are manageable by policy makers and policy making structures that are already over extended.

- The work of the social partners. This has taken place in the National Economic and Social Forum which has made a number of recommendations on mainstreaming equality and giving this a legal basis. It is also evident in the National Economic and Social Council which has conducted an important review of poverty proofing. This highlighted the importance of addressing data deficiencies, the need for more streamlined guidelines, the need for institutional supports and the potential of an interim staged process towards integrated equality and poverty proofing. Most importantly the last two national agreements of social partners established an equality proofing working group. This is convened by the Department of Justice, Equality and Law Reform. It has produced a report on equality proofing, established an aspiration that such an approach have a legal basis and be integrated with poverty proofing, and developed a range of pilot initiatives to develop new learning on approaches to equality proofing.
- The new national agreement 'Sustaining Progress' by the social partners contains an important commitment that 'proofing of policies and services in the public sector to avoid unanticipated negative impact on any of the groups protected under the equality legislation, to ensure policy coherence and best use of resources, will build on the experience of gender proofing under the National Development Plan, the working group on equality proofing and the

experience of poverty proofing.' The implementation of this commitment should involve a rolling out across the public sector of initiatives to mainstream equality in all major policy or programme developments.

- The work of the National Statistics Board in developing a strategy for equality and social data. Their report is currently being considered by Government and should lead to the gathering and analysis of new data across the nine grounds of the equality agenda.

### Conclusion

Hopefully this paper gives some sense of the potential in approaches to mainstreaming equality and the importance of a legal basis to this. Hopefully it also gives some sense of the potential for change in the current context. We are moving into a position where we could benefit from this new generation of equality legislation.

The ambition must be to further develop:-

- planned and systematic approaches to equality in the workplace.
- policy making and practice that acknowledges, accords value to and makes accommodation for diversity.
- a recognition of the persistence of inequalities and a commitment to full and effective equality .
- evidence based decision making resourced by data, rather than assumptions or stereotypes.
- the social partnership ethos to decision making processes that are participatory and that include all nine grounds covered by the equality legislation.

Mainstreaming equality with a legal basis can assist in realising this ambition. We look forward to contributing to the full development of this new approach to equality.

### Footnote

- (1) McCrudden, C. 1999. Mainstreaming Equality in the Governance of Northern Ireland. Fordham International Law Journal 22.



## Mainstreaming Equality - Models for a Statutory Duty

By Ms. Kristin Mile, Gender Equality Ombud, Norway

Gender equality has been placed on the political agenda in Norway since the 1970s. Our Gender Equality Act dates back to 1978 and the Ombud's institution was established at the same time.

The Norwegian Gender Equality Act has a two folded purpose. Like the legislation in most other European countries the Norwegian Act prohibits any form of discrimination on grounds of gender.

In addition the Norwegian Gender Equality Act shall promote gender equality and aims in particular at improving the position of women. This purpose, combined with the scope of the Act which is in all areas of society, is a clear signal from our Parliament to work for positive changes in the society.

Since 1978 the Act has had a section demanding public sector to promote gender equality. But no one regarded this as a tool for mainstreaming until the principle of mainstreaming was introduced as a main approach for gender equality at international as well as national level.

The purpose and the scope of the Act has been, and is used to demand that there should be a gender perspective in all public decisions, proposals and practices.

The Ombud uses these sections of the Act to examine the work of all kinds of public decision makers or authorities. An important part of my work is to give my opinion on proposals through hearings, to handle all kinds of complaints about the public sector bodies and to suggest and to initiate changes when we experience or fear that practices or proposals work against gender equality.

With reference to the duty to promote gender equality we do not only have the possibility to

act towards discrimination, but also to demand a gender perspective in all public work. A very concrete example of this is the Government's internal instruction that demands of the ministries to assess and describe effects on gender equality in all proposals. This instruction is however not often complied with. I often experience a lack of gender perspective in my work with proposals and decisions in the public sector.

Experience for more than 20 years shows us that a strong legislation has been a successful way of improving the situation for gender equality, but only to some extent.

We experience that in both public and private sector show little interest in and little knowledge about promoting gender equality. Another experience, when addressing this problem, is the lack of understanding and knowledge of gender equality.

After twenty years with an almost unchanged legislation, a revision of our Gender Equality Act was initiated in 1998. One of the proposals from the Ombud's office was to strengthen the obligations for both public and private sector to work actively for gender equality. We wanted the employers to be held responsible for positive changes in the workplace, not merely to comply with the anti-discrimination legislation.

The revised Gender Equality Act was passed through our Parliament (Stortinget) in April 2002 and entered into force on 1st of July last year. The most important change is in my opinion the new section 1A 'The duty to promote gender equality'.

As you can see the public sector is no longer only responsible for promoting gender equality. The revised Act introduces a statutory duty to promote equality by following a given recipe or strategy. Public authorities shall work actively, and systematically to promote gender equality in all sectors of society.

Employers, both in the private and in the public sector have a corresponding duty within their

enterprise, that is 'as employer'. The same goes for the social partners who shall work actively and systematically to promote gender equality in their sphere of activity. They have the duty as employers and as social partners within the workplace as well as social partners at national level in negotiations and policymaking.

These new demands on public and private sector require action. It is no longer enough to act in accordance with the anti-discrimination principle. In addition the employer has a duty to improve the situation and to remove or reduce traditional differences between men and women.

To follow up this new duty, the Parliament decided that all enterprises shall make an annual account on gender equality. This goes for all enterprises that have a statutory duty to prepare an annual report, which means almost all enterprises in Norway.

The account shall consist of two parts – the actual state of affairs, and measures that have been implemented or measures that are planned to be implemented in order to promote gender equality and to prevent discrimination.

Public authorities and public enterprises that are not obliged to prepare annual reports shall give a corresponding account in their annual budgets.

In order to give an account for the actual state of affairs it is necessary for the enterprise or the public authority to present statistics to some extent. As an Ombud I have to give information about this duty, and so far we have said that there are some areas that have to be covered in this account. That is gender based statistics on:

- Wages
- Working hours
- Use of parental leave and other social rights related to parenthood
- Statistics on sick leave
- Education/vocational training
- Recruitment
- Advancement
- The number of men and women in different positions
- The use of positive action

This list is not exhaustive, the intention is to help the enterprises to start the work. For many enterprises there can be other items that need to be included.

In order to give an account of measures that have been implemented and measures that are planned to be implemented on gender equality it is necessary for the enterprise to fulfill the demands in section 1 A, that is the duty to work actively and systematically. In this way the duty to work actively is corresponding to the duty to make the annual account.

The Act says nothing about the extent of the duties and leaves to the enterprises themselves to decide what areas they want to focus on and how many activities they want to initiate or how fast they want results.

The statutory duty to promote gender equality is to be enforced in two ways.

For the private enterprises the annual report is already controlled by a public register. This register will from now on check that an account of gender equality is included in this report.

For the public sector the control will be performed by the local governments or by the ministry responsible for the annual budget, and that would be the Ministry of Finance.

These controllers will however not control the content of the annual account, that is the quality of it. The Gender Equality Ombud is responsible for controlling or following up on the quality of the accounts. It is not possible for my office to check up on all annual reports and budgets. The control will have to be done by spot tests.

### Concluding Comments

This new and strengthened legislation has been met with some negative comments from the employer's union, but as I see it, the critical comments have silenced. I believe that by giving good information about the new duties and emphasizing the fact that each enterprise or public authority themselves decides the volume of the account and the

kind of activity that they are going to focus on, we have managed to calm down the employers and their union.

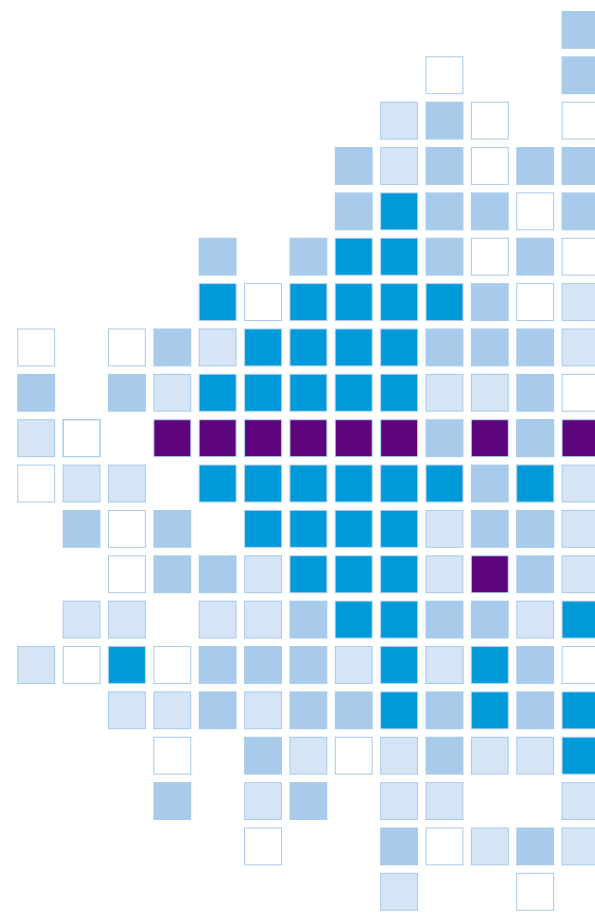
Some private companies and parts of the public sector have already started this work and they realise that this gives them positive results.

Our present government has decided to develop the principle of gender budgeting and the ministries are now in a process where they choose political areas in which they will make gender sensitive accounts.

In my opinion the year 2002 was an important year for development on gender equality in Norway. These new statutory duties to work actively and to make written accounts on gender equality will bring us important steps forward.

In addition to these new statutory duties, the Government have also decided to put forward to the Parliament a new legislation on quotas in boards of private and public companies.

Our Minister for Trade and Industry stated on 7th March last year that if the companies do not manage themselves by the end of 2005, there are going to be a statutory duty to have at least 40% of each sex in every private and public board.



## Mainstreaming Equality – the Statutory Duties in Northern Ireland

By Evelyn Collins, Chief Executive, Equality Commission for Northern Ireland

Thank you for the opportunity to participate at this important event. I am very pleased to be here, both to learn about mainstreaming elsewhere and to share our experiences in Northern Ireland with the implementation of the statutory duties arising from Section 75 of the Northern Ireland Act 1998.

### This Presentation Covers:

- the basic mechanics of Section 75, which places a statutory requirement on public authorities to carry out their duties with due regard to the need to promote equality across nine grounds and regard to the need to promote good relations in respect of three grounds.
- guidance on the development of equality schemes and equality impact assessments;
- achievements and difficulties in respect of implementation to date;
- further developments envisaged and areas for improvement, as identified in the mid-term analysis being undertaken by the Commission; and
- an assessment of the importance of a Statutory Duty as a basis for helping to deliver equality

By way of background, briefly, you will be aware that through the 1990s there was a growing interest internationally in mainstreaming equality, as a complementary approach to the more traditional methods of tackling discrimination, such as anti-discrimination legislation. Many definitions have developed over the years, perhaps most simply put mainstreaming means putting equality considerations at the heart of decision-making and service delivery.

The following definition of mainstreaming is taken from the Commission's publication, the *Guide to the Statutory Duties*, published in 2000.

*'The (re)organisation, improvement, development and evaluation of policy processes, so that a(n) ... Equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.'*

Experience in Northern Ireland, with a voluntary approach to mainstreaming through Government's Policy Appraisal and Fair Treatment Guidelines during the 1990s, was poor. Their status was mainly advisory and, indeed, they tended to be ignored by some statutory bodies.

The response to this, through the work of the various equality bodies in existence then, the Committee on the Administration of Justice and others including the Standing Advisory Commission on Human Rights, was to call for an equality duty to be put on a statutory footing. The Government's response to the Standing Advisory Commission on Human Rights' review of employment equality, issued in March 1998 as a White Paper *Partnerships for Equality* was to accept SACHR's recommendation on a statutory equality duty. The White Paper also mooted merging the various equality Commissions into a single body, with a view to ensuring the effective implementation of the duty. The whole issue then got swept up in the political discussions leading to the Belfast Agreement of April 1998, a central theme of which, of course, relates to equality and human rights.

The Agreement included a commitment from Government to create a statutory duty on public authorities in Northern Ireland and this was given a legislative basis in the Northern Ireland Act 1998 – Section 75 and Schedule 9. The new Equality Commission, also created by the Northern Ireland Act, was given a key role to keep under review the effectiveness of the duties imposed by Section 75, to offer advice to public authorities and others in connection with those duties and to carry out specific functions conferred on it by Schedule 9.

### 1. Basic Mechanics of the Duties

Turning to the duty itself, Section 75 sets out the following:

### 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;
- (d) between persons with dependants and persons without.

Without prejudice to these obligations, a public authority is also required, in carrying out its functions, to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group (Section 75 (2)).

The decision to apply the new duties to areas where there is, as yet, no legislative prohibition on discrimination, such as sexual orientation and age, is particularly important. This provided for these areas to be given, for the first time, the equality profile that they deserve and well in advance of the EU provisions being implemented.

