

Section 75

Review

**THE SECTION 75 EQUALITY DUTY –
AN OPERATIONAL REVIEW**

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**The Northern Ireland Section 75 Equality Duty: An
International Perspective**

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Abstract

'Mainstreaming' equality came to international prominence in the mid-1980s. This approach of *promoting* equality contrasts with anti-discrimination laws designed to protect the rights of individuals in that it is concerned with transforming public decision-making processes and resource allocation. It requires making the concerns and experiences of hitherto marginalised and discriminated groups an integral dimension of the design, implementation, monitoring and evaluation of all policies and programmes. This holistic approach has developed rapidly and has been endorsed and adopted by countries and supranational organisations around the world. However, despite its widespread acceptance, in the two decades since mainstreaming came to international prominence, there have been very few detailed evaluations of the various approaches developed in different countries.

A survey of the published literature reveals that some countries and organisations have favoured a 'light-touch' approach to mainstreaming - based upon enabling legal and institutional mechanisms, whereas others have adopted a more regulatory approach with an emphasis on monitoring, compliance and legal enforcement. This paper is concerned with an example of the latter approach. The 'Section 75' statutory equality duty, as set out in the *Northern Ireland Act (1998)* has been described as 'unique and world leading'. It requires strategic practice that compels public sector agencies to mainstream equality. It is singular in both its broad scope and its use of strong regulatory and monitoring mechanisms. Here we contrast the N.I. duty with an extensive range of international approaches to mainstreaming, and examine the way in which the S.75 duty has been implemented. Our discussion reveals that whilst the initial operationalisation of the pioneering N.I. equality duty has impacted upon its overall effectiveness, it nevertheless has great utility. Important lessons can be learned from the Northern Ireland experience, lessons that can inform the contemporary approach to promoting equality in a variety of national and international contexts. Moreover, the evidence set out in this paper indicates that in several respects, the N.I. duty reflects the future trajectory of international approaches to promoting equality.

Introduction

Within an international context, support for mainstreaming has grown rapidly over the past two decades.¹ Our primary purpose here is to determine where the 'Section 75' statutory equality duty, as set out in the *Northern Ireland Act (1998)*, fits into the growing number of measures undertaken around the globe to mainstream equality in public services and public policy making. The S.75 duty is an important area of inquiry, for recent academic analyses have concluded that it is: 'the single most extensive positive duty imposed in the UK'² - and, moreover, that - 'Northern Ireland's model of mainstreaming is both unique and world leading'.³ Yet, locating this development in a wider context is a challenging prospect because 'research in the area of mainstreaming remains in the development stage'⁴ not least because it 'is still a strategy in full development'.⁵ In the two decades since the concept came to international prominence, there have been very few detailed evaluations of the various approaches developed in different countries.⁶ That 'the monitoring and analysis of gender mainstreaming in global governance ... remains a promising area for further study'⁷ is evidenced by even the most cursory review of the literature. Despite a growing number of individual case studies relating to various national approaches to mainstreaming, and a (markedly small) number of comparative analyses, little evidence has been collated to determine the current trajectory of mainstreaming in an international context. Is, for example, the present trend for a 'light-touch' approach to such issues based upon enabling legal and institutional mechanisms that, on the whole, rely upon consensus and political will to achieve equality outcomes? Or, as seen in Northern Ireland, is there a move towards a more regulatory approach with an emphasis on monitoring, compliance and legal enforcement? Here we set the N.I. duty alongside a range of international approaches to mainstreaming, and examine whether the way it has been operationalised has constrained or maximised its potential to mainstream equality and the broader environment of human rights and social justice. We also make a number of recommendations as to how the duty's effectiveness might be enhanced.

This paper is based upon a review of secondary published sources and official publications. The limited number of studies in this area of inquiry has necessitated strong reliance upon the 'grey' literature of non-governmental organisations and groups concerned with the promotion of equality. Initial attention is placed on the nature of the

mainstreaming concept. Subsequently, a brief summary of the Northern Ireland duty precedes a global survey of the governmental and organisational approach to the promotion of equality and application of mainstreaming at both supranational and national levels. Our discussion concludes with a summary of the position and significance of the N.I. duty within an international context.

What is mainstreaming?

Origins

A recent analysis of future development of equal opportunities policies concluded that: 'the capacity of the modern state - and the division over the consequences of strategies to introduce change - is a crucial aspect of contemporary politics across Europe and America'.⁸ As a new social and political priority, the mainstreaming concept was initially focused on gender equality and came to prominence at the 1985 Third World Conference on Women in Nairobi, Kenya.⁹ At this time it was also developing in the domestic policies of several Northern European countries, such as the Netherlands, Sweden, and Norway'.¹⁰ It came to wider attention at the 1995 United Nations (UN) World Conference on Women held in Beijing and it has subsequently developed into an internationally recognised approach to delivering gender equality outcomes in a broad range of organizational contexts.¹¹ Indeed, (gender) mainstreaming has been one of the most rapidly adopted, progressive social justice-oriented initiatives endorsed by the international community in the modern era. From a global perspective there are some similarities between European ideas and practices around mainstreaming and North American discourses and practices around 'managing diversity'.

Nature and Scope of the Mainstreaming Concept

Whilst the initial focus was on gender equality, in recent years, and in particular contexts, the mainstreaming concept has developed to incorporate a further range of equality dimensions such as disability, language, or ethnicity. Exceptionally, it has been based upon promoting equality 'for all people'.¹² Importantly, mainstreaming has been conceptualised as 'a social justice-led approach to policy making and service delivery'.¹³ There are competing definitions of the concept. The following example can

be applied to all marginalised - or so-called 'minority' groups - for it captures the essence of the concept. Namely:

a 'strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality'.¹⁴

An alternative definition is provided by the Council of Europe:

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

Gender mainstreaming cannot replace specific policies which aim to redress situations resulting from gender inequality. Specific gender equality policies and gender mainstreaming are dual and complementary strategies and must go hand in hand to reach the goal of gender equality'.¹⁵

A full discussion of mainstreaming theory is beyond the present purposes rather the principal characteristics of the approach will be set out as a framework for later discussion of international examples.¹ Indeed a brief review of the literature shows it to be a contested concept.¹⁶ Mainstreaming equality, we have argued elsewhere, is underpinned by three principles:

- *treating the individual as a whole person*
- *democracy*
- *equity and justice*

¹ A list of key publications on the concept and application of mainstreaming is included in Appendix One - 'Mainstreaming Theory and Practice: International Perspectives'.

It requires putting in place the following factors:

- *appropriate institutional arrangements,*
- *awareness raising,*
- *training,*
- *expertise,*
- *use of mainstreaming tools,*
- *reporting mechanisms,*
- *'commitment from the top',*
- *incentives to build 'ownership', and*
- *securing necessary resources.*¹⁷

The tools used depend on the equality dimension. For gender, it would involve gender disaggregated statistics, gender budgets, gender impact analyses, gender proofing, monitoring and evaluation and 'visioning'.