It is noteworthy that public authorities must have **regard** to the good relations duty and **due regard** to the equality duty. Whilst the equality duty has been given primacy in the legislation, both the Commission and public authorities recognise that good relations cannot be attained if equality is not afforded and that this is an important element of the Section 75 duties.

In introducing Section 75, a priority need was to raise awareness and provide training on the statutory duties. The Commission played a key role in awareness raising and training provision, with public authorities and with the voluntary and community sector in particular, representing affected groups.

Public authorities also developed awareness raising/training strategies and mechanisms to mainstream understanding of the duties, both for staff employed by public authorities and for users of services. Section 75 awareness has been

incorporated into staff induction programmes, specialist training in Screening and Equality Impact Assessment has been provided for key managerial staff.

Public authorities **must** produce an Equality Scheme to comply with the legislation and this Scheme must be approved by the Equality Commission. Public authorities **must** screen all of their policies, existing and new, and subject those policies with greatest likely impact on equality to a process of Equality Impact Assessment.

Consultation and public participation underpins the mainstreaming process and is a key element of it. There must be consultation on draft Equality Schemes, on outcomes from screening exercises and during Equality Impact Assessments. Consultation must be both meaningful and inclusive. Consultation enables an assessment to be made of the views of those affected by policy decisions or the design of services. It can help identify issues/problems which might otherwise not be discovered until later – or too late – and it enables members of affected groups to participate in the process of policy making.

### 2. Guidance on equality schemes and impact assessments

Schedule 9 of the Northern Ireland Act sets out a detailed procedure for the enforcement of the duties. Public bodies are required to prepare an Equality Scheme stating how they propose to fulfil their equality duties. This must be submitted for approval to the Equality Commission and conform to the guidelines as to form and content that we published in March 2000, with the approval of the Secretary of State, following extensive consultation.

The Equality Scheme is a key document, being both a statement of the public authority's commitment to fulfilling the statutory duties and a plan for their performance.

**So, what should an equality scheme contain?** Schedule 9 is very specific about the content of Equality Schemes, they must show how the public authority proposes to fulfil the

duties imposed by Section 75 in relation to relevant functions.

In particular, Equality Schemes must include:

1. a general introductory statement specifying the purpose of the Scheme and the public authority's commitment to the statutory duties;
2. arrangements for assessing its compliance with the Section 75 duties and for consulting on matters to which a duty under that Section is likely to be relevant;
3. arrangements for assessing and consulting on the impact of policies adopted or proposed to be adopted on the promotion of equality of opportunity;
4. arrangements for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity;
5. arrangements for publishing the results of equality impact assessments and of monitoring of any adverse impact of policies adopted by the authority on the promotion of equality of opportunity.

This must include a commitment to including in the published results of an equality impact assessment:

- a statement of the aims of the policy to which the assessment relates;
  - details of any consideration given by the authority to measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity;
  - details of any consideration given by the authority to alternative policies which might better achieve the promotion of equality of opportunity.
6. a commitment that in making any decision with respect to a policy adopted or proposed to be adopted by it, that the public authority shall take into account any equality impact assessment and consultation carried out in relation to the policy;
  7. arrangements for training staff on issues relevant to the duties;
  8. arrangements for ensuring, and assessing, public access to information and to services provided by the authority;

9. the timetable for measures proposed in the Scheme;
10. details of how the Scheme will be published;
11. arrangements for dealing with complaints arising from a failure to comply with the Scheme;
12. a commitment to conducting a review of the Scheme within five years of its submission to the Equality Commission and to forwarding a report of this review to the Equality Commission (Schedule 9).

The duties applied to Government Departments, local government, health, education and other public bodies from January 2000 and they had until 30 June that year to submit draft Schemes to the Equality Commission for approval.

Following a process of auditing the draft Scheme, and analysing an audit of the consultations on the draft scheme, Commission staff discussed detailed comments with each public authority. The public authorities amended their Schemes and returned them to the Commission for approval, which commenced then in a rolling plan from early 2001. Ongoing advice, guidance, training and support to public authorities is provided by the Commission.

Screening of all existing policies, written and unwritten, is required as part of the process. Screening is based upon criteria in the Commission's Guide to the Statutory Duties, which helps public authorities to identify the estimated impact of policies on equality of opportunity. The criteria involves consideration of whether there is evidence of higher or lower participation or uptake by different groups; whether there is evidence that different groups have different needs, experiences, issues and priorities in relation to the particular policy; whether there is an opportunity to better promote equality of opportunity or better community relations by altering the policy or working with others in Government or in the larger community; and whether consultations with relevant groups, organisations or individuals indicated that particular policies create problems which are specific to them.

The main outcome from screening is the production of a list of those policies which are likely to have the greatest impact on equality of opportunity. This list is developed into the timetable for equality impact assessment by the public authority. Such timetables are usually set out for 3 – 5 years and the Commission monitors adherence to EQIA timetables.

The Commission has advised public authorities to join up EQIAs on related policies, e.g. employment policies. The Commission has also advised public authorities to join with other public authorities to equality impact assess similar policies, for example, in respect of Traveller accommodation. The Commission also responds to a range of EQIAs, in its role as a statutory consultee.

The Commission's Practical Guidance on Equality Impact Assessment, published in 2001, outlines the steps which must be taken to assess the impact of existing policies, building on the seven steps set out in our initial Guidelines. These steps also assist public authorities in equality proofing of new policies. Consultation is essential to gather information, particularly where there is a lack of quantitative data on equality impacts and to consider if the amended policy will deliver equality better than its previous version.

### 3. Achievements/difficulties in implementation to date

Achievements and difficulties encountered in implementing the new duties are often two sides of the same coin and of course the experience of public authorities has differed in some respects and some aspects are being commonly experienced.

Overall, there are now 154 approved Equality Schemes in place in Northern Ireland, covering all aspects of public policy and service delivery. This is a considerable achievement and represents a great deal of hard work by public authorities and consultees as well as the Commission itself.

Further, we have worked to ensure the designation of public authorities for Section 75

purposes, to secure widespread coverage of the duties, and a number of Designation Orders have now been made by the Secretary of State. Legislation creating new bodies (e.g. police bodies) or affecting the status/role of existing bodies (Housing Associations) can also be used to enable designation. In addition, the Commission recommends the designation of various public bodies because of their importance to delivering public policy and equality.

It is clear that the duties have attracted political and senior level commitment – our guidelines advise that this is demonstrated in the Schemes and thus, for example, the Schemes of all Government Departments are signed by the relevant Minister and Permanent Secretary. There is evidence of some real hands-on interest by Ministers and senior public servants.

We would point, also, to culture change which is occurring in the public sector, perhaps particularly in the Civil Service Departments, as policy makers engage with people on issues which are affecting their daily lives and consider the equality implications of their functions and policies. There is a greater awareness of, and sensitivity to, needs and there is also evidence of mainstreaming of the statutory duties into corporate objectives and structures.

We are also seeing greater accountability and transparency and a move towards joined-up government, with a greater understanding that decisions taken in some areas have an impact in other areas – for example, in the health sector.

The screening exercise provided most public authorities with the opportunity to audit and write up all of their policies. Indeed, it could be said that the duties have helped public authorities focus on their key functions and policies, to consider what they do and why they do it and also to consider where policy decisions are actually made and who makes them. This has been helpful in clarifying roles and responsibilities.

A further achievement is that Equality Impact Assessments (EQIAs) are now being progressed by public bodies and are the subject of

consultation. Some EQIA timetables have fallen behind and it would be fair to say that the quality of some EQIAs is better than others. There is good evidence that public authorities have utilised the EQIA process as a template for the formulation of new policies.

On the other hand, the development of information management and monitoring systems, to support data collection on the nine groups detailed in Section 75 and also on multiple identities has been slow. Good work is being advanced by the health sector at present and the Commission and the Office of the First Minister and Deputy First Minister (OFMDFM) are also involved in auditing information needs and producing guidance for public authorities.

Consultation fatigue has also become a real issue, particularly due to mass mailing of Schemes, screening reports and EQIAs by public authorities. Some public authority public meetings have been poorly attended. Evidence suggests that face to face engagement with affected groups works better than the aforementioned forms of consultation. Many public authorities have developed panels or fora, to enable joint work with other public authorities and representatives of affected groups.

That said, the fact that all Equality Schemes, screening reports and EQIAs have been published, and made available/accessible in a range of formats and languages, demonstrates a high level of transparency in relation to the processes.

There has been much training provision on the implementation of the new duties within and across various public authorities and sectors, although little of this has been formally evaluated to date.

No additional resources were provided for public authorities to deliver the duties, and this has been a real issue in Northern Ireland, as the implementation of Section 75 requires necessary input in terms of people, time and money. There has been a steep learning curve for public authorities, in producing schemes, screening and undertaking EQIA.

Overall, however, public authorities are reporting progress in all areas of Section 75 work, although some are making better progress on specific elements and some authorities are moving faster than others on implementation. The first report of progress made by public authorities, based on their reports to the Commission is shortly to be published by the Commission.

While there is this evidence of positive progress, challenges remain for the Commission and others to ensure that we keep focussed on the purpose of the duties, which is to bring equality considerations into the heart of decision-making. We cannot and will not allow the implementation of the duties to become simply a paper exercise.

### 4. Further developments envisaged

There remains the need for ongoing advice and guidance to public authorities. The Commission is presently reviewing both its guidance documents in conjunction with representatives of public authorities and affected groups and will be publishing revised texts for consultation in 2003/04. This is with a view to ensuring improvements, taking into account the practical experiences gained to date.

Work on developing guidance on monitoring across all nine categories is also being advanced, following a consultation exercise on this during last year. While for employment purposes, monitoring for community background and gender is well established in Northern Ireland, collecting information in relation to a number of the other categories listed in Section 75 brings new challenges for us all and these need to be identified and worked through.

Following an audit of the implementation of the good relations aspect of the duties, the Commission is presently developing its strategy to ensure the effective implementation of this part of Section 75. This work will necessitate the provision of baseline guidance to public authorities and the identification and sharing of best practice models and examples and is scheduled for action in the forthcoming year.

We are also likely to witness developments with the enforcement of the equality duties. A Section 75 Complaints and Investigations Strategy has been developed by the Commission and is now being implemented. Public authorities are addressing an increasing number of Section 75 complaints, as awareness of how to complain is increasing and we will be monitoring the effectiveness of procedures set up to deal with complaints and their outcomes.

For the future, more effective management of the consultation process will be essential to ensure engagement of those affected by Section 75, to make best use of available resources and to share information. The Office of the First Minister and Deputy First Minister and the Commission plan to address various problems identified on consultation by recent research undertaken on behalf of the Office of the First Minister and Deputy First Minister, to ensure better consultation through use of dialogue, more participation with affected groups, better use of resources, more joined up approaches, the use of a range of consultation methodologies and new technologies. There is potential for public authorities to develop more effective liaison with those in the voluntary and community sector, to seek advice, gather information and better utilise their skills and communication channels.

It is also clear that there continues to be a real need to build capacity in the voluntary and community sector in particular, to enable groups to play their part in the process effectively and to be better informed about decision making, about what policy means.

Like all important initiatives there is the need for sufficient resources to be allocated to ensure effective implementation and monitoring of it, otherwise progress will be that much slower. We should remember that effecting beneficial impact on society is not a quick fix and that much effort will be needed to continue the good work commenced. Indeed, the Section 75 initiative is still very new and we are all on a steep learning curve in relation to it.

As indicated already, the Commission has prepared an overall progress report on the

implementation of the duties, for 2000 – 2002, based on public authorities' reports to us, and this will be launched shortly. It provides much information on implementation of the duties by public authorities and the Commission. Each public authority also receives individual feedback on annual progress, with Commission suggestions for more effectively implementing the duties.

In future, the focus of progress reporting will be shifted more to outcomes and to further analysis of the progress being reported. Public authorities will be expected to report on outputs, outcomes and impacts as well as inputs and processes. The Commission will use various mechanisms to assess the views of affected groups in relation to the impact of Section 75 generally. We would also wish to benchmark the performance of public bodies in this key area of their activities.

Finally, we have to work to ensure that there is proper training and communication within the public sector about the broad range of equality issues governed by the duties – gender, religion/politics, race, disability, sexual orientation, age and dependent status – and on ways to build a sustainable equality culture.

### 5. A statutory duty?

Our experience in Northern Ireland is that delivering on equality needs to be supported by legislation, without the statutory framework we would not have seen the progress which has been achieved. The implementation of the Policy Appraisal and Fair Treatment initiative which preceded the introduction of the statutory duties was limited and patchy because it was not a statutory instrument but a set of guidelines. It applied only to Government departments, thus not all public authorities were included. Section 75 is much more robust, it requires action, otherwise sanctions can be applied by the Secretary of State via the Commission, by means of further investigation and imposing a scheme.

The legislation and guidance provides a consistent structure for the mainstreaming of equality and for reporting on and monitoring its effectiveness.

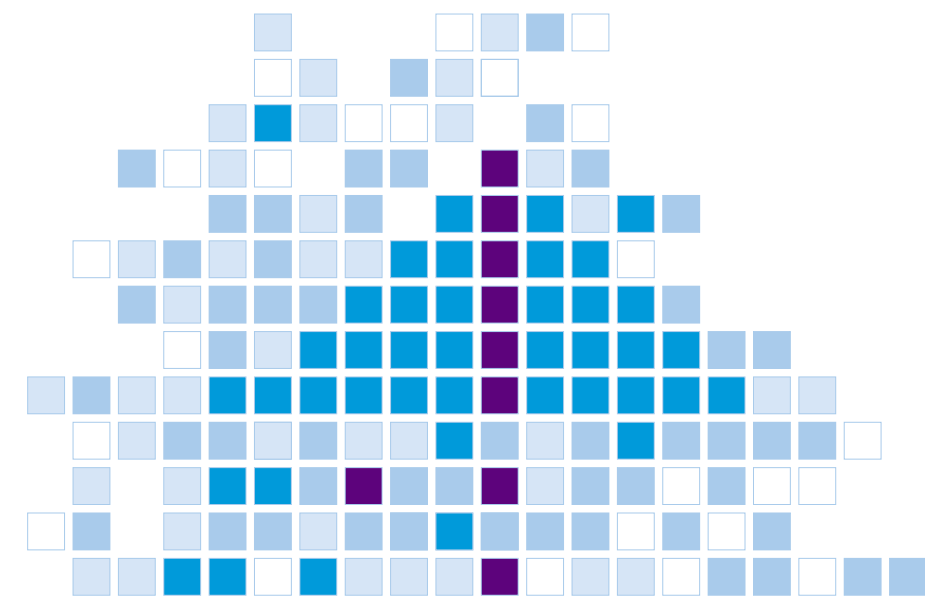
However, some authorities view compliance with Section 75 as being all that has to be done to deliver equality, in addition to meeting existing legislative requirements. Other public authorities view Section 75 as only a baseline for action and some Equality Schemes reflect the Commission's suggested best practice as opposed to the 'baseline' guidance documents.

Some public bodies view Section 75 as another burden, particularly as its implementation has not been resourced by any new money, and they are making slower progress. However, the fact that they are under a legal requirement to mainstream equality into policymaking and service provision means that the Commission and others can work to ensure compliance with the duties.

### Conclusions

In all of this, there are lessons for other jurisdictions from what is happening in Northern Ireland, as well as much for us to learn from experiences elsewhere.

The Commission recognises that the new duties represent an historic milestone on the road to promoting an equality culture in Northern Ireland. However, they are only the first step and the real achievement will lie in making sure that they are effectively implemented. The Commission is fully committed to making this happen and to moving towards a more equal and inclusive society which will make a real difference to the lives of the people of Northern Ireland.



## Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law

By Colm O’Cinneide, Faculty of Law, University College London\*

### Introduction

The inclusion of Article 13 in the EU Treaty and the coming into effect of the two Equality Directives collectively represent a watershed in the evolution of European equality law. It constitutes a welcome if long-delayed recognition that problems of discrimination require a pan-European response.<sup>1</sup> The Directives significantly expand the reach of EU equality law, with varying consequences for each member state, either requiring a *broadening* of existing law, as in the UK, or an *intensification* of pre-existing legislation, as in many EU states. However, while acknowledging the significance of the Directives, and the major new anti-discrimination legislative measures and policy initiatives being introduced throughout the EU, there is also a pressing need to recognise the inherent limitations of existing national and EU responses to discriminatory practices and attitudes.

EU equality law (including the provisions of the Equal Treatment Directive) and national anti-discrimination laws in the member states all share a common approach. This approach is based upon two key elements: encouraging compliance with a fixed legal standard of conduct and relying upon individuals or equality commissions to bring enforcement actions when that standard of conduct is violated. However, this approach is restricted in how it combats deeply-embedded patterns of institutional discrimination and prejudice. It is excessively dependant upon individual enforcement, and tends to produce a culture of negative compliance, whereby emphasis is placed upon just taking the necessary steps to meet the legislative standard rather than upon taking proactive action to eliminate discriminatory practices and attitudes.

In contrast, the development of various types of positive duties in both the private and public sectors represent the next stage in anti-discrimination law. To understand their potential usefulness, it is necessary to examine where and how existing equality law is failing to deliver, and to assess what positive duties contribute to closing these gaps in real and meaningful protection. Giving substantive effect to a meaningful concept of equality will ultimately require member states to move beyond the requirements of existing anti-discrimination law, which will mean also going beyond the narrow economic and ideological analysis that has dominated anti-discrimination law since the 1970s.

### Substantive v Formal Equality: the Limits of Existing Anti-Discrimination Law

The existing model for combating discrimination relies upon individuals bringing civil actions challenging discriminatory treatment. Originally shaped by the US and Canadian legislation in the 1960s<sup>2</sup>, this model has had considerable success in combating overt forms of discrimination. The Independent Review of the Enforcement of UK Anti-Discrimination Law (the ‘Hepple Report’) describes its effect in the UK as having ‘broken down barriers for individuals in their search for jobs, housing or services’ and ‘driven underground... overt expressions of discrimination’, as well as ‘providing an unequivocal declaration of public policy’ and having an important ‘educative or persuasive function’.<sup>3</sup> However, as the Independent Review also notes, despite thirty or so years since the putting into place of the individual enforcement model, ‘many barriers remain’ to securing meaningful equality for underprivileged groups. The same is true across North America, Europe and the Commonwealth countries. These structural barriers take different shapes for different groups in different contexts. However, the basic pattern remains the same in both the employment and non-employment spheres: existing legislation, while very effective at breaking down many visible barriers and prejudices, proves inadequate in dealing with more complex and deeply-rooted patterns of exclusion and inequality.

The limitations of existing anti-discrimination law are rooted in its underlying premises that all individuals should be treated in a formally equal manner, and that legislation should involve the imposition of a fixed, single standard of behaviour. Fredman describes the concept of equality underlying this as ‘formal equality’ or ‘equality as consistency’, which requires that ‘fairness requires consistent treatment’.<sup>4</sup> This concept of equality, while attractive, ignores the specific contexts in which individuals are situated, and obscures the crucial importance of group identity. Combating discrimination becomes a matter of proving formal guarantees of equal treatment instead of tailoring specific measures to assist and empower disadvantaged groups and cross-sections of society.

Even where the existing approach does take account of varying social contexts (for example, by recognising a group dimension in determining what neutral criteria in fact constitute indirect discrimination), the approach taken is that classed by Fredman as ‘equality of results’ or ‘equality of opportunity’. The emphasis is on creating a common starting-point of treatment by removing illegitimate criteria, while ignoring the varying ability of different groups to compete once the fair procedural requirements are in place.<sup>5</sup> Providing ‘equal opportunities’ generally does not involve consideration of economic and cultural factors that might limit the ability to avail of such opportunities. As Bob Hepple has argued, it operates as a procedural requirement that is not concerned with results, and which leaves unchallenged and unexamined notions of ‘merit’ that may be stacked against underprivileged groups.<sup>6</sup>

The emphasis in the existing model of anti-discrimination law on formal equality of opportunity and treatment has in practice hindered its impact in four different ways: an excessive reliance on individual enforcement measures, the encouragement of a culture of ‘negative compliance’, a lack of participation and limited sensitivity to the needs of disadvantaged individuals and groups, and the absence of a coherent approach to dealing with overlapping forms of discrimination. The individual enforcement model relies excessively on an

approach that resembles sending a fire engine to fight a fire rather than preventing that fire in the first place. The existing formal legislative approach eliminates difference, not disadvantage.

### The Limits of Individual Enforcement

The emphasis on formal individual equality is reflected in how anti-discrimination law leaves the burden of enforcement to the individual complainant, acting upon the assumption that litigants are equally placed to bring legal action.<sup>7</sup> Anti-discrimination law relies for its implementation on the willingness and ability of individuals to bring actions, or at the very least to approach the enforcement commissions where they exist.<sup>8</sup> Even where a claim is brought, our enforcement model is limited in the remedies it can provide by its reliance on awarding *ex post facto* individual remedies. Remedies are limited to redressing retrospectively the immediate wrong, rather than removing discriminatory practice across an organisation.<sup>9</sup> What is suitable for enforcing a contract does not translate well into securing meaningful equality. The focus is on remedying individual acts of discrimination after the event, not on the elimination of structures and patterns of behaviour that perpetuate discriminatory practices.<sup>10</sup>

### Negative Compliance

Existing equality legislation also sets formal legal standards of equal behaviour and requires organisations to comply with these standards. Such standards are obviously a necessary part of any anti-discrimination policy. However, they tend to encourage a culture of ‘negative compliance’, where adherence to formal anti-discrimination standards is seen solely as involving the taking of the necessary steps to avoid liability. This results in organisations taking the necessary defensive steps to meet the requirements of the legislation, rather than taking proactive steps to encourage a culture of real diversity and to identify and eliminate practices that may have discriminatory impact even if not caught by the legislation.<sup>11</sup>

This makes existing anti-discrimination law of limited use in combating institutional discrimination in both public authorities and

private organisations, as defined in the context of race by the Macpherson Report.<sup>12</sup> Even where anti-discrimination legislation extends to public authorities, it is capable only of handling discriminatory acts with a clear link to detectable consequences that negatively impact on specific individuals. This means that many forms of institutional discrimination will slip beneath its radar. This has the additional consequence of making practices that amount to institutional discrimination appear acceptable, as they are outside the legally established definition of discrimination.

### Closed Horizons: Group Participation

This problem is compounded as much of the prejudicial treatment faced by disadvantaged groups arises out of patterns of institutional discrimination involving the neglect or lack of understanding of the specific needs of these groups. Very frequently, this neglect is due to the limited participation of these disadvantaged groups in decision-making processes, and inadequate consultation with representatives of these groups. Non-diverse public or private sector decision-making elites frequently lack the necessary understanding of the perspectives of disadvantaged groups to provide genuine diversity. The “one-size fits all” formal equality approach of the individual enforcement model becomes the template for addressing inequalities, rather than a substantial equality approach that aims to remove obstacles faced by the differing disadvantaged groups and to empower these groups in a meaningful way.

The new EU Directives for example do little to address these flaws in the individual enforcement model. Both Directives provide for consultation with community representatives and NGOs from the protected groups. This is a welcome rhetorical nod towards the importance of ensuring the participation of the disadvantaged groups in decision-making processes, but the Directives impose no required framework for consultation. Proposed amendments to the Equal Treatment Directive require Member States ‘actively and visibly’ to promote the objective of equality between men and women, but complete discretion is left to the Member States: no specified measures are imposed, nor any

requirement to achieve set targets of equality of outcomes and participation.

### Overlapping Forms of Discrimination

An entire range of other problems arises in the context of overlapping types of discrimination, or ‘cumulative discrimination’. ‘Abnormal’ discriminatory behaviour as targeted by the legislation is classified into discrete types of discrimination, such as gender, age, race and so on. Victims of discrimination have to fit their claims within these distinct categories, even where the inequality they have encountered arises from the interaction of different types of categories, or where they define themselves as members of more than one disadvantaged group.<sup>13</sup> Women who are Muslim members of an ethnic minority, for example, face very specific forms of discriminatory treatment in the UK by virtue of their overlapping identities.<sup>14</sup> However, they must bring any claims for redress under one or the other of the existing categories, obliging them to define their identity and the discrimination they face in distorted ways.<sup>15</sup> This results in a limit on the ability of courts and tribunals to consider complex interaction of various types of discrimination.

Conceptualising discrimination in terms of rigid discrete categories also results in inevitable anomalies, gaps in protection, and confusing distinctions. In the UK, as noted above, race relations legislation applies to public authorities performing public functions, but not sex discrimination or disability legislation, while discrimination on the ‘new’ equality grounds of sexual orientation, religion and age will only apply to the employment context. Again, this distinction does not flow from any policy rationale, but simply results from the separation of the various grounds of discrimination and the ensuing inertia that slows any attempt to formulate coherent policy across all the heads of discrimination. While Ireland’s unified legislation overcomes much of this problem, the level of protection under the legislation varies from ground to ground, with age in particular having limited protection.

Imposing clear demarcation lines between the various grounds of discrimination also inevitably

involves defining groups in fixed, unchanging, mutually exclusive categories. This has the effect as described by Fredman, that ‘differences between groups are highlighted, differences within groups are rendered invisible’.<sup>16</sup> Internal disputes and differences within groups are glossed over. Drawing rigid distinctions between disadvantaged groups can also trigger occasional competition between the differing equality demands of these groups. The emphasis on specific and separate types of discrimination also serves to gloss over the crucial importance of poverty as a common factor that imposes substantial disadvantages on the various protected groups, who are invariably disproportionately poorer than the norm.

### Going Beyond Formal Equality: The Parameters of a New Approach

Formal equality and equality of opportunity are essentially limited concepts, in that their focus is on providing a level playing field rather than upon achieving real outcomes for disadvantaged groups. Approaches based upon ‘substantial equality’, on the other hand, place an emphasis on eliminating obstacles to fair treatment and generating change in the form of real outcomes for these groups. Given the limitations of the existing structure of anti-discrimination law, equality practitioners and policy-makers need to develop strategies for ‘going beyond’ this model by supplementing it with mechanisms designed to bring about substantial equality and recognition of the needs of disadvantaged groups. To do this, it is necessary to describe the outline of possible new strategies (described as ‘fourth generation’ strategies in the UK context<sup>17</sup>), to discuss how they can remedy the shortcomings in the existing model,<sup>18</sup> and what they should be designed to achieve.