Another account highlights the following elements as integral to mainstreaming: *principles* (setting out commitment to and conceptions of equality), *systems* (consisting of strategies, policies, structures, mechanisms through which these principles can be put into practice) and *tools*, and *techniques*. The later fall into three broad categories: analytical, educational, and consultative and participatory.¹⁸

Such contrasting perspectives and nomenclature lend credence to the widely-held view that mainstreaming is an 'active process' that involves complex interplay of all the foregoing elements. A recent international review of mainstreaming concluded that :

'a great deal has been learned since the phrase 'gender mainstreaming' first entered the international vocabulary, but there is much more to be done. Lessons need to be more broadly shared and utilized to make required changes, particularly at policy and institutional levels, and the remaining challenges to gender mainstreaming need to be identified and addressed'.¹⁹

The Northern Ireland Duty

Origins

Over the past decade, Northern Ireland has been the locus of innovative practice in the application of mainstreaming. The first phase of this active engagement with the development of the concept stems from the Policy Appraisal and Fair Treatment (PAFT) guidelines introduced in the early 1990s. This required all new public policies and public services to be assessed for their impact on nine social categories: religion and political opinion, gender, race and ethnicity, disability, age, sexual orientation, marital status and dependency. Under these arrangements, if an adverse equality impact was identified, policy makers and service delivery agencies were required to *consider* altering the policy in order to offset or ameliorate the negative impact. However, there was no *requirement* for the policy to be changed. Overall, analysis has concluded that, whilst promising in its aims, PAFT was undermined by poor implementation.²⁰ Identified shortcomings included: the non-statutory basis of the guidelines, contradiction and lack of clarity between the guidelines and other policy imperatives, institutional resistance, and lack of technical knowledge and comprehension by (some) bureaucrats.²¹

Nature and Scope of the Duty

The second phase of the development of mainstreaming, and the subject of this paper, relates to the replacement of PAFT by Section 75 of the *Northern Ireland Act (1998)*. The latter effectively put PAFT on a statutory basis by placing an *active duty of promotion* of equality on designated public authorities. A full discussion of the nature of the S.75 duty is beyond present purposes and has been extensively covered elsewhere.²² However, the principal features of the duty are as follows:

Under Section 75 of this Act, named public authorities are required to have due regard to the need to promote equality of opportunity –

- Between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- Between men and women generally;
- Between persons with a disability and persons without; and
- Between persons with dependants and persons without.

A public authority is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

Each public authority must have an equality scheme in place, as both a statement of its commitment to the statutory duties, and a plan for performance on the duties. Public authorities must assess the equality impact of their policies and publish the outcome of this. In addition, consultation with those affected by public policy decisions is at the heart of the new law. Equality schemes spell out an authority's arrangements for consultation on the duties and on the likely impact of policies. Moreover, the duty to promote equality is carried out through the Equality Impact Assessment Process (EQIA). If a public authority's assessment of the impact of a policy shows a possible 'adverse impact' on any group, it must consider how this impact might be reduced, and how an alternative policy might lessen any adverse impact that the policy may have. The public authority must also show that it considered how any alternative policies might better achieve the promotion of equality of opportunity.²³

Promoting Equality: A Global Overview ²⁴

Wide international variations exist in the contemporary legal basis for the promotion of equality of opportunity by national and federal governments. Such legal instruments are significant, for, as in the case of the N.I. duty, they underpin - and often determine the scope of - attempts to mainstream equality. Some polities such as Canada have strong legislative frameworks that concentrate primarily on the promotion of gender equality. Others have made extensive use of internal government policy directives to this end (e.g. Sweden). Several countries, such as Ireland and Spain, have developed equality legislation that moves beyond gender equality to encompass other social groupings. Exceptionally, as in the case of some U.S. municipalities,²⁵ the Greater London Authority, and national government in Wales, law requires 'an approach to eliminate discrimination and ensure equal opportunity ... in a way that meets ... the needs, roles, and responsibilities of all persons'.²⁶

Within a global historical perspective, between 1950 and 1990, more sophisticated legal concepts and mechanisms developed to tackle indirect discrimination, promote equal pay between men and

women, and facilitate affirmative action in the pursuit of greater equality. Such developments took place across Europe, Scandinavia, India, Canada and the USA. The measures introduced during this period were generally more complex than the pre-existing anti-discrimination laws. The latter were generally limited to retrospectively redressing an immediate wrong, rather than removing discriminatory practice across an organisation. In most industrialised countries affirmative action was - and continues to be - permitted only in tightly circumscribed situations.

Amongst industrialised nations, Australia and New Zealand have been the countries with the least developed labour market equality measures. Yet such comparative lack of progress was not restricted to the southern hemisphere. The European Union was equivocal during the 1980s on the extent to which it should adopt indirect discrimination, equal pay and affirmative action measures. In contrast, in the USA:

‘the origin of affirmative action programmes against discrimination can be found in federal government initiatives dating back to the late 1960s, but the antecedents to those efforts can be traced to federal policies developed much earlier, in the 1930s and ‘40s’.²⁷

In Canada and Northern Ireland, recent developments have led to a revised approach to equality, one that has moved from securing absence of discrimination towards achieving equality of outcomes. In the former case ‘employment equity’ policies were developed throughout the 1980s. For example, the *1985 Employment Equality Act* sought to address ‘systematic discrimination’ and introduced compulsory monitoring for federally regulated employers and permitted a variety of affirmative action interventions short of quotas.²⁸ In India, quotas formed part of affirmative action. Public sector job reservation policies were directed at redressing historical injustice experienced by ‘dalits’² and ‘scheduled tribes’. The latter strategy has a comparatively long history and can be traced back to measures that were instituted in the 1950s (and expanded after 1990).²⁹ From a global perspective, most states uphold the view that those in breach of equality law are assumed innocent until proven guilty. In South Africa however, the *Promotion of Equality and Prevention of Unfair Discrimination Act*

² hitherto often referred to as ‘untouchables’ by English speakers.

(2000) puts the onus on the person accused of discrimination to prove their innocence.

Despite such a perplexing international array of laws and approaches underpinning contemporary attempts to mainstream equality, it is evident that most apply in industrial and post-industrial societies, and/or former colonies and/or members of the British Commonwealth. As a result, much of the world's population is not directly affected by these legal and political equality initiatives. Even when countries purport formally to promote equality, the reality for citizens is often different. As a leading account of women's international legal rights concludes:

'regardless of all the international standards and accompanying national legislation, unless there is resonance in national civil society, there is little scope for real transformation. Although international civil society has been active in the field of women's rights, at the national level, when it comes to family and community in many countries, civil society is far more conservative... Women's groups working at the national level in many Asian and African countries are facing innumerable obstacles.'³⁰

As the following discussion illustrates, the 'engines' of equality reform, and as a consequence the development of mainstreaming, are to be found in the social, political and legal initiatives linked to government, official bodies and NGOs that operate at a supranational, national and regional level.³¹

Mainstreaming: Supranational Organizations ³

Existing analyses have highlighted the way in which (gender) mainstreaming has developed largely as the result of the actions of supranational organisations acting in a rapidly changing system of global governance.³² Indeed, according to such a view, 'without specific attention, resources and activities, information on the details of gender mainstreaming risks staying contained within the setting where it is developed'.³³ Accordingly, supranational organisations have a key role to play in the context of emerging democracies and international development. The concept has been adopted officially by a wide range of supranational

³ See Appendix Two: 'Mainstreaming Practice (- and Associated Issues): Selected International Web Resources'

organisations, including: the U.N. Human Rights Committee, the World Health Organisation, the Council of Europe, World Bank, the United Nations Development Programme, the Commonwealth Secretariat, the Organisation for Security and Cooperation in Europe, and the European Union. As the following discussion of contemporary approaches to mainstreaming equality reveals, many of key supranational organisations have made significant progress in relation to: establishing appropriate institutional arrangements, awareness raising, training, expertise, reporting mechanisms, 'commitment from the top', incentives to build 'ownership', and securing necessary resources.