From the analysis above of what existing anti-discrimination law does not succeed in doing, it is apparent that individual-orientated complaint procedures and remedies need to be reinforced by methods of proactively removing group disadvantages and of breaking down institutional discrimination. Any attempt to achieve this has to try to circumvent the artificial distinctions between groups that characterise existing anti-discrimination law, and to encourage a culture of diversity rather than defensive compliance.

Action against discrimination needs to be proactive rather than reactive.

As part of this process, the impact of private and public sector policies on disadvantaged groups has to be continually reviewed and assessed, and the perspectives of the members of the groups themselves need to be integrated into this process. Participation has to be recognised as a key value, guarding against paternalism and complacency towards the real effectiveness of existing practices and policies.<sup>19</sup> The Report of the UK Independent Review proposed as a basic principle of anti-discrimination law that ‘there must be opportunities for those directly affected to participate, through information, consultation and engagement in the process of change’.<sup>20</sup> However, in taking this participative group-based approach, it is necessary to recognise that disadvantaged groups may have different perspectives and values, and that the groups themselves are not monolithic blocks. ‘Equality’ does not necessarily involve a totally shared agenda, although there may be many common elements.

This emphasis on participation is frequently conceptualised in terms of a ‘right to process’: disadvantaged groups have rights and entitlements to take part in decision-making and to receive equal consideration in considering the impact of policies. The danger with this approach is the possibility that this entitlement to participate will be seen as a purely procedural right, and satisfying this ‘right to process’ only obliges institutions to ensure equal procedures. Equality of process is only a stage in achieving real and substantive equality, if an important and necessary one. Excessive emphasis on procedural gains can create the illusion of real change. The outcomes of participatory processes are what ultimately matter.

### The Limits of Mainstreaming

Moves towards ‘fourth generation’ responses have generally in the EU taken the form of the adoption by the public sector of ‘mainstreaming’ policies, defined by the Council of Europe in the gender context as the incorporation of a gender equality perspective in all policies at all levels and at all stages by the actors normally involved in policy making.<sup>21</sup> McCrudden has identified two main components of effective mainstreaming: impact assessment, concentrating on the impact of policies on disadvantaged groups, and the participation of these groups in decision-making processes.<sup>22</sup> By providing for participation by disadvantaged groups, and for proactive policy-making designed to identify and if possible to eliminate discriminatory impact, mainstreaming as a strategy incorporates some of the key elements of a meaningful substantive equality strategy.<sup>23</sup> Mainstreaming as a strategy has attracted support from the UN, the EU, Commonwealth Secretariat, ILO and OECD in recent years, and has been presented as the solution to the problems identified here with the existing anti-discrimination model.

Interestingly, mainstreaming initiatives so far have tended to centre upon gender. Almost all of the EU states, as well as Canada, Australia and New Zealand have implemented well-developed gender mainstreaming programmes. In all these countries, gender mainstreaming is usually based around what Sue Nott has described as the ‘expert-bureaucratic’ model<sup>24</sup>, where specialist units with gender expertise within the government structure push internally for the incorporation of gender perspectives at all levels of public sector decision-making.

In contrast, mainstreaming initiatives in other areas remain comparatively underdeveloped. ‘Equality proofing’ initiatives designed to implement a form of mainstreaming across all the equality grounds have been introduced to a limited extent in Ireland, Canada and elsewhere: other countries, such as New Zealand, have introduced initiatives designed to factor in human rights considerations at every policy-making stage. Disability action plans have been adopted in a number of EU and Commonwealth countries. Outside of the gender field, however,

these initiatives remain tentative, and tend to excessively focus upon ensuring compliance with legislation or human rights standards rather than proactive mainstreaming. The political impetus that has driven the introduction of comprehensive gender mainstreaming has not been present in respect of many of the other grounds, and throughout the EU the mainstreaming of ethnic or minority perspectives in particular has been implemented only via very *ad hoc* procedures involving consultation with NGOs. The UK remains the exception in this respect, with race equality mainstreaming having been introduced at local and national levels of government from the early 1990s on and the PAFT guideline having been introduced in Northern Ireland in the early 1990s.<sup>25</sup>

Even the relatively comprehensive gender mainstreaming policies that have been adopted in the EU and elsewhere have attracted a degree of criticism, even though they have generated real and tangible results.<sup>26</sup> These policies are usually not given detailed shape by means of legislation, leaving it very much open to the discretion of various state bodies as to how they should ‘consult’ and carry out impact assessments. The nature and extent of participation and the key issue of who should be consulted often receives a vague response. Nott has contrasted the ‘expert-bureaucratic’ model outlined above with a ‘democratic-participative’ model, that emphasises consultation with civic and community groups rather than reliance upon elite specialist units within the civil service hierarchy. Outside of the UK, however, ‘democratic-participative’ mechanisms have remained comparatively underused.<sup>27</sup>

The extent of the obligations imposed on public authorities is also not clear, which makes effective mainstreaming often dependent on the enthusiasm and willingness of individual units. Residual uncertainty as to the meaning and scope of mainstreaming seems prevalent in UK departments.<sup>28</sup> In Australia, large divergences in the substance and style of gender mainstreaming has been identified, and strong criticisms have been made that the mainstreaming process has often had the effect of diluting existing gender initiatives.<sup>29</sup> Mainstreaming obligations also often

contain no requirement to eliminate *existing* discriminatory structures, just to integrate equality concerns into *ongoing* policy-making. This is particularly problematic where institutional discrimination may be deeply-rooted in an authority’s performance of their basic functions: mainstreaming may only operate to influence the future development of policy rather than the fundamental root and branch reform of existing practices that may be required.

Another major problem with many existing mainstreaming policies is that they are ‘soft law’ initiatives that are not framed as statutory duties and lack any meaningful enforcement mechanism. A recurring experience in discrimination law is that equality initiatives have little or no real impact without strong legislative enforcement provisions. This has been true in respect of prohibiting discrimination, evidenced recently by the limited success of the UK Government’s Code of Practice on age discrimination, and it is equally true in respect of mainstreaming.<sup>30</sup> The PAFT guidelines were particularly criticised for their lack of enforcement requirements.<sup>31</sup>

Fredman notes that there is evidence that mainstreaming has been effective at EU level, particularly in respect of policy formation in education, employment and training<sup>32</sup>: however, attempts to implement mainstreaming in the UK has produced very few tangible results<sup>33</sup>, and the Policy Appraisal and Fair Treatment (PAFT) Guidelines introduced in Northern Ireland in 1993 were widely felt to have been a failure due largely to lack of political will.<sup>34</sup> It appears that some form of legally binding regulation is needed to ensure clarity in what mainstreaming requires and also to ensure that it has real bite, in particular in circumstances when political will to drive forward the equality agenda is lacking.

### Positive Duties

In light of these criticisms of existing mainstreaming practices, the development in the UK and elsewhere of positive duties to promote equality represent an interesting step. The aim of positive duties is twofold: to impose a legal requirement to promote equality via impact assessment and consulting, and to also impose an

enforceable duty to eliminate discriminatory structures by proactive and anticipatory action, rather than waiting for retrospective-based, individual action by means of the individual enforcement model. The aim is to change practice rather than to provide compensation *ex post facto*. Positive duties require action to target and eliminate institutional discrimination that is not otherwise combatable by means of the individual enforcement model because it does not involve discrete, detectable acts of discrimination with direct consequences for individuals.

The duty is directed at the bodies capable of best promoting equality, rather than perpetrators of discriminatory acts.<sup>35</sup> Unlike the individual enforcement model and many mainstreaming requirements, positive duties are not imposed as a general standard, but are imposed with varying levels of detail and obligations on specified authorities. As the content of the duties imposed will vary with the activities of the body in question, the specific requirements imposed by the duties can be tailored to suit differing types of public authority. This can also allow a greater level of specification in respect of consultation and impact assessment requirements.

To be effective, the duties must be flexible and adjustable to new circumstances, requiring a constant process of assessing and monitoring the impact of policies and equality strategies. The participation by both disadvantaged groups and the bodies subject to the duty is essential in making this process of assessment and review effective, as well as ensuring that the disadvantaged groups have a democratic input into the process. To ensure this participation, positive duties emphasise consultation and the inclusion of the perspectives of different disadvantaged groups in identifying discrimination and exclusionary practices, and in assessing the effectiveness of remedies. As part of this process, transparency requirements have to be introduced to make sure that the procedure and results of impact assessments and consultation processes are available for public scrutiny. The perspectives of the bodies subject to the duties need also to be taken on board in designing the extent of the specific duties: to a



large extent, the effectiveness of equality strategies can depend on convincing those implementing equality measures of their usefulness, purpose and value.<sup>36</sup>

### Public Authorities and Positive Duties

The single most extensive positive duty imposed in the UK is that provided for by S. 75 of the Northern Ireland Act 1998, which imposes a duty on specified public authorities to have 'due regard to the need to promote equality of opportunity' across all the protected grounds in carrying out their public functions.<sup>37</sup> A wide range of authorities is subject to the legislation, with some important exceptions, including many of the UK Ministries. Schedule 9 of the Act specifies the measures required to comply with the duty, including the preparation of an 'Equality Scheme' setting out the required impact assessment, monitoring and consultation procedures and which is required to be published. The Northern Ireland Equality Commission has set out guidelines for drafting Equality Schemes and carrying out Equality Impact Assessments.

Similar positive duties have been imposed on many of the new UK devolved and regional authorities. Under the Government of Wales Act 1998, the National Assembly for Wales may exercise the powers of making delegated legislation where these are transferred to it by ministerial order, but cannot alter parliamentary legislation. Section 120 of the Government of Wales Act 1998 imposes a duty on the Assembly to ensure that its business and functions are conducted with due regard to the principle of equality of opportunity for all people. Unlike in Scotland, there is no definition of equal opportunities. This 'absolute duty' and the consequent developments in Wales designed to implement that duty have resulted in the rapid emergence of a distinctive equality agenda in Wales, reflected in among other developments pay audit and contract compliance initiatives, mainstreaming of equality in policy-making and in the Assembly's procedures, the establishment of an Assembly equality committee and initiatives to encourage greater diversity in public appointments.<sup>38</sup> Section 404 of the Greater London Assembly Act imposes a similar wide

duty upon the Greater London Assembly, and has had similar results in encouraging the development of a proactive equal opportunities agenda by the Assembly.

Under the Scotland Act the Scottish Parliament cannot legislate on designated 'reserved matters,' including anti-discrimination legislation. However, there is an exception allowing 'the encouragement (other than by prohibition or regulation) of equal opportunities' and for imposing duties on any office-holder in the Scottish Administration or any Scottish public authority subject to the control of the Scottish Parliament to make arrangements to ensure that their functions are carried out with due regard to the need to meet the equal opportunity requirements.<sup>39</sup> Equal opportunities are defined as "the prevention, elimination or regulation of discrimination between persons" on a series of grounds that include race, nationality and ethnicity, but which also includes religious beliefs, unlike the duty under the RRAA. This duty to promote equality of opportunity has produced very concrete results, with equal opportunity duties being imposed on relevant local authorities in the recent Housing Act and in a current Local Government bill going through the Parliament. The Scottish Parliament has also established an Equal Opportunities Committee to oversee equal opportunities policy and to oversee implementation of these duties.<sup>40</sup>

The UK Race Relations (Amendment) Act 2000 imposes a general positive duty on an extensive list of specific public authorities which combines a negative obligation to eliminate racial discrimination with complementary positive obligations to promote equality of opportunity and good relations between people of different ethnic groups.<sup>41</sup> The aim of this duty is to make the promotion of racial equality and the elimination of existing discriminatory practices integral parts of how public functions are carried out. The general duty, as with the Northern Irish duty, has to be given 'due regard' by the listed public authorities. The Commission for Racial Equality (CRE) in its code of practice defines this as meaning that 'the weight given to race equality should be proportionate to its relevance to a particular function'.<sup>42</sup> The draft code of

practice states that public authorities should 'consider' meeting the duty by identifying which of their functions are relevant to the duty, setting priorities for these functions based on their relevance for race relations, assessing how the implementation of these functions and related policies affect race equality, and considering how the policies and practices might be changed, where necessary, to meet the duty.<sup>43</sup>

The general duty is supplemented by specific duties imposed by the Home Secretary on specific types of public authorities. Listed government departments, local authorities, police and health authorities, regulatory bodies, commissions and advice agencies are required to prepare and publish a Race Equality Scheme, setting out how they intend to fulfil the requirements of the duty. It should identify and provide for the regular review of the policies and functions which are relevant to the duty, set out arrangements for assessing and consulting with racial groups on the likely impact of its policies on the promotion of racial equality, and for monitoring any potential for adverse impact. The Scheme is also to set out its arrangements for publishing the results and for making sure the public has access to public services and information, as well as the authority's training arrangements in respect of race equality.

In addition, listed public authorities are under various specific duties to monitor on ethnic lines the composition of their staff and the ethnic make-up of the pool of applicants for posts, promotion and training, as well as monitoring the composition of those involved in grievance, disciplinary procedures and performance appraisals. As part of the transparency requirement, the results must be published annually. A similar duty is imposed on educational bodies in respect of the ethnic composition and performance of their staff and pupils.