United Nations

The 1995 United Nations Action Plan called on member governments to 'promote an active and visible policy of mainstreaming a gender perspective ... in the monitoring and evaluation of all policies and programmes'.³⁴ To varying extents, this call was heeded by both supranational and national government bodies. Official UN analysis of over 150 governments around the world reveals that varying progress is being made. Rather than evidence of a wholesale embracing of the approach, this study found that individual governments 'tend to reflect national priorities and limit themselves to some critical areas of concern'.³⁵ In 1997, the UN Council endorsed a raft of 'Principles for mainstreaming a gender perspective in the United Nations system'. The Council resolution stated that: 'gender mainstreaming must be institutionalized through concrete steps, mechanisms and processes in all parts of the United Nations system'.³⁶ The United Nations Development Programme (U.N.D.P.) provides a good example of the positive impact of the Resolution.⁴ As recent academic analysis has concluded: 'as well as [being] the dominant framework of that organisation, it has provided a more hospitable environment for advocates of gender mainstreaming in the 1980s and 1990s, resulting in its relatively rapid acceptance by the U.N.D.P.'.³⁷

European Union

Significant progress was made towards gender mainstreaming in the European Union during the 1990s. This was largely driven by the Equal Opportunities Unit of the European Commission and the Women's Rights Committee of the European Parliament. In 1996,

⁴ See also discussion of the ILO - below.

the European Council of Ministers adopted the Fourth Action Programme (1996-2000) on Equal Opportunities for Women and Men. In this policy statement mainstreaming was the single most important element. The Programme was formally ratified in the 1997 Amsterdam Treaty which made equal opportunities for men and women a central objective of the European Union. Importantly, Article 13 of the Treaty, the Directive on Employment, broadened the focus of equality initiatives beyond gender and set out to prevent discrimination on the grounds of age, sexual orientation, religion, race and disability in the workplace. Following the Fourth Action Programme, the European Commission has developed a set of institutions and procedures to mainstream equality across a broad range of E.U. policies. The latter measures include: the Equality Group of European Commissioners,³⁸ and a group of gender mainstreaming officials in each of the European Commission Directorates-General (DG). The latter operate to represent a gender perspective in the policy making of each DG and to co-ordinate policy with their counterparts throughout the E.C.³⁹

According to its own assessment, gender mainstreaming it is now 'a central feature of European Union policy-making in all sectors'.⁴⁰ However, recent academic analysis is more cautious yet makes a positive overall assessment. It concludes that:

'the policy outcomes of gender mainstreaming have varied starkly across issue-areas in the E.U., proceeding most readily in the social and regional policy arenas and encountering the greatest resistance in the area of competition policy...Nevertheless, some six years after the adoption of gender mainstreaming as official E.U. policy, the spread of gender issues across the policy arena is impressive, and merits further monitoring in the years to come'.⁴¹

Further analysis of the EU policy process concludes that the Union has generally adopted an *integrationist* approach to gender mainstreaming. This refers to the tendency to introduce a gender perspective into *existing* policy processes, rather than challenge the existing policy paradigms and rethink the fundamental aims of the EU from a gender perspective'.⁴²

Contrasting attitudes towards mainstreaming are evident in two important recent legal and constitutional developments. The E.C.'s

European Governance White Paper makes little reference to equality matters.⁴³ In contrast, the *Draft Treaty Establishing a Constitution for Europe* is potentially a landmark document. Article Two places 'equality' (along with non-discrimination) as one of the European Union's core values; Article Three states that 'equality between women and men' is also one of the E.U.'s core objectives; and Article 44 ('The principle of democratic equality') states that 'in all its activities the Union shall observe the principle of the equality of citizens'.⁴⁴ In addition, the European Convention of Human Rights must be factored into the legal and policy framework underpinning the development of mainstreaming in the EU. Article 14 guarantees citizens certain rights to apply without discrimination with respect to sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

World Bank

The World Bank has traditionally been more closed to the international women's movement than other supranational bodies. Leading analysts⁴⁵ state that this has been caused by the relative paucity of élite allies and access points, and the dominant neoliberal organisational philosophy within the Bank. These factors have resulted in a relatively late acceptance of gender mainstreaming.⁴⁶ However, despite this, research has shown that 'when the World Bank did eventually adopt mainstreaming as official policy, its greater implementation capacity resulted in a record of implementation that arguably exceeds that of the U.N.D.P. [United Nations Development Programme].'⁴⁷ The World Bank's latest detailed report (c.2004) on the global implementation of its gender mainstreaming strategy list the following areas of progress:

- the completion of country gender assessments ('most of which were judged to be satisfactory');
- increased attention to gender issues in core diagnostic economic and sector work, especially poverty assessments;
- increased attention to gender issues in country assistance strategies; increased attention to gender issues in project design and supervision; completion of a World Bank Institute strategy (WBI), and action plan for integrating gender into its programs, and initiation of its implementation, following the appointment of a WBI gender coordinator; and

- greater use of partnerships for gender mainstreaming.⁴⁸

Despite evident, broad-based progress, the Bank identified the following extensive 'priority actions to address significant challenges':

- dissemination of and follow-up to country gender assessments (CGA) through
 - (a) active dissemination of the CGA review to Bank operational staff, and clients;
 - (b) dissemination of good practice examples, to provide ideas for effective follow-up to completed CGAs; and,
 - (c) targeted assistance in selected countries with recently completed CGAs;
- inclusion of gender analysis, and complementing it with gender-responsive actions and monitoring in economic and sector work, and lending programs - with particular attention to gender issues in sectors other than education and health, especially in sectors where research suggests there are often important gender issues (rural development, social protection, private sector development, water and sanitation, and transport);
- engendering client and staff capacity building.

Future monitoring of the gender mainstreaming strategy will be reported in the Sector Strategy Implementation Updates.⁴⁹

The Council of Europe

Founded in 1949, the Council of Europe (CoE) comprises 45 countries (21 of which are from Central and Eastern Europe). Notably, the Council's political and strategic influence extends beyond Europe: the United States of America, Canada, Japan and Mexico have 'observer status' on the Council. Foremost of the Council's aims are those to: 'defend human rights'; 'develop continent-wide agreements to standardise member countries' social and legal practices'; and - 'to strengthen: democracy and human rights, social cohesion, the security of citizens and democratic values and cultural diversity'.⁵⁰ Significantly, in October 1987, and - in the wake of the UN Third World Conference on Women - the CoE's Committee of Ministers resolved to:

'encourage decision-makers to take inspiration from the [1985 UN] report [on gender mainstreaming] in order to create an enabling environment and facilitate conditions for the implementation of gender mainstreaming in the public sector'.⁵¹

The CoE's assessment of the progress made amongst members in gender mainstreaming highlighted that 'the strong political rhetoric about gender mainstreaming is not always matched by an equally strong development of concrete and detailed attempts at designing gender mainstreaming projects'.⁵² Recognising the scale of the challenge presented by mainstreaming, the report continued, 'the problem does not seem to be a strong resistance to gender mainstreaming, but rather "cold feet" and a reluctance to experiment. Gender mainstreaming involves a fundamental reorientation and state bureaucracies are extremely hard to change'.⁵³ The CoE's survey of emerging practice in relation to mainstreaming in its member countries concludes by highlighting key challenges. These suggest the need for a more rigid legal, institutional and procedural framework in order to successful mainstream equality. The report states:

'it seems that, at the national level, the focus is mostly on analytical and educational tools. Tools involving consultation and participation are mainly found in gender mainstreaming initiatives at the local or regional level, even in countries that are known for their consociational policy styles...Even if tools are available, gender mainstreaming then is largely dependent on good will and coincidence, and this obviously weakens the strategy. The lesson learnt is that the accent should not only be on developing more and better tools, but simultaneously on the anchoring of tools in policy processes, and on sanctioning their use'.⁵⁴

Organisation for Security and Cooperation in Europe (O.S.C.E.)
As in the case of the World Bank, the O.S.C.E. was slow to embrace a mainstreaming approach to its work. Yet recent research has concluded that this organisation presently 'demonstrates the potential of gender mainstreaming in a traditional "security" organisation which opened its doors to the "human dimension" in the 1990s. Here, moreover, as in other cases, the contribution of a few dedicated member governments has proven vital in establishing the financial and human resources for the implementation of a successful mainstreaming

programme'.⁵⁵ Recent reports from the OCSE highlight the way in which it has begun to put in place many of the institutional prerequisites for gender mainstreaming. These include:

- *technical expertise* (e.g. a unit of gender specialists in the Secretariat and the Office for Democratic Institutions and Human Rights);
- *awareness raising and training* (e.g. the OSCE Strategy on Capacity-Building through Training that aims to 'incorporate a gender aspect into the training of all staff in order to introduce the policy of gender mainstreaming, to raise awareness of gender issues, and to facilitate the work of, and co-operation with, the gender advisers');
- *data gathering* (e.g. 'the Gender Adviser in the Secretariat will analyse the situation of women within the OSCE Secretariat, institutions and field missions, regularly prepare gender-disaggregated statistics');
- *monitoring and impact assessments* (e.g. 'All OSCE institutions and field operations will report to the Secretary General on an annual basis about their achievements related to gender mainstreaming in their work');
- *individual policy initiatives* (e.g. staff training for over 300 mission members, on OSCE commitments regarding gender equality and combating trafficking in human beings);⁵⁶
- the development of a *strategic approach* (e.g. the adoption of the Gender Plan for Action and associated documents).⁵⁷

North American Free Trade Agreement

The North American Free Trade Agreement has neither explicit mainstreaming mechanisms nor policies. Rather, in the place of a central strategy, individual initiatives have developed. These have attempted to mainstream equality through measures to increase female participation in the labour force, issues of part-time labour and flexible working hours, tackling the gender pay gap, and the transformation of female education levels in the North America Free Trade Agreement Area.

Commonwealth Secretariat

The 1971 Declaration of Commonwealth Principles set out the aim of 'equal rights for all' and adherence to 'the principles of human dignity and equality'. The Commonwealth Secretariat, the principal organisation of the Commonwealth, implements the decisions taken by the 53 member governments. It has instituted a series of inter-governmental ministerial meetings between (what it terms as) Women's Affairs Ministers in order for governments to discuss and exchange best practice on gender equality issues. The Secretariat was mandated by the Heads of Government Meeting (Durban, 1999) and the 5th and 6th Women/Gender Affairs Minister's Meeting (Port of Spain, 1996 and New Delhi, 2000), to: 'promote the fundamental political values of the Commonwealth through setting two 30% targets to increase women's participation and representation in (i) political decision-making; (ii) conflict/peace initiatives'. Official texts assert that, 'the Secretariat is committed to mainstreaming gender through policy advisory services and programmes on democracy, institutional development in conflict and post-conflict situations'.⁵⁸ Accordingly, the Commonwealth Secretariat has overseen the publication of a range of technical documents designed to promote best practice in gender mainstreaming. The Secretariat has pursued a sectoral approach to disseminating gender mainstreaming advice, as evidenced by recent publications on: health,⁵⁹ tax revenue collection and economic policy,⁶⁰ agriculture and rural development,⁶¹ and multi-lateral trade.⁶² In addition, generic mainstreaming advice has been developed through the Gender Management Toolkit designed to 'implement an holistic approach to integrating gender analysis into the mainstream of decision-making and action at all levels by government, civil society and other stakeholders'.⁶³

International Labour Organization (ILO)

The ILO has identified gender as an issue cutting across all of its programmes and activities. In 2001 it published its 'Action Plan on Gender Equality and Gender Mainstreaming in the ILO'. The Action Plan covers:

- (i) a new methodology for analysis to ensure gender concerns are incorporated in planning, programming, implementation, monitoring and evaluation.

- (ii) gender-sensitive data, and gender-specific development tools and indicators; and
- (iii) implementation of gender balance in its personnel policy and practices.

The ILO asserts that: 'its two-pronged approach to gender equality is to mainstream gender concerns in all its policies and programmes. This includes gender-specific interventions, based on gender analysis, which may target only women or only men, or women and men together'.⁶⁴ The Organisation continues: 'the ILO considers gender equality a key element of its vision of Decent Work for All toward social and institutional change to bring about equity and growth. Gender equality, along with development, has been identified by the ILO as a cross-cutting issue of the strategic objectives of its global agenda of Decent Work'.⁶⁵

British Council

The British Council has representation around the world and operates to promote education, international co-operation, and better governance. It has specific programmes in relation to law and human rights, ethnicity and communities, and gender. The Council is also concerned with economics, management, modernising government and promoting participative democracy. It has adopted gender mainstreaming as an approach to inform its work. Official Council publications note that: 'We work with women and men globally to promote the status of women and their participation in the political, social, economic, cultural and legal structures in their countries. Our work in gender equality focuses on the need to address the barriers that women face in all areas of their lives, which impede their development as individuals'.⁶⁶

Specific initiatives by the Council include:

- Funding small-scale projects and programmes with local partners overseas in order to strengthen organisational capacity and raise awareness of the need to mainstream gender and tackle issues of gender justice;
- Supporting key individuals overseas, both men and women to integrate gender issues into policy and planning processes at local and national levels;

- Developing networks at regional and global levels to disseminate experiences and learning which help women to tackle barriers of inequality;
- Building partnerships between higher education institutions in the UK and overseas to integrate gender into curricula and develop research capacity;
- Working across different sectors to promote a better understanding of the need to mainstream gender through all areas of work and experience;
- Bringing together men and women from different countries and regions working to improve the status for women e.g. British Council international seminars;
- Ensuring that British Council personnel, training and monitoring policies encourage commitment to gender equality.⁶⁷

Mainstreaming: Selected National Case Studies

“... governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that, before decisions are taken, an analysis is made of the effects on women and men, respectively.”

(Beijing Platform for Action, 1995, para 79)

As the following review reveals, there is a greater diversity in the individual national responses to the 1995 United Nations Action Plan that called on member governments to ‘promote an active and visible policy of mainstreaming a gender perspective ... in the monitoring and evaluation of all policies and programmes’. Some countries have progressed little beyond enshrining a commitment to equality in the constitutions, many place central reliance on anti-discrimination laws, and a growing minority are shifting towards the implementation of positive equality duties and/or a mainstreaming focus that extends beyond gender to embrace other social groupings.