The dividing line between the activities of public and private bodies has become very indistinct with increased privatisation and the growth in private-public partnerships. The Race Relations (Amendment) Act provides as a consequence that a public body remains responsible for the

performance of a duty imposed on it even if it has contracted out some of its functions. The UK Home Secretary can also add bodies to the list of those subject to the duty if they are 'exercising functions of a public nature'.

The strength of the relevant enforcement mechanisms are key to the successful operation of positive duties. The Northern Ireland S. 75 duty requires all equality schemes to be submitted for approval to the Northern Ireland Equality Commission, which if dissatisfied with a scheme can refer the authority in question to the Secretary of State for Northern Ireland, who can impose an alternative scheme if necessary. The Commission can investigate the extent of compliance with the duty or with a specific scheme, and if non-compliance is found, can refer the matter to the Secretary for State. Initial levels of compliance have been impressive. The UK duty does not require schemes to be referred to the CRE on account of the potentially unmanageable workload, but the CRE can issue a compliance notice to any public authority that is failing to comply with one of the specific duties, requiring the authority to take steps to meet the duty. If after three months the CRE considers the authority is still in violation of the duty in question, an order from a county court ordering compliance can be sought. Compliance with both the general and specific duties will also be assessed by audit mechanisms, which may prove to be more effective than the CRE mechanism. There also is the possibility that the positive duty can be enforced by judicial review.<sup>44</sup> No enforcement mechanism is provided for in respect of the Welsh, Scottish and GLA duties.

The introduction of the positive duties in Northern Ireland and the UK has been warmly welcomed, despite initial concerns in respect of the UK race duty that the legislation provided for insufficient detail.<sup>45</sup> The duties have the potential to be a more powerful tool in respect of equality in the public service than legal compliance under the individual enforcement model has ever been. The enforcement provisions and the more specific requirements imposed mean that the positive duties have much greater 'bite' than mainstreaming

requirements. They make possible a proactive, participatory equality strategy that focuses on the elimination of disadvantage rather than the removal of obstacles to formally neutral treatment as required under the individual enforcement model. However, the full impact of the duties and their ultimate utility remains to be determined. Also, any adoption of positive duties to specific local, regional and national contexts will require necessary modifications to reflect the relevant conditions and context: issues of race, ethnicity and membership of the Traveller community in Ireland involve very different considerations than the position in Britain, for example.

### Process vs Outcome

A particular area of concern about positive duties is common to all forms of mainstreaming: compliance with duties may just take the form of 'process compliance', where authorities treat the duty as involving adherence to set consultation procedures, rather than focusing on achieving effective *outcomes*. A recent assessment of UK local authority and health care equality mainstreaming initiatives concluded that too much emphasis had been placed on 'the production policies and protocols rather than service outcomes'.<sup>46</sup> There is a danger that positive racial equality duty will similarly as Claire Collins describes 'divert energy and resources back into the... 'comfort zone' of process compliance'.<sup>47</sup> To be effective, the focus of compliance with positive duties has to be on the assessment and monitoring of *outcomes*. Process is important to ensure participation of disadvantaged groups, but procedure is not enough in itself. An approach designed to achieve substantive equality should require that the actual results of policies be assessed and monitored, and that the emphasis be placed on securing effective outcomes that bring about real and meaningful equal treatment. The race equality duty in the Race Relations (Amendment) Act fails to impose clear and explicit requirements that the primary focus of complying with the duty must be on achieving meaningful outcomes rather than just complying with a set process.

The Northern Ireland Equality Commission includes a clear warning in its guidelines on conducting equality impact assessments (EQIA) that 'the **processes** involved in conducting an EQIA should not be seen as an end in themselves... the aim of the assessment is the promotion of equality of opportunity and thus the **outcomes** of the EQIA are of primary concern'.<sup>48</sup> Similar guidance has been provided by the Commission for Racial Equality in its Code of Practice on the positive duty. Collins argues that the most successful previous UK equality assessments were those that concentrated on outcomes, citing in particular the Race Strategy developed in the context of the UK government's 'New Deal' labour training schemes.<sup>49</sup> She argues that clear and committed central leadership and co-ordination, the adoption of 'best practice' models, extensive training and the efficient exchange of information are all necessary to make sure that the race equality duty does not fall into the 'process' trap.

This is all the more important in that outcome orientated approaches have the potential to compensate greatly for the deficiencies of the individual enforcement model. By considering who is affected by a policy, and by designing that policy to meet where possible the needs of disadvantaged groups, positive duties can remedy the emphasis on formally equal treatment and the assimilation to the dominant group 'norm' that structures most existing policies. Collins cites in particular the development of the UK National Service Framework for Diabetes as an example of this. Diabetes in the UK is particularly prevalent in black African and Caribbean people, and is a treatable disease with high unnecessary mortality rates. Delivering services appropriate to minorities and which incorporates their specific needs is therefore particularly necessary in this context. The National Framework is structured around an outcome-orientated approach, which by taking into account the great relevance (and likely impact) of diabetes policy to minorities, 'created a framework based around the needs of minority ethnic groups... which was then adjusted to ensure that it also fitted the needs of white patients'.<sup>50</sup>

### Consultation

As discussed above, mainstreaming initiatives have tended to adhere to a model based upon expert units rather than broad-based participative consultation. The positive duty framework aims to alter this emphasis. However, in both Northern Ireland the rest of the UK, the ability of civic and community groups to engage in the consultative process is very mixed. In the context of the race duty, Muslim and Afro-Caribbean groups in particular have argued that inadequate resources and support make it very difficult for representative groups within their communities to participate. The lack of financial and logistical support for interested groups has been cited as a problem with the Northern Ireland duty.<sup>51</sup> If such support is absent, then there is a real danger that 'consultation' will involve merely contacting the most prominent elements of the different communities, a 'usual suspects' approach that may serve to conceal real differences and divergences of opinion and perspective within groups.

### Cross-Strand Equality Duties

Framing cross-strand equality raises interesting issues. Imposing duties only in respect of particular grounds is problematic, and should only constitute an interim stage if such strand-specific duties are introduced. One of the great strengths of positive duties if applied across the various equality grounds is that they represent a method of overcoming the problems of overlapping forms of discrimination, by requiring adequate consultation and policy impact assessment across the full range of disadvantaged groups recognised in equality legislation, both in respect of each particular group is affected and also in terms of how those belonging to overlapping groups will be affected. Also, by requiring a cross-strand approach, such duties can emphasise the diversity and inter-connectedness of the equality grounds, and focus attention on the common principle of equality that underlies them all.

In the UK, the current restriction of the positive duty to racial equality is a limitation, an artificial restriction that ignores how race, religion, gender and other grounds of discrimination are linked. The UK Government has committed itself

to introducing positive duties in the future in respect of gender and disability only.<sup>52</sup> The particular needs, perspectives and obstacles faced by religious groups who are not directly protected under the race relations discrimination runs the risk of being marginalised within the positive duty.<sup>53</sup> This lack of focus is reflected in the lack of data on the disadvantages suffered by Muslim groups.<sup>54</sup> Again, the CRE Code of Practice refers to the importance of recognising the interlinkage of race and religion, but the Commission on British Muslims and Islamophobia has called for the duty to be extended to the promotion of equality between persons of different religious groups, in line with the equal opportunities policy of the Police Service.<sup>55</sup> In addition, the duty's sole focus on race also neglects overlapping types of prejudices such as gender, which in turn may hinder the development of an adequate focus on the needs of groups subject to overlapping and multiple forms of prejudice.<sup>56</sup> This criticism could equally be directed at the restriction of most mainstreaming in Ireland to gender grounds.

Arguments have been made that mainstreaming should be reserved for those equality grounds such as race, gender and disability where such an approach is most appropriate, and that extending duties (or mainstreaming *simpliciter*) across all the grounds risks diluting the potential gains in these areas.<sup>57</sup> There is no doubt that grounds such as sexual orientation will require a different approach than race or gender: monitoring, for example, in that context would be a most inappropriate tool to use! Monitoring also raises considerable issues in the context of religion, and despite its potential utility may serve to reinforce hierarchies and discriminatory patterns. Nevertheless, a strong case exists for the imposition of a general equality duty, to ensure an adequate focus across the equality strands.

The Northern Irish duty, by requiring a single equality scheme, ensures that public authorities are required to eliminate discrimination on the grounds of racial, ethnic or national origin and religious belief, and to assess and monitor all forms of discriminatory impact. The Welsh, Scottish and Greater London Authorities duties, for all their lack of enforceability, similarly

extend across all the grounds of discrimination recognised in the EU Framework Equality Directive and consequently allow for a broad equality focus that can proactively advance equality of opportunity and good relations across all these grounds. All these general duties have generated real results across the grounds to which they apply. Overlapping forms of discrimination will remain a constant thorn without the introduction of a general duty, and there exists real potential for existing ‘hierarchies of inequality’ to be maintained and reinforced if certain grounds are excluded from a general duty. Serious consideration should be given to introducing a general positive duty across the full range of equality grounds specified in the EU Framework Directive. This can be supplemented with specific positive duties and codes of practice being introduced for each of the specific individual grounds as appropriate, with due acknowledgement of the differences and specific contexts relevant to each strand.<sup>58</sup> The single equality bill introduced by Lord Lester of Herne Hill QC into the UK House of Lords contains such provision, after extensive consultation on this issue.<sup>59</sup> Devising appropriate mainstreaming for Traveller community-related issues in Ireland, for example, will require careful framing to ensure their effectiveness.

### Supervision and Integration

Enforcement procedures are central to the effective functioning of positive duties, but the procedures set out in the Northern Irish and UK duties could be supplemented by greater clarity in the framing of the duties, opening up the possibility of effective judicial review, as well as establishing effective parliamentary scrutiny measures in the form of specialist parliamentary equality committees, similar to the Welsh and Scottish committees.

Positive duties and mainstreaming will also inevitably overlap with issues of human rights, community cohesion, integration and poverty. It is imperative that these new strategies be linked with community initiatives designed to promote good relations, and that this aspect of the equality agenda should not be neglected. In addition, clear links and co-ordination needs to

be established with any ‘poverty proofing’ or ‘human rights proofing’ measures that are being implemented. The importance of this cannot be underestimated, both to secure positive outcomes for disadvantaged groups and also to situate equality duties and mainstreaming within the context of community cohesion, integration, human rights and anti-poverty strategies, to ensure that they are made meaningful to those outside the disadvantaged groups.

### Positive Duties and the Private Sector

Positive duties can also be applied to the private sector, requiring proactive action to eliminate discrimination. In Northern Ireland, the Fair Employment Act 1989 imposed a positive duty on employers to take measures to ensure a fair proportion of Catholics and Protestants in their workforce. The duty has been extended and modified by the Fair Employment and Treatment (Northern Ireland) Order 1998.

US Executive Order 11246 requires government contractors to abstain from unlawful discrimination and to take positive action to increase the representation of racial minorities in their workforce. The Office of Federal Compliance Programs enforces these contract compliance requirements by audits, enforceable conciliation agreements and ultimately by seeking judicial sanctions that can debar contractors from government work. It also requires contractors to file annual reports and to monitor the composition of their workforce. The Independent Review concluded that these positive duties were the most significant influence on their organisations, more so than the possibility of individual enforcement, and that all US employers surveyed by them accepted the need for this mechanism.<sup>60</sup>

Due to the enforcement provisions of both the US and Northern Irish private positive duties, they have proved in the main successful. The House of Commons Northern Ireland Affairs Committee reported in 1999 that ‘the extent to which employers have complied with the regulatory requirements of the legislation appears to be impressive’,<sup>61</sup> a conclusion backed by the findings of the Independent Review.<sup>62</sup> Interestingly, less strict enforcement provisions

have lessened the impact of the Ontario Pay Equity Act 1987, which imposed a statutory duty on employers with more than 10 employees to examine their pay structures for discriminatory gender pay patterns. If a discriminatory pattern is found, then the employer is required to take action to draw up an equity plan or to implement pay adjustments. There is no filing requirement imposed on employers, however, and the Pay Equity Commission depends on individual complainants bringing cases, unlike the Northern Ireland Commission and the US Office of Federal Compliance Programs. This has proved to be a serious deficiency in the Act.<sup>63</sup>

The lesson from the comparative experience of these private sector positive duties is that they are very effective if enforced not in line with the individual enforcement model but proactively by enforcement agencies that can shape group remedies and require changes in practice even in the absence of individual complaints. This demonstrates the possible utility of positive duties in circumventing the restrictions inherent to the individual enforcement model. Positive duties requiring monitoring such as the Northern Irish duty also mean that the enforcement agencies can act against patterns of institutional discrimination and discriminatory structures that would be impervious to attack under the existing enforcement model. By allowing for conciliation procedures and mutual agreements between the enforcement agencies and employers on methods to remedy discriminatory patterns, enforcement moves away from a simple adversarial model to one that allows for flexibility and conciliation. The interlinking of monitoring and remedial action means that outcomes are intimately bound up with process.

The imposition of such positive duties on private employers involves the inevitable imposition of extra costs on employers. Arguably, the approach of the Irish Supreme Court in *re the Employment Equality Bill 1998*,<sup>64</sup> in restricting the ability of the state to impose costs on employers to remedy discrimination, may be incompatible with such positive duties. It would be regrettable if the formalistic approach taken by the Court to the

equality guarantee in Article 40.1 of the Constitution and the more substantive approach taken in respect of the right to property in Article 43 were to close off the possibility in Ireland of adopting proactive positive duties in the private sphere.

The UK Independent Review found that ‘there was general support from our respondents for an inclusive, proactive non-adversarial approach to achieve employment equity’ with mixed feelings from employer organisations as to whether that approach should be founded on an enforceable positive duty.<sup>65</sup> The Review concluded that the costs of imposing such a duty would not be excessive, that comparative experience had shown the clear need for enforcement measures, and that the inadequacies of the existing individual enforcement model justified the imposition of a positive duty on employers with 10 or more employees. This duty would require a three-year periodic review of their employment procedures in consultation with interest groups, and a requirement to take reasonable remedial action by means of an employment equity plan when the review indicated the existence of significant under-representation. This would be enforceable by an equality commission, with similar powers to the Equality Commission of Northern Ireland.<sup>66</sup>

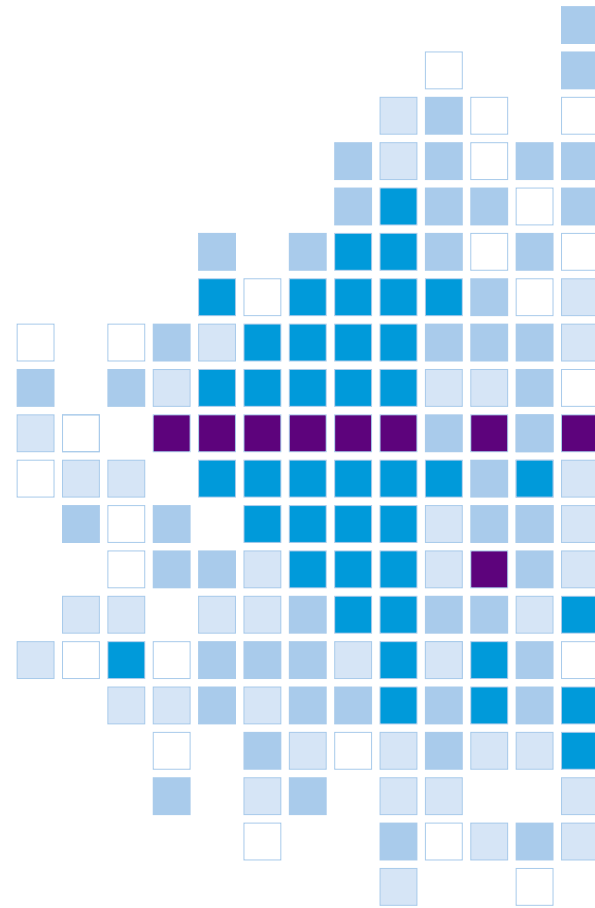
### Conclusion

The Independent Review’s conclusions are indicative of how a growing consensus is forming with respect to the usefulness of positive duties in both the private and public sectors. By virtue of their requirements for the participation of disadvantaged groups, their proactive nature, emphasis on substantive equality and the lack of a straitjacket imposed by a need for individual complaints and remedies, positive duties can fill the gaps left wide open by the individual enforcement model. Implementing effective positive duties will require a recognition of the limits of existing equality strategies, and real changes in our concept of equality.

Implementing positive duties will not be a panacea for all forms of inequality. If the emphasis is placed on process rather than

outcomes, then their impact will be considerably blunted and cosmetic change will substitute for real progress. Similarly, if they are structured so as to accentuate existing artificial and narrow distinctions between ethnic groups, they may add to existing problems of intersectionality. An effective positive duty imposed on a public authority should also recognise the link between human rights, community cohesion, integration, poverty, socio-economic rights and equality, rather than treating them as compartmentalised units. The gradual introduction of poverty 'proofing' in Ireland and the UK is a step in this direction, but this needs to be linked up with equality issues. Positive duties should recognise the differing needs of differently situated individuals and groups, and proactively address the factors and structures that contribute to discrimination. They offer a way forward for equality, but will require real commitment, a broad scope and rigorous enforcement, as well as clear consciousness into how they fit within overall strategies to enhance the rights and opportunities of all.

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### Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law: Endnotes

*\* (This paper is a draft outline of a forthcoming article that develops some of the ideas in a previous paper written for the Equality Authority conference on the implementation of the new EU Race and Framework Equality Directives, while incorporating new issues and perspectives – any comments will be gratefully received by the author, who is of course responsible for all errors, inappropriate remarks and irrational leaps of faith!)*

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- (14) See the Report of the Independent Review, op cit., at n. 4.
- (15) See Fredman and Szyszczak, op cit., at n. 13.
- (16) See Fredman, at n. 4 above, p. 158.
- (17) See the Independent Review, above at n. 3.
- (18) See Fredman, at n. 4, at p. 176.
- (19) See Fredman, above at n. 4, pp. 22–23.
- (20) See the Independent Review, above at n. 3, para. 2.19.

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## “An Absolute Duty” – Learning from Wales

By Kate Bennett, Director, Equal Opportunities Commission Wales; Paul Chaney, University of Wales

In the run-up to devolution in the 1990s, the Equal Opportunities Commission – and its partners – campaigned for an equality duty to be included in the legislation setting up the Welsh Assembly. We were delighted that we were successful and since the establishment of the Assembly in 1999, the EOC, in particular, has pressed the Assembly to take this duty very seriously.

After a couple of years we felt the duty was having a significant impact. We were seeing new policies and initiatives that we had not seen in Wales before – ones that differed from what was going on in England. We were anxious to try and measure this more robustly. We wanted to be sure we were not seeing Wales through rose tinted spectacles. We wanted to establish whether the equality initiatives that we were experiencing in Wales actually arose from the duty, rather than from some other cause. We wanted to see whether this kind of positive duty to promote equality could have wider benefits if applied across the UK.

So we joined with the Commission for Racial Equality and the Disability Rights Commission to commission some independent research. The resulting report by Paul Chaney was entitled: ‘An Absolute Duty: Equal Opportunities and the National Assembly for Wales’ (copies are available from the Institute of Welsh Affairs, or can be downloaded from the EOC Wales Section of EOC website at [www.eoc.org.uk](http://www.eoc.org.uk)).

In this paper we will:

- Outline the nature of the Welsh Assembly's equality duty;
- Examine the impact that it has had during the Assembly's first term – what has the duty achieved? What have the outcomes been?
- Suggest that it is a model that has merits and is an approach that could usefully be applied to government elsewhere both in the UK and beyond.

So, turning now to the duty. It is a unique legal innovation designed to secure the promotion of equality of opportunity by government. It was set out in the Government of Wales Act 1998; the Assembly's founding statute.

### Government of Wales Act 1998

Section 120: ‘the Assembly shall make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people’

In addition, section 48 of the Act says that the Assembly shall secure that its business is conducted with due regard to the same principle

So what kind of equality duty is this?

### What Kind of Duty?

- unique
- absolute
- enforceable

The National Assembly's equality duty is UNIQUE within the context of the UK's devolution legislation.

It contrasts with the equality duties contained in the Scotland and the Northern Ireland Acts. In addition, it diverges with practice at Westminster where there is no general equality duty placed upon MPs – although, Westminster may, as in the case of the Race Relations Amendment Act (2000), impose equality duties upon itself.

A further distinctive aspect here is that whilst equality of opportunity is a reserved power and remains at Westminster, the Welsh Assembly's equality duty modifies all Westminster Acts of Parliament where the Assembly has powers in their implementation. So, it is a major area of divergence in the equality law applying in Wales compared to the rest of the UK.

The Assembly's equality duty is an example of what law academics have called a ‘fourth generation equality law’. In that it requires government to be PRO-ACTIVE in equality matters.

In terms of the duty's ENFORCEABILITY, law academics have called it ‘AN ABSOLUTE DUTY’ because – in their words – it ‘provides no escape clause’.

### What Kind of Duty?

- innovative
- systematic
- inclusive
- positive rights

Within the context of the UK's equality law, the Welsh equality duty is innovative and, as we shall see, has led to a systematic approach to the promotion of equality.

It is a duty that is not focused on set equality strands, but rather one that aspires to an inclusive approach – one that is directed at all social groupings. The Welsh equality duty has non-prescriptive phrasing – and an all-embracing scope. It applies to ALL people and ALL Assembly Government functions.

These functions are wide-ranging and are set out in S.22 of the Government of Wales Act. They cover areas such as health, education, economic development and social services.

As a result of these factors, legal analysis of the duty concluded that:

*‘the people of Wales are the first in the UK to be given a series of POSITIVE RIGHTS to exercise, and, if necessary, to enforce through the courts in Wales’.*

In this sense the duty has the potential to make government more accountable in that it sets out what people can expect from their elected representatives.

This assertion is linked directly to the duty's legal enforceability.

An early perception of the Welsh Duty was that it was a ‘weak’ duty. One that was based on good intentions, but lacking any enforcement mechanisms. This is not true.

### Enforceability

- Judicial Review
- Welsh Administration Ombudsman
- Any relevant court/tribunal proceedings

Under Schedule 8 of the Government of Wales Act, the National Assembly may be subject to judicial review if it is felt that it has failed to comply with the provisions of the equality duty. Such a challenge may be made at any relevant proceedings before any court or tribunal. Under these arrangements actions may ultimately proceed to the Privy Council for a final ruling.

It is also possible that – under Schedule 9 of the Government of Wales Act – the Welsh Administration Ombudsman may challenge the Assembly in cases of alleged mal-administration in relation to Section 120.

However, the equality duty has yet to be tested in law. In particular, key terms in the duty like ‘to have due regard’ and ‘appropriate arrangements’ have yet to be fully defined in a legal sense. Therefore its enforceability is presently unknown.

There would seem to be benefits in establishing external monitoring and enforcement mechanisms to oversee the duty – these could be possible new functions for a Single Equality Body in Wales if this is the way the government chooses to reconfigure the equality infrastructure in Britain.

So, that is the nature of the Welsh Duty. We turn now to consider its impact, what it has achieved. We will summarise the newly emerging distinctive equality agenda in Wales – namely, policies and actions not previously known in Wales and not being pursued elsewhere in Britain.

### Distinctive Equality Agenda

- budget setting
- new consultative equality networks
- commitment to mainstreaming

In relation to fiscal matters the Assembly Finance Minister has referred to equality and other considerations leading to: *‘an entirely new and radical way of producing a budget’.*

Accordingly, the Annual Commissioning Paper for the Assembly's £11 billion budget required the views of all Assembly subject committees on ways of mainstreaming equality.

In a further notable development, the statutory equality duty has led to the development of four consultative equality policy networks designed to promote equality by increasing the participation of hitherto marginalized groups in government. They include the Assembly sponsored consultative network for lesbian, gay and bisexual people (LGB Forum Cymru) – the first government-funded dedicated consultative forum of this type in the UK.

We will return to mainstreaming later. This has underpinned the Assembly's strategy for delivering an equality-centred approach to policy making and implementation.

We now turn briefly to 4 selected areas of reforms undertaken in the wake of the equality duty:

#### Distinctive Equality Agenda

- Civil Service reforms
- equal pay
- contract compliance
- diversity in public appointments

In terms of equal pay:

#### Distinctive Approach to Equal Pay

- Close the Pay Gap campaign
- extra £ available
- equal pay as performance indicator
- pay in Higher Education

Research has shown that in Wales women's hourly earnings are, on average, only 87% of men's. In a direct response to the equality duty the Assembly has backed the Close the Pay Gap Campaign in Wales.

There have been successive pay audits of the Assembly's 3,500 staff. These have revealed pay disparities along lines of gender, as well as ethnicity and disability. In response, extra funding has been allocated and, in relation to the gender pay gap, a three-year pay deal was been

negotiated that will add a further 22.3 per cent on to the Assembly's pay bill.

In addition, measures have been instituted that target the former Quangos – or Assembly Sponsored Public Bodies (ASPBs) – in order that they too monitor and reform their pay practices.

Latterly, equal pay has become a performance indicator in the public sector (this means that, in part, it determines the level of funding public sector bodies receive from the Assembly Government). As a result of Assembly Government policy in this area all higher education institutions are now encouraged to undertake pilot equal pay reviews that follow EOC guidelines.

This approach to equal pay differs significantly from that being taken in England and Scotland – it is more determined, producing far more concrete outcomes in terms of narrowing the gender pay gap in the public sector.

Turning now to further examples of government and public sector reforms:

#### Government/Public Sector Reforms

- reform of Assembly employment practices
- applied to public sector bodies
- mandatory equality training
- aim of greater staff diversity
- equality audits

In response to the equality duty, key changes have been made to the employment practices of the Assembly Civil Service and the Welsh Public sector. Thus, for example, in a break with British Civil Service practices, the Assembly has now adopted open, external staff recruitment in order to increase the numbers of staff from so-called 'minority' groups. In addition, in 2001-2, mandatory equality awareness training was given to all 3,500 Assembly staff.