European Overview

A recent survey of gender mainstreaming in Europe presented the following 'thumbnail sketch':

'Within Europe, it seems that the countries that already had a long history of gender equality policies, or a history of attempts at integrating a gender perspective in their regular policies before the Beijing conference, such as the Netherlands, Sweden and Norway, had a head start. It seems that countries with a historical strong accent on legislation in matters of gender equality, such as the United Kingdom and Denmark, had more problems adjusting to the perspective of gender mainstreaming, as it took them more time to get started. It seems that young bureaucracies, such as the Flemish Community and Slovenia, had an advantage in more easily introducing the new strategy of gender mainstreaming. Moreover, it becomes evident that it is extremely difficult for Central and Eastern European countries to start gender mainstreaming, as they lack almost all prerequisites, and often even have a problem to get gender equality anywhere on the political agenda'.⁶⁸

Republic of Ireland

Recent developments in Ireland have seen: a broadening of the scope of equality law, the linking of the equality and human rights agenda, and the development of a single equality body. The latter, the Irish Equality Authority, was established in October 1999. Its self-stated mission is 'providing leadership in ... mainstreaming equality considerations across all sectors'.⁶⁹ Indeed, the Republic of Ireland provides one of a limited number of global examples of what has been termed a 'participative-democratic model' of mainstreaming.⁷⁰ Irish equality law is principally set out in the *Employment Equality Act (1998)* and the *Equal Status Act (2000)*. These statutes outlaw discrimination in employment, vocational training, advertising, collective agreements, the provision of goods and services, and other opportunities to which the public generally have access. This legislation proscribes discrimination in relation to nine distinct grounds: gender; marital status; family status; age; disability; race; sexual orientation; religious belief; and membership of the traveller community.

Mainstreaming work has been undertaken by the Authority and public sector agencies in relation to equality impact assessments (EQIAs) and data gathering. A prominent example is the Equality Authority's 2001 strategy *Building the Picture: The Role of Data in Achieving Equality*.⁷¹ This provides a detailed and careful consideration of systems of data collection, both qualitative and quantitative, which can be used to inform equality issues. In *Building the Picture*, the argument is advanced that comprehensive disaggregated data (broken down by all equality categories) should be made generally available in relation to: social status, family status, economic status, employment status, unemployment situation, occupation, income, educational attainment, training, housing, health, time use, assets, care services, violence, dependants, geographical area, and representation. The strategy states that equality mainstreaming within organisations requires data in relation to: levels and patterns of expenditure, composition of participants on programmes, level and nature of provision of services, composition of beneficiaries, representations within decision-making structures, staffing and training with respect to equality, targeting of groups vulnerable to inequalities and discrimination in policy and programmes, and the establishment of systems for monitoring and review of policies and programmes. Overall, this approach to mainstreaming is founded on the belief that: 'it is crucial that systems and approaches to data collection are grounded in an awareness of the different situations affecting different and overlapping groups within society. This means that effective consultation with groups and organisations representing different strata must be systematically built into data design, gathering and dissemination systems.'⁷²

A further example of the Irish approach to mainstreaming is set out in the document: *Gender Proofing and the European Structural Funds: Outline Guidelines* (c.1999). This was produced by the Department of Justice, Equality and Law Reform.⁷³ The document argues that gender proofing should be characterised by two main features: the participation of affected groups, and the use of gender impact assessments.⁷⁴ A further example of this participatory dimension is evident in the work of the Irish government and the actions of the Cabinet. Whilst it has chosen not to legislate in this area, it has adopted gender guidelines which specify that *all* proposals approved by Cabinet should include Gender Impact Assessments (GIAs).⁷⁵

Wales and Scotland

In the wake of the (re-)establishing of limited self-government in these two nations in 1999, distinct approaches to the promotion of equality have developed. Constitutional reform has created enabling contexts in which the promotion of equality of opportunity can develop. From the outset the Executives and legislative bodies in Wales and Scotland undertook to use the revised constitutional and legal arrangements in order to pursue a mainstreaming approach to equality of opportunity. In Wales the equality agenda has been partly driven by a unique fourth generation equality duty that requires the promotion of equality for 'all persons'. In Scotland the executive is able to use an enabling statutory equality clause to develop its equalities work. In both countries, factors underpinning moves towards a mainstreaming approach to developing public policy include: a favourable political climate, increased engagement with NGOs, and significantly increased proportions of women elected to national politics.⁷⁶ In Wales and Scotland mainstreaming has developed in a manner that goes beyond gender equality. To date appropriate institutional mechanisms for mainstreaming such as equality policy machinery, and parliamentary scrutiny committees have been combined with a greater institutional capacity to promote a mainstreamed approach (based on increased levels of knowledge, awareness, expertise, and resources). Further work is required in relation to the full implementation of a thoroughgoing model of mainstreaming and systematic reviews of the future development of mainstreaming in the post-devolution era have been undertaken in the past two years.⁷⁷

United Kingdom

Since 1997, the UK government has undertaken a number of initiatives to reform the approach towards gender and other modes of equality. These have formed part of the executive's overall plan to modernise government. Within Whitehall, a Women's Unit was created in central government for the first time. Its purpose was 'to ensure that the voices of women in the UK are fed directly into policy making across government'.⁷⁸ However, a recent assessment has concluded that disappointing progress has been made. It stated that: 'the first Blair government found the notion of mainstreaming difficult to incorporate in practice'.⁷⁹ Despite such a lack of progress, the second term of the UK Labour government has seen some propitious developments that promise to accelerate progress towards a mainstreaming approach by government.

These include: the 'fourth generational' aspects of the *Disability Discrimination Bill (2003)*, a renewed commitment to introduce a statutory duty to promote gender equality in the public sector, and most significantly, the publication in May 2004 of the White Paper⁸⁰ establishing the integrated Commission for Equality and Human Rights (CEHR).⁵

Sweden

Since 1994, Sweden has developed its gender mainstreaming strategy at the national, regional and local levels. Pilot projects have been set up, procedures put in place, and many new and innovative instruments have been constructed.⁸¹ At government department level, the Swedish experience is underpinned by a 'flying gender expert' who is available to join ministries and help them to develop methods and routines which ensure a gender perspective in the policy processes. Since 1996, Swedish local authorities have been involved with the JAMKOM project which uses a technique known as the R method to incorporate gender equality issues into the work of local authorities. The R (or 3R method) is based on gender and action research methods, and stands for Representation, Resources and Realia.⁸² At present the scheme appears to focus on internal matters (primarily representation on committees and boards, resources tied to members of those boards) but the principles could be extended to other policy areas. However, it is unlikely that this scheme as it currently operates will be particularly illuminating of wider concerns. A further initiative in Sweden is 'Sida' (Swedish International Development Co-operation Agency), the primary focus of which has been training and the production of a series of handbooks dealing with mainstreaming across public sector agencies.⁸³

Finland

The Finnish mainstreaming project began in 1998. Initially described as a piece of 'action research', analysis has concluded that: 'the methodological package of mainstreaming and the eventually changing practice will be brought about through a dialectical and empowering monitoring and evaluation of these projects in collaboration with the participants.' A number of

⁵ For a fuller discussion of developments in the UK see the paper by McCrudden in this publication.

ministries have given an undertaking to mainstream particular projects but the project is still at an early stage.⁸⁴

Norway

Norway, was one of the first countries to adopt the goal of gender mainstreaming. However, it did not concentrate on the development of mainstreaming instruments, but integrated gender equality in its consensus-oriented style of policy making.⁸⁵ Since 1977, all ministries are - in theory - required to promote gender equality. Analysis shows that, since 1991, the accent has been placed on institutionalising gender mainstreaming, with Secretaries of State being given responsibility for the progress made in this area.⁸⁶ As a result, since 1998, a Committee of Secretaries of State responsible has been established. This meets every six weeks and discusses all policy and legislative proposals before they are presented to the Storting.⁶ In addition, policy development guidelines have been drafted to assess all relevant policy proposals for their gender impact. Overall, contemporary analysis concludes that there is great variability between government departments in terms of how projects have developed.⁸⁷ A further, recent noteworthy development is the extension of the Norwegian Equality Ombudsman's remit to include the promotion of equality in respect of the private sector.

Netherlands

Gender mainstreaming was not a new concept to the Netherlands for it can be seen as a further elaboration of a pre-existing strategy known as 'facet policy'. This developed in the 1980s and stated that equality should be seen as a facet of all policies.⁸⁸ The Netherlands' Gender Impact Assessment (GIA) model was launched in 1994 as an instrument that 'could assess the impact on gender relations of any policy proposal at the national level.' It was designed to be used 'before the final decision on a given policy proposal is taken.' That is, the assessment relates to an assessment of new policies prior to implementation. The development of SMART (Simple Method to Assess the Relevance of policies To gender) formed an integral part of the overall development of the Netherlands' approach to gender impact assessments. SMART consists of only two questions: is the policy proposal directed at one or more target group? And, are there differences between women and men in the field of the policy

⁶ the Norwegian parliament

proposal (with regard to rights, resources, positions, representation, values and norms)? A recent evaluation of this technique has concluded that it: 'may prompt analysis of differences between men and women and initiate thoughts on how to deal with the gender relevance of the proposal but does not offer a comprehensive tool for policy review.'⁸⁹ As a result, other techniques are presently being developed.

In respect of the Netherlands' institutional equality infrastructure, all government advisory bodies are required to provide advice on equality matters when relevant for their own area. Recent research shows that ultimate responsibility for equality monitoring lies in the hands of Parliament.⁹⁰ Yet it has been demonstrated that this is only effective if there is clear political commitment that is supported by bureaucratic expertise.⁹¹

Belgium

The Flemish Gender Impact Assessment has taken its lead from the Dutch experience. It is an instrument which appears limited in scope and involves three steps:

- To trace the gender dimension of a policy proposal
- To estimate its size
- To formulate alternatives where necessary

The focus of this impact assessment centres on policy proposals rather than the review of existing policies.⁹²

Central and Eastern European countries (CEECs)

The political situation in CEECs has changed dramatically since the fall of communism in 1989. These countries are undergoing the twin processes of democratisation and 'europeanisation'. Accession to the EU in 2004 has resulted in reform of many of their political and economic institutions. However, recent analysis highlights the scale of the challenge if the accession countries are to be compliant with European gender equality directives. One source notes that: 'on the one hand, the creation of new democratic institutions would appear to offer an opportunity for an increase in women's political representation and the mainstreaming of gender interests. In reality, however, women are under-represented in decision-making institutions and sites of influence across the CEECs (e.g., parliaments, parties, trade

unions and social movements)'.⁹³ According to another analyst: 'the countries in Central and Eastern Europe are facing a transformation process that is beyond their institutional capacities, and as gender mainstreaming is extremely necessary in setting up the new democracies, supranational institutions and western countries should do everything possible to create windows of opportunity for gender mainstreaming'.⁹⁴

Against the background of such challenges, a recent EC report summarises the present preparedness of accession countries to meet EC law and gender mainstreaming directives by stating that: 'the majority of accession countries, in particular ... Czech Republic, Latvia, Lithuania, Hungary, Slovakia and Slovenia, are fairly well advanced in the process of alignment... Cooperation will continue with Romania and Bulgaria who have made significant progress towards alignment with Community law'. This assessment continues, 'transposing the law is not enough in itself. It is equally important to establish adequate institutional and administrative structures, in particular equality organisations and mediators as well as independent advisory bodies. Several countries, including the Czech Republic, Hungary, Latvia, Lithuania, Slovenia and Poland have already set up structures of this nature'.⁹⁵

Australia

In Australia, anti-discrimination law is the principal mechanism used to address equality issues. Individual states have passed statutes to promote equality in public services and public policy making. For example, the *Queensland Public Sector Management Commission Act (1990)* has established the institutional framework in order to 'ensure' and 'evaluate' that 'equal opportunity principles apply in management and employment in the public sector'.⁹⁶ This statute requires that the state's Public Sector Management Commission':

- 2.14(1) (j). ensure that equal opportunity principles apply in management and employment within the public sector;
- (ja) to assist units of the public sector in relation to EEO [Equal Opportunity in Employment] management plans;
- (jb) to evaluate the effectiveness of EEO management plans—
 - (i) in ensuring that equal opportunity principles apply in management and employment within the public sector; and

(ii) in achieving equal employment opportunity within the public sector⁹⁷

At a federal level the Australian Human Rights and Equal Opportunities Commission (HREOC) was established in 1986. Its principal role is to promote human rights and enforce anti-discrimination legislation by dispute resolution. The HREOC has a President and five specialist commissioners, who each have responsibility for the following equality strands: human rights, sex discrimination, disability, race - as well as a Aboriginal and Torres Strait Islanders commissioner who is concerned with social justice for the latter peoples. Analysis of the work of the strand-specific commissioners concludes that it is: 'very effective in providing a visible access point for stakeholders, complainants (in particular from very disadvantaged groups) and NGOs concerned with particular strands. They also provide a mechanism for ensuring that the needs and requirements of particular strands are not internally glossed over'.⁹⁸

United States of America

The US Equal Employment Opportunity Commission (EEOC) is a federal agency that was set up in accordance with the Civil Rights Act (1964). Following a recent broadening of the scope of federal equality law, the EEOC presently acts to promote equality along the lines of race, gender, and disability. Recent analysis shows that a major part of the EEOC's workload is based on retrospective investigation of complaints made under anti-discrimination laws relating to contemporary employment practices.⁹⁹ The Commission may bring legal action on behalf of complainants or in its own name. Over the past decade it has developed the way that it promotes equality through employer-directed outreach and education programmes, together with best-practice initiatives in relation to business. Expert analysis concludes that such measures: 'played a considerable role in promoting equality and the use of positive action to achieve diversity in the public and private sectors'.¹⁰⁰

Canada

The legal and institution equalities framework at a federal level in Canada is principally concerned with enforcing anti-discrimination law via a complaints process as well as with promoting human rights. The main federal compliance authority is the Canadian Human Rights Commission that was established in 1977. Analysis

has shown that it is: 'the dispute resolution process [that] has dominated the Commission's workload, ensuring that it has been criticised for being essentially reactive and demand-led rather than proactive and strategic'.¹⁰¹ In relation to the government policy process, research has revealed that consultation and the participation of external partners and members of equality groups in the policy process are seen as integral parts of wider equality-proofing processes in Canada. For example, the NGO Status of Women Canada has produced materials designed to assist policy makers in carrying out gender-based analyses. Such a methodology reflects impact assessment techniques as, for example, under this model the policy development/ analysis cycle is represented by eight steps, each with a series of structured questions associated with the development of policy proposals.¹⁰²