Ongoing monitoring of equality awareness and mainstreaming procedures in the Assembly bureaucracy is another feature of the post-devolution equality agenda. Annual published equality audits of the entire Assembly Civil Service are now undertaken.

In the wake of the equality Assembly's duty, another example of a distinctive Welsh approach to equality is the use of Contract Compliance or contractual terms.

#### Contract Compliance

- distinctive 'Welsh' approach
- underpinned by Equality Duty
- procurement of goods and services
- employment practices of contractors
- voluntary code of practice
- extended to public sector e.g. NHS Wales

The Assembly has adopted this in order to promote equality of opportunity in respect of the goods and services that the Assembly (and public sector bodies) procure, and in the employment practices of those that the legislature conducts business.

According to the Assembly's legal officer, the Counsel General for Wales, the equality duty:

*'Has enabled the Assembly to develop its policy in this area ... it is the peg upon which you can hang a policy which is broader than the policy which we have at the moment.'*

In respect of billions of pounds worth of public sector contracts, most are still awarded on the basis of open competition, but suppliers who support the Assembly's new voluntary equality code are assisted with positive action such as guidance on ways to improve their practices, and constructive feedback on unsuccessful tenders. In this way they will be able to improve their competitive advantage and be better placed to win future Assembly Government contracts.

This approach has also been applied to public sector bodies subordinate to the Assembly notably, in relation to its provision of primary healthcare. NHS Wales is now required to ensure that independent contractors' employment practices promote equality of opportunity and they will be held accountable for progress in this area on an annual basis.

And finally our last example ...

#### UK Commissioner for Public Appointments

Dame Rennie Fritchie:

*"The approach in Wales is a strategic one that I have not seen elsewhere in the UK."*

In relation to public appointments: the limited diversity amongst those holding public appointments, particularly in regard to quangos, featured in the arguments of the pro-devolution campaigners in Wales.

Citing its equality imperative, the Assembly Equality Committee has implemented a range of reforms to promote diversity in almost 1000 appointments made by the National Assembly to 160 Welsh public bodies each year. Senior participants have described how the Assembly Government has: *'used the legislation, – the equality duty – as an opportunity for going beyond what is laid down under the Nolan principles in terms of making transparent and open the procedures of making public appointments'*.

Actions taken in this respect include: information dissemination strategies and outreach work to reach under-represented groups; and mandatory training in best practice in candidate selection for all involved in interviewing for public appointments.

In addition, plans are being progressed for the reimbursement of receipted childcare or carer costs, and any additional costs incurred by disabled people in respect of all public appointments

So how then does the 'Welsh Model' equality duty work?

#### How Does it Work?

- powerful motivator
- overcomes resistance and obstruction
- facilitates holistic approach
- offers support

A wide range of interviewees has stated that the legal equality imperative in Wales has focused minds – it has been a powerful motivator of change.

Interviewees have also spoken of the way in which the equality duty has been used to overcome resistance or obstruction to the promotion of equality of opportunity in a way that was not generally possible prior to devolution. The Welsh equality duty provides an enabling framework to tackle the multiple (and non-discrete) forms of discrimination and inequality in an holistic approach.

Lastly, interviewees have also stated that the Assembly's clear lead in equality matters has lent, 'moral support' and, in sometimes-hostile institutional settings, it has been a boost to equality reformers who have often felt isolated and unsupported in their work in the past. It is an approach that has been endorsed by key decision-makers, who, might not necessarily be thought of as natural allies to a reforming equality agenda.

Sir Jon Shortridge, Welsh Assembly Government Permanent Secretary, has described the equality duty as slicing through Assembly policy making in the way that a knife slices through butter.

Thus ...

**Welsh Assembly Permanent Secretary**  
*"the statutory duty – coupled with the Assembly Equal Opportunities Committee – is a very, very powerful motivator and driver of change"*

So, in summary, what has been the effect of the Welsh equality duty?

#### Assembly Action

- co-ordinate multi-agency working
- exemplar of good practice
- awareness raised
- equality data improved
- new units established

Firstly, it has compelled the Welsh government to co-ordinate multi-agency working to promote equality across the public, voluntary and private sectors.

It has underpinned the National Assembly's aim to become an exemplar of good equality practice.

The equality duty has raised awareness of equality matters and led to increased resources in order to improve equality data.

It has also led to institutional reform and the creation – and funding of new equality policy units – for example, in the Assembly itself and for Welsh local government.

Thus in functional terms, the duty has meant that the Assembly has promoted equality in four important areas:

#### Equality Promoted

- in conduct of government business
- in other tiers of government
- in role as regulator and funder
- in policy process

For example, in conduct of government business, the Assembly operates family friendly hours and has strict rules about the kind of way members can speak about each other in the Chamber – sexist language in particular has been deemed unacceptable.

In relation to other tiers of government, the equality duty underpinned requests from the Assembly government that asylum seekers no longer be housed in Cardiff Prison. Although a non-devolved area, this approach was successful.

The Assembly has used the duty its role as regulator and funder; for example in relation to social housing grants. All applicants now have to state how they will promote equality.

The policy process has been most crucial to the changes seen over the past four years. From the outset the Welsh executive formally stated its intention to mainstream equality across all areas of the Assembly's work. This commitment was subsequently repeated in the Assembly Government's strategic plans for government. Technical innovations have been introduced to facilitate this approach. For example, civil servants are required to sign policy submission statements in order to ensure that policy complies with the equality duty.

Nevertheless, much work remains to be done in order to achieve a thoroughgoing approach that

mainstreams equality.

Earlier this year the Equality Committee of the Welsh Assembly endorsed recommendations contained in the report 'An Absolute Duty' that will strengthen Assembly's subject committees' compliance with the equality duty. This will be achieved by formal changes in the Assembly's internal law (or 'Standing Orders').

In conclusion, to what extent can the Welsh equality duty be seen as a model approach?

#### A Model Approach?

- duty still not well known
- too early to tell
- need to examine outcomes
- apply to named public sector agencies
- improve monitoring/enforcement of the duty

From the interviews conducted in the course of the Absolute Duty research it is clear that there is a low level of general awareness of the duty beyond those people who have themselves been involved in the equality reforms.

Importantly, it is still too early to evaluate the impact of the duty in terms of equality outcomes because many policies are still being implemented.

Also, the effectiveness of the duty could also be enhanced by making modifications that are consonant with the existing approach of the Race Relations Amendment Act 2000. In particular, the Welsh equality duty could be extended to a broader sweep of named public sector agencies. The latter point derives from the specific, and some would argue unsatisfactory, devolutionary settlement in Wales, whereby the National Assembly can require action from some – but not all – public sector bodies in the country.

Furthermore, the equality initiatives outlined in 'An Absolute Duty' have taken place within a framework of self-regulation and monitoring by the Welsh Assembly itself (albeit underpinned by legally enforceable duties). Independent external monitoring and enforcement would strengthen the wider adoption of a 'Welsh

model' duty and should be undertaken by a dedicated statutory non-departmental government body.

#### A Model Approach?

- the most significant factor
- led to a distinctive approach
- initiated reforms
- has overcome opposition
- new all-Wales equality agenda

Despite these 'health warnings', we can be very upbeat about the impact and achievements so far.

The research findings have shown that during the Assembly's first term the **equality duty has been the most significant factor in the post-devolution equality reforms.**

Reforms have been initiated in relation to most of the Welsh legislature's functions.

Interviews conducted for An Absolute Duty, together with the evidence of Assembly policy documents, reveal that **these are reforms that would either not have taken place, or would have taken much longer to be implemented.**

The duty has meant that equality of opportunity is beginning to be addressed in a **systematic way at an all-Wales level of government for the first time.**

In its wake **the level of financial resources, political will and expertise that have been invested in promoting equality in the process of government is unprecedented.**

Given the backing of legal sanction – the duty has overcome resistance to equality reforms – and it has led to a distinctive new all-Wales equality agenda.



In summary:

**A Model Approach?**

- non-prescriptive
- all-embracing
- legally enforceable

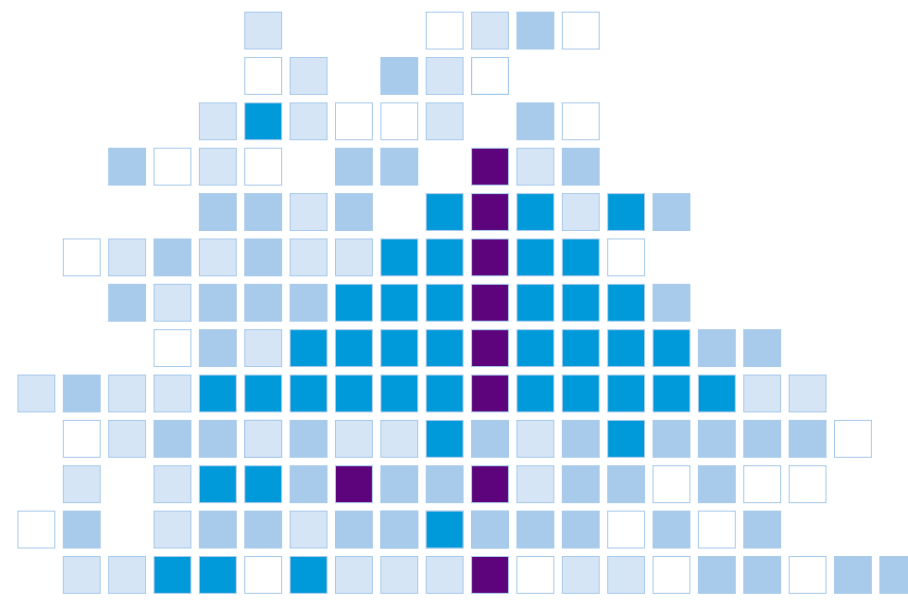
**The “Welsh Model” Equality Duty is:**

- Non-prescriptive and all-embracing in a way that is consistent with the principle of equality;
- It requires a pro-active government response;
- It conveys legal rights to the citizen.

In short:

The Welsh Duty has achieved significant change over a short time period. For this reason we argue that a ‘Welsh Style’ Duty should be considered when new positive equality duties are formulated for Ireland and for the UK.

The Welsh model has merit!



**The Public Duty to Promote Race Equality - A Model and Perspective from Britain**

**By Seamus Taylor, Director Strategy & Delivery, Commission for Racial Equality**

**Introduction**

I am going to speak to you this afternoon about the Public Duty to promote race equality and a model and perspective from Britain.

I am going to cover a number of strands. Firstly, I am going to set the context for this statutory duty then I am going to look at the elements of the duty, then I am going to move on to look to the CRE’s approach to enabling and enforcing delivery. I will also touch on evaluation of the Year 1 response to the Public Duty and finally make some concluding comments.

**The Context**

First, we can start with the context. The context to the Statutory Duty to promote Race Equality in Britain is the Lawrence Inquiry, which was an independent inquiry set up by the Home Secretary in Britain in 1998, into the handling of the racist murder of a young black teenager in South London, Stephen Lawrence. That inquiry which was led by Sir William McPherson, when it reported, highlighted the issue of institutional discrimination and brought it to the fore of the public policy arena. Previously race debate and race legislation in Britain had primarily focused on individual acts of discrimination and taking retrospective action after an individual complaint or individual incident had arisen. What the Lawrence Inquiry did was that it fundamentally shifted the focus away from individual acts of discrimination to the way in which institutions and Public Sector services, can fail to provide appropriate services to people because of their colour, culture or ethnic origin. The inquiry highlighted a number of key failures. It highlighted the way in which many communities had ‘lost faith’ in the system, and highlighted how it was incumbent upon Public Sector bodies to rebuild trust and to demonstrate fairness to the various communities that they serve. Now they were particularly talking about the Police and

Criminal Justice agencies, but it was clear in making the recommendations that they saw, read across to all main public sector services. The challenges then coming out of the Lawrence Inquiry were that, whilst we who worked in Public Sector services may well believe and may well deliver our services on a fair basis on a day to day basis, we actually need to demonstrate that fairness, just like we demonstrate that we manage our budget appropriately and that we manage personnel appropriately. We now have to demonstrate that we manage equality and fairness appropriately. The Government’s response to the Lawrence inquiry was to accept that the issue of institutional discrimination is the potential and real problem. How do we plan it out of the Public Sector before it arises? The amendment to The Race Relations Act is the legislative response to that challenge. It is an attempt to use the law to inculcate a sustained sensitivity into the way public service organisations deal with race equality. It arrives in the policy arena at the moment of wider Public Sector reform. It provides an opportunity to factor fairness into wider public sector modernisation. The Race Relations Amendment Act and the duty to promote Race Equality is an agenda for thinking about race equality as we go about our work. It is an agenda for acting for racial equality and an agenda for delivering on race equality. It is basically an agenda for mainstreaming race quality into our core business guided by principles of relevance and proportionality.