New Zealand

The New Zealand Human Rights Commission was established in 1977. Its principal functions include overseeing and enforcing the legislative prohibitions set out in the *Human Rights Commission Act (1977)*. The latter statute proscribes discrimination on grounds of sex, marital status and religious or ethical belief. Within this framework, equality is a *de facto* sub-set of the overall human rights agenda. Despite its anti-discrimination focus, the Commission also has general promotional duties in respect of the whole spectrum of New Zealand's human rights obligations and enforcement responsibility for equality of opportunity requirements. In 1996, and in order to promote a mainstreaming approach, the New Zealand Ministry of Women's Affairs produced a set of guidelines designed to provide a framework for gender analysis based on impact assessment procedures. In practice this six stage model¹⁰³ operates as a cross-cutting government method to promote gender equality.¹⁰⁴ Evident shortcomings in the promotion of equality were subsequently addressed by the *Human Rights (Amendment) Act (2001)*. This aimed to encourage an enhanced cross-strand approach to equality and human rights.¹⁰⁵

A recent assessment of gender mainstreaming initiatives in New Zealand highlighted 'the potential conflicts between the government's political agenda and the interests of diverse groups of women'.¹⁰⁶ This analysis continued: 'given the enormous challenge that gender analysis, properly done, poses to the existing distribution of resources and power, and in light of the deep-seated resistance to such change that is apparent, sustained

pressure exerted from outside government may be crucial in generating the political will that appears to be necessary if gender analysis mainstreaming is to be implemented successfully'.¹⁰⁷

India

The Indian constitution guarantees equality 'to all persons' (Articles 14 and 15). As a result the constitution states that all laws that are inconsistent with these Fundamental Rights are void (Article 13). In addition, the constitution sets out the rights of 'Scheduled Castes, Scheduled Tribes and the Other Backward Classes' (Articles 15(4), 16(4), and 29(2)). Article 15(4) authorizes the State to take positive action and 'make any special provision for the advancement' of the scheduled castes. This has resulted in legalised discrimination through a quota system that is applied to certain public posts and organizations in order to achieve greater equity between social and ethnic groups and redress historical patterns of discrimination. Recent research has illustrated how 'public interest litigation'¹⁰⁸ has successfully 'opened spaces for women's empowerment and social change' through the development of case law in respect to key areas such as domestic violence, rape, and employment law.¹⁰⁹ Despite this embryonic legal and constitutional equalities framework, India presently lacks the political will, and institutional and legal mechanisms to achieve a thoroughgoing mode of public administration that secures the mainstreaming of gender and other modes of equality.

The need for future research

The foregoing review of international practices highlights the clear need for a systematic, in-depth comparative study of the various approaches to mainstreaming. In spite of the extensive resources invested in developing a mainstreaming approach around the world, there is at present a failure of evidence-based policy-making. There is a strong need to inform the future development of mainstreaming by focusing on emerging equality outcomes in order to determine the most effective approaches to promoting equality. At present there is some evidence of complacency in regard to the development of the approach. The latter point was made in a recent study that reflected: 'to what extent have national governments, regional bodies or local authorities signed up to this approach?... the main difficulty in reviewing the development of gender mainstreaming is that many bodies utilising one or more of the tools will claim that they are "doing gender mainstreaming"'.¹¹⁰

The Operationalisation of the NI statutory duty

A number of criticisms of Section 75 have emerged since its implementation on 1st January 2000. Echoing the experience of implementing fourth generation equality duties elsewhere,¹¹¹ concerns have centred upon the lack of capacity on the part of civil society to respond to the requirements of S.75. Recent analysis of the implementation of the duty highlights 'consultation fatigue' amongst third sector organisations as a significant issue. Moreover, the increased costs of deepened participation and extensive consultation have had major resource implications for public and voluntary organizations. Yet there is limited evidence to suggest that this was fully calculated or budgeted for during the implementation of the S.75 duty. Furthermore, contemporary analysis has also focused on problems associated with, what has been termed, 'the 'scattergun' approach of including all new policies and all policy changes, within the ambit of the [S.75] initiative, largely regardless of their importance for equality'.¹¹² This is something that, according to this evaluation, 'has perversely weakened rather than strengthened the policy'.¹¹³

In addition, what has been seen as an excessive focus on process rather than outcome has, according to some experts, helped to undermine the political credibility of mainstreaming as an equality practice.¹¹⁴ The danger here, it is argued, is that one of the duty's principal strengths, namely its somewhat rigid and prescriptive approach (- one that *requires* action -) is at the same time overly bureaucratic. This raises concerns about what has been termed the 'tick box approaches to mainstreaming', namely, the danger that mainstreaming achieves *procedural*, but little by way of *substantive*, improvement in equality.¹¹⁵ Such an emphasis on procedure could also have the knock-on effect of contributing to a failure to develop joined-up policies for, under such an approach, too little consideration is given to linking equality monitoring and compliance with meeting Best Value and other performance measurement indicators.¹¹⁶

A further concern in the duty's operationalisation is the way in which S.75 does not fully engage with the contemporary conceptual development of 'equality' and the associated shift from an exclusive focus on equality of *opportunity* to a focus on equality of *outcomes*.¹¹⁷ Accordingly, it is vital that the economic dimension to equality is not lost, for, as leading analysis has argued, mainstreaming in relation to gender equality makes sense only when conducted in the context of significant structural socio-

economic fields such as taxation, welfare benefits, social housing, education and so on.¹¹⁸ Moreover, recent critical evaluation has outlined the way in which S.75: 'demonstrates the limitations of even-employment equity policy coupled with mainstreaming equality in the policy process since significant socio-economic inequalities of outcome endure along religious-political as well as gender and other lines.'¹¹⁹ In addition, an anomalous aspect of the N.I. duty's operationalisation is the fact that, unlike the situation in some polities,¹²⁰ the duty does not apply to the regional legislature itself (i.e. the Northern Ireland Assembly).

In assessing the N.I. duty in an international context, a key question that emerges is has the manner in which S.75 has been operationalised constrained or maximised its potential to mainstream equality and the broader environment of human rights and social justice? In short, the published evidence concludes that the necessarily pragmatic manner in which the duty was operationalised in a highly politicised environment *has* shaped its initial impact and effectiveness.¹²¹ It is, of course, not possible to establish counter-factual history, that is, to know with certainty that the some of outcomes would still have happened regardless of the specific circumstances in which the duty was implemented 2000-04. Nevertheless, the ECNI's adoption of a broadly non-litigious, 'name and shame' approach towards public authorities that are non-compliant - rather than making use of enforcement powers - must, in part, be seen in the light of the overwhelming initial opposition to the creation of the ECNI. Furthermore, some of the initial problems with operationalising the duty must also be seen in the context of the extremely short (sixteen week) period that the Working Group tasked with operationalising aspects of S.75 and the ECNI had to deliver their recommendations. The ongoing political instability and associated civil disorder must also be factored into an assessment of the constraints conditioning the operationalisation of the duty.