**The Elements of the Duty - the General Duty and Underlying Principles**

This duty is made up of a general duty and a series of specific duties. The general duty to promote race equality applies to listed public authorities, which run to 40,000 approximately. They are required in carrying out their functions to have due regard to three things: the elimination of unlawful discrimination, the promotion of equality of opportunity and the promotion of good race relations between people of different racial groups. It is an interesting duty in that it holds in balance equality, difference and cohesion simultaneously. They are, to this very day, key issues of debate about the kind of future society will want to

create. What does this duty mean for Public Bodies that it applies to? What it means is that bodies have to take a pro-active approach. It is about mainstreaming. It is underwritten by a number of important principles. It is obligatory; it is statutory and there is no opt-out. Two fundamental key principles that underline this duty are: the principles of relevance and proportionality. What that means is that the weight you give to race equality is expected to be in direct proportion to its relevance to a particular function. For example, if you take Education bodies or Education authorities within a local authority in Britain who deal with education, not necessarily the same responsibilities as here in Ireland, the attention that you give to education attainment, would be likely to be higher than the attention you give to highways management. What these principles do, is that they provide those of us who work in the Public Sector with a managed and planned approach for addressing race equality over time. The final principle is that all of the elements of the duty are complimentary so that when you consider one you will also have to consider all three together.

### Specific Duties

The general duty is supported by a series of specific duties. In regard to the specific duties, it is important to bear in mind that they are not ends in themselves, they are routes to the delivery of the general duty. We will go on to see what these specific duties are. Specific duties exist for main public services such as: local government, health bodies, central government departments, the police and criminal justice agencies. Their specific duties are first that they must prepare and publish a Race Equality Scheme. They had to do their first one by the 31 May 2002. Basically, the Race Equality Scheme is a strategy and an action plan for making improvements on race equality that looks three years ahead. Public Sector bodies are used to producing all sorts of strategies and action plans, now this is simply a statutory plan in relation to race equality. It is a statutory plan, which comes with some prescription. There are prescribed themes or issues that it must address:-

(1) The public body must identify its functions and policies for relevance to race equality

that means listing the core things that you do and dividing them into those that are of the high priority to race and those that are of medium priority and those of low priority. Then in a planned sequential basis reviewing those activities and race equality proofing them over time.

(2) The second specific issue that must be addressed in the race equality scheme is that the public body must set out its arrangements for monitoring the impact of its existing policies on race equality. Now this does not mean every single policy but those that are relevant to race equality and some will be much more relevant than others.

(3) The next specific duty is to assess and consult on the impact of future policies on Race Equality. This does not mean that every future decision that is made, or every future policy, it is about those policies of most relevance. Remember those principles of proportionality and relevance are critical as we work our way through all parts of this agenda. What this duty is trying to get at, is policy proofing of future policies. We have all over the years, at least in Britain, been very used to writing this standard paragraph in the public sector about equal opportunities implications, of what we do but over time that has in a sense lost its substantive meaning and it has become pretty anodyne and reduced to beautiful words but not a lot of substance behind them. This specific duty requires us to undertake proper race equality impact assessment, where relevant.

(4) The next specific duty is to publish the results of these assessments consultations and monitoring that are undertaken.

(5) The next specific duty is to ensure public access to the information and services that we provide.

(6) The next specific duty is to monitor employment practice from the point of application into the workforce, through to entry into the workforce and then experience whilst working for the employer

whether in terms of promotion training and disciplinaries or grievances through to exit and the reasons for leaving. Linked to this is a requirement to annually publish the employment monitoring results.

(7) The final specific duty is to train staff on race equality issues.

All of these specific duties must be addressed and set out in the Race Equality Scheme. When you address any of the specific duties like monitoring, or for instance, you need to link back to the general duty. Take for example monitoring, you are not just monitoring to record people's experience, or in consultation, you are not just consulting to find out how people think, you are monitoring in order to record people's experience to find out if there unjustifiable differences between their experiences and other groups and, if so, to raise the question what further things do you need to do in order to achieve race equality. All of these specific duties are steps to the overall end of the general duty, which is about achieving race equality progress. Still looking at the specific duties, the government, in introducing this duty in Britain, decided to have a different approach for Schools and Further and Higher education institutions. The government in a sense wanted to give education bodies a more appropriate touch than other parts of the public sector. What schools have to do is to prepare and maintain a race equality policy, and to assess the impact of their policies on staff, pupils and parents. The thrust of the emphasis in relation to schools is in relation to school attainment levels. Policies have to be monitored and results have to be published. Similarly for Further and Higher education bodies, it is about a race equality policy, assessing the impact, recruitment: monitoring and progression of staff and publishing results.

### Different Duties for Different Sectors a Sector Appropriate Approach

Re-capping on the issue of the general duty and the specific duties, what the government did in bringing in this duty, was to consciously set about trying to have a proportionate approach. In total you have approximately 40,000 bodies

covered by the general duty but some are just covered by the general duty itself, for example, Parish Councils in Britain. Some bodies are covered by the general duty, and just the employment duty, for example the Arts Council or the National Lottery Charities Board, now known as the Community Fund. Some bodies, such as all the main public services are covered by the general duty the employment duty and the duties to have a Race Equality Scheme. This applies to all main public services like local government, health, the police etc. Schools are covered by the general duty and specific duties for schools and further and higher education by the general duty and specific duties for Further Education and Higher Education. The whole thrust is to have a stranded, sector-specific proportionate approach.

### The CRE's Work to Enable and Enforce the Duty

Moving on from the elements of the duty, to look at how the Commission for Racial Equality are working to enable and enforce the public duty. We have this dual role of providing advice, assistance, guidance and or promotional activities generally and ultimately to be the enforcer of the public duty. The CRE's vision in relation this agenda, is to achieve a step-change in performance in Race Equality across the Public Sector. In terms of the end state vision from that overall statement the outcomes we are looking for group into about 6 or 7 key blocks.

(1) First, and most critically is shifting key service outcomes by ethnic group. What is meant by this, is for example, shifting inequalities in education attainment, stop and search by the police, health and inequalities between different ethnic groups. All of these currently show significant ethnic disparities between different groups in the population. If this agenda is to deliver it should provide the framework, firstly for identifying those differences and then a framework and means of closing gaps in them over time if public authorities focus on them seriously. That is one key set of critical outcome targets is shifting key service outcomes.

- (2) Secondly is working to achieve parity in service user satisfaction between different groups of service users. Do different communities have different levels of satisfaction with the services you provide?
- (3) Linked to this but slightly separate is parity in public confidence levels. Different communities hold Public Sector services in varying levels of confidence. We know in Britain that many ethnic minority communities have much lower levels of confidence in criminal justice agencies including the police, the CPS and others. If this agenda is working properly we should be moving in measurable steps towards parity in public confidence over time on this issue.
- (4) The next critical issue is measurable improvements in race relations. This is a difficult issue because we are not wholly clear; any of us really, as to what yet constitutes good race relations. It is something we are working on currently, and we will be bringing out detailed guidance in the course of the next year but what we need to address is measurable improvements in it over time. Moving on from the external measurements to the more internal world of public sector organisations.
- (5) The next issue is more representative workforces. This agenda should help public bodies to know what their workforce composition currently is and how to achieve a more representative workforce over time.
- (6) It should also help Public Sector organisations to work towards parity in employee's experiences across the employment cycle. There shouldn't be significant differences by ethnicity in terms of who gets promoted, who gets disciplined and who takes out grievances. This agenda should enable you first to identify whether that exists, and then to address it over time.
- (7) Finally, and fundamentally, linked to that is parity in employees satisfaction. There should not be significant differences by ethnicity in how our employees rate us as an employer. If

there are we need to ask ourselves questions and if those are significant and linked to racial inequality and institutional racism then we need to be addressing them.

**Detailed Elements of our Multi-Pronged Approach to Enable Delivery of the Public Duty**

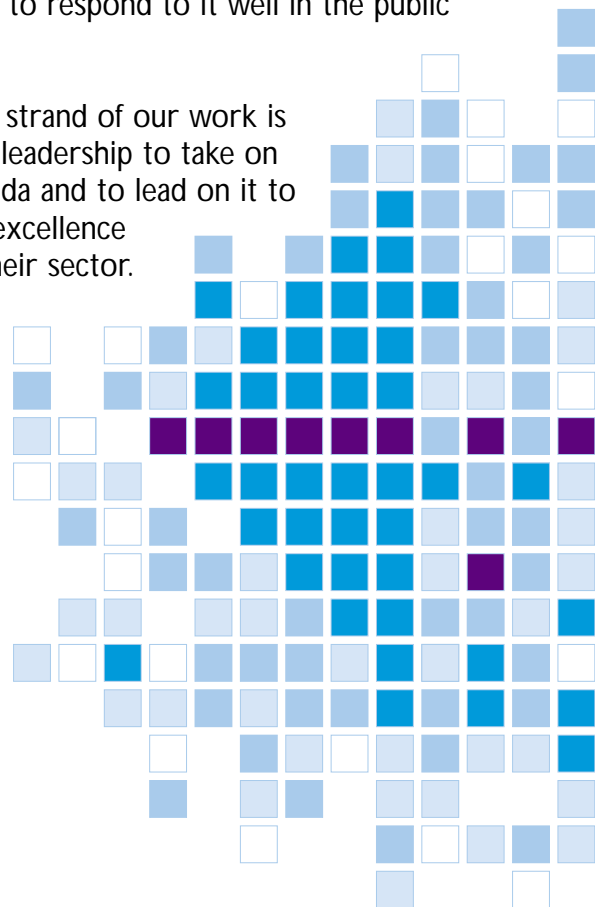
There you have the vision and end state outcomes we want to achieve and our approach to getting there is what I now want to outline. We have a multi-pronged in the sense approach or toolbox of initiatives that we are seeking to work on to deliver this agenda.

It starts from the provision of guidance advice and support to public bodies about what the requirements are and how you might go about addressing this issue if you want to do it well.

This is fundamentally linked to the strands of our work that promote awareness through training conferences and seminars.

Linked to that is a range of activity about marketing and communication through leaflets and advertising campaigns, all of which are about promoting and raising awareness, deepening the knowledge base in relation to the public duty and how to respond to it well in the public sector

Another strand of our work is enabling leadership to take on this agenda and to lead on it to achieve excellence within their sector.



**Guest Speakers**

**Kate Hayes**

Kate Hayes is the first Chair of the Equality Authority. Previously, she spent twelve years with the Employment Equality Agency, holding the office of Chair and Vice Chair during that period. Her experience and expertise assisted the process of establishing and developing a new framework for equal opportunities in Ireland with the establishment of the Equality Authority. Ms. Hayes brings a high level of experience to the equality area. She has worked extensively in the area of gender equality for men and women and is currently a member of the Commission for Justice and Peace.

**Niall Crowley, Chief Executive Officer, Equality Authority**

Niall Crowley is Chief Executive Officer of the Equality Authority. Previous to this post he worked on Travellers rights issues with Pavee Point and on the wider equality agenda with the Community Workers Co-operative. He has been a member of the National Economic and Social Forum and the National Economic and Social Council.

**Kristin Mile**

Kristin Mile was appointed as Gender Equality Ombudsman by the Norwegian Government in June 2000. She was appointed for a six year term of office. She is a lawyer educated at the University of Oslo. She has considerable experience in gender equality issues, having been the Ombudsman's Deputy since 1995. She also has experience from working in the Directorate of Labour Inspection and the Immigration Directorate.

**Evelyn Collins, Chief Executive, Equality Commission for Northern Ireland**

Evelyn Collins has been working on equal opportunities issues since she joined the Equal Opportunities Commission for Northern Ireland in the 1980s. From 1990-1992, she was on secondment as a National Expert in the Equal Opportunities Unit, DGV (Directorate-General for Employment, Industrial Relations and Social Affairs), European Commission, Brussels. This post entailed responsibility for

European Union-wide initiatives on employment equality.

**Colm O'Conneide**

Colm O'Conneide is a lecturer in Human Rights, Constitutional and Equality Law at the Faculty of Law, University College London, and has published extensively in the field of equality and anti-discrimination law. He has also lectured in Constitutional Law at the University of Limerick (1998-1999), and is a member of the Irish Bar.

**Séamus Taylor, Director of Strategy and Delivery, the Commission for Racial Equality**

Within the CRE, Seamus is managing the new statutory duty to promote race equality under the Race Relations Act as amended. He has recently served as a member of the Advisory Group for the Cabinet Office study on Ethnic Minorities and the Labour Market. He graduated with distinctions from University College, Dublin and University of London (Goldsmiths College).

**Kate Bennett, Director, Equal Opportunities Commission (Wales)**

Kate Bennett holds a BA (Hons) Degree in Industrial Relations with Politics and Government from the University of Kent in Canterbury. Before joining the EOC in 1999, she worked for the Manufacturing Science and Finance Union, initially in London and subsequently Caerphilly, negotiating on pay and conditions of employment and equal opportunities. Her job included promoting the MSF agenda more generally, especially with government. In September 1999, Kate was appointed Director of the Equal Opportunities Commission in Wales. Her main aim in this important role is to mainstream equality in Wales and narrow the pay gap, by working in partnership with employers, trade unions, and equality agencies towards economic regeneration in Wales with everyone having the chance to fulfil their potential.

**Paul Chaney**

Paul Chaney is a lecturer at the Institute of Welsh Politics, University of Wales, Aberystwyth. He has published a number of articles on political and social issues in Wales. His research interests include public policy and administration, governance and equality issues.

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