A further factor to be considered is the complexity of integrating the pre-existing bodies⁷ in a limited time period and in a manner that dealt effectively with attendant fears that the larger, more established Fair Employment Commission would dominate the

⁷ i.e. The N.I. Equal Opportunities Commission, Northern Ireland Disability Council, N.I. Commission for Racial Equality, and Fair Employment Commission.

new Commission. Research has also shown that the rapid implementation of the S.75 duty created further problems related to issues of institutional capacity and the levels of staff know-how for, according to one published account, 'cross-strand [legal] expertise was simply not there initially'.¹²² This source continues: 'most difficulties arose within the legal unit [of the ECNI]. The previously existing commissions had very different methods of handling cases and making case funding decisions. As the different teams, which initially remained specialized, utilized different strategies, this produced different levels of support for cases coming under the different strands. It also resulted in a "leveling-up" tendency, where the treatment of cases in general was ratcheted up in cost terms across the board to match practice in other strands. This produced a substantial cost overrun, which the Commission was obliged to address promptly.'¹²³ This evaluation further observed that, initially, there was also a 'lack of strand-specific co-ordination across the different functional units in the ECNI; a problem that has now been addressed.'¹²⁴

Recent analysis has shown that key problems in the implementation of the duty centre upon consultation processes and issues of co-ordination, communication, skills, and resources.⁸ This research supports recent political science analysis that highlights the way in which issues of communication and visible efficacy - or 'where the public policy system can show a capacity to respond' - affect the nature and quality of the participation in public policies/ reforms.¹²⁵ The Office of the First Minister and Deputy First Minister (OFMDFM) reported that: 'generally it was felt that S.75 consultation required greater co-ordination of activity to ensure that all stakeholders would come to feel that their efforts and involvement with S.75 were worthwhile, and that communication between all key stakeholders lay at the heart of many perceived difficulties. Many public authorities, and consultees, needed help to continue to meet their obligations, and including additional resources'.¹²⁶ Moreover, it improvements were needed in disseminating information, seeking opinion, and offering feedback

⁸ For a full discussion of these and associated issues see Office of the First Minister and Deputy First Minister (OFMDFM) (2003) *Review of Section 75 Consultation Processes, Final Report*, Belfast, OFMDFM

Overall, the foregoing aspects of the duty's operationalisation resulted in what has been described as, 'a high level of initial skepticism reflected in the consultation exercise and considerable discontent generated by the government-imposed speed of the transition process. This discontent has been reflected in a certain level of personnel and stakeholder resistance to a single commission and to its functional structure'.¹²⁷ A further problem stemmed from the fact that the ECNI is required to approve equality plans for *all* public bodies. This generated an overwhelming amount of work which prevented the Commission from acting strategically. Accordingly, the regulatory framework around the public duty needs to be resourced in proportion to such work levels or else needs to include a sufficient element of discretion to enable key areas to be selected for scrutiny.¹²⁸

Related to the foregoing, the existing reviews of the implementation of the duty by ECNI and OFMDFM point to the fact that in several cases the requirements of the Act have been too demanding for some organisations and that they have placed excessive pressure on public sector managers. Moreover, the short timeframe for implementation has compounded these issues. The key requirements of Schedule 9 require detailed work on: arrangements for assessing compliance, the impact of policies, monitoring adverse impacts, publishing the results of impact assessments, training staff and dealing with complaints. Many public bodies, particularly the smaller ones, have lacked the capacity and resources to meet these requirements. This is evidenced by progress made on the equality impact assessments (EQIAs). Implementation of EQIAs had been slow for many sectors (notably central government, higher education, regional healthcare and local government). For central government, most departments have done little more than catalogue the assessments and implementation in the education sector has been particularly slow. As of 2003, no education authority had undertaken an EQIA.

Lastly, analysis has also highlighted a further issue in the operationalisation of the duty, namely the potential for inherent tensions in the different responses to the two clauses that make up the S.75 duty. Such concerns centre on Section 75 (2) of the *Northern Ireland Act*, which requires public agencies to have 'regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group'. According to leading analysis 'in this highly sensitive area

of identity politics... the first requirement [i.e. S.75 (1) - the equality duty] is clearly given priority over the second [S.75 clause] and could, in theory at least, override it'.¹²⁹ Reflecting on the way that the S.75 was operationalised, this account concludes that, 'in any event, public discussion of the "equality agenda" has almost entirely ignored S.75(2) ... sustaining a public discourse of the common good, and how equality can contribute to it, is not only critical to preserving the common good - but advancing the cause of equality itself'.¹³⁰

Overall, as this review of the international approaches to promoting equality and the application of mainstreaming shows, whilst such shortcomings and constraints in the operationalisation of the S.75 are largely the product of local circumstances, they are also *broadly typical* of the institutional and legal challenges associated with implementing innovative equality reforms experienced across the globe during the past six decades. Indeed, the history of equality law and the comparatively recent development of mainstreaming have been consistently marked by *incrementalism, pragmatism and ongoing refinement*, not least because promoting equality is essentially a political as well as a socio-economic undertaking. Given the challenging circumstances and limited timeframe for implementation, it is perhaps understandable that shortcomings have been identified in the operationalisation of the S.75 duty. This in part is also connected to the complexity of operationalising an equality duty as comprehensive as S.75, something that is unprecedented in public administration. It also reflects the challenges of co-ordinating actions between a large number of bodies and organisations. A point that emerged in a recent study of S.75 consultation processes: 'there is no strong consensus as to what is the most appropriate way to proceed, perhaps reflecting the alternative perspectives that so many different stakeholders bring to s75 and associated consultations'.¹³¹ Whilst further primary research in this area is required, the published evidence suggests that the way the S.75 duty has been operationalised will not result in numerous long-term constraints on its potential to mainstream equality and make a positive contribution to the broader environment of human rights and social justice.

Recommendations

Three areas for the future development of the S.75 duty emerge from the foregoing overview of its operationalisation:

I. Developing the duty as an enabling framework to foster an holistic approach to equality

The S.75 duty with its nine prescribed equality 'strands' presents an enabling framework to develop mainstreaming that operates to tackle simultaneously inequality and discrimination in relation to multiple identities. This means moving away from policies that have a discrete focus on, for example gender, or disability. Rather it requires full development of the multi-strand potential of the S.75 duty and the introduction of an all embracing approach whereby policies factor-in individuals' membership of a number of social categories traditionally targeted by separate equality policies.¹³² An economic dimension that addresses low income and poverty could further be factored into foregoing approach.

II. Encouraging and enabling public and government bodies to take 'ownership' of equality monitoring and assessment

The historical experience of the statutory equality commissions around the world provides several examples where such bodies become over-burdened with their monitoring functions. Accordingly, the ECNI should promote a culture in which public sector agencies and government bodies are encouraged and enabled to take ownership of the ongoing monitoring and assessment of their equality practices. To further this objective public bodies that are concerned with the auditing and performance review of public agencies should be encouraged to more fully integrate equality indicators into their assessment criteria in a manner that supports the effective implementation of S.75.

III. Developing a participative-democratic mode of mainstreaming⁹

A number of accounts have stated that 'a particularly important dimension of fourth generation equality law is their potential to encourage participation by affected groups in the decision-making process itself'.¹³³ As the most advanced example of a fourth generation equality law, its future development should be informed by this point. Accordingly, public and government agencies/ departments should encourage the active participation of the groups targeted by the nine 'strands' of the S.75 in the planning and visioning of strategies and public service delivery *at the outset of the planning stage*. Following this approach, resources are targeted on securing effective equality practices at the outset rather than expended attempting to transform existing strategies. This argument is grounded in the political science literature of 'descriptive representation'. In short, this states that representation and decision-making should be undertaken by individuals that are typical of the wider social group to which they belong.¹³⁴

Conclusions

In several respects the Section 75 equality duty, with its wide-ranging scope, detailed provisions and enforcement mechanisms suggests the *future* trajectory of international approaches to the promotion of equality of opportunity. Yet, in a number of key regards the N.I. duty is also typical of the *existing* equality practices presently to be found around the globe. The following factors explain this dual position and summarise the position of the N.I. duty in the context of contemporary international equality practices.

The S.75 duty's legal and institutional framework reflects those found in countries where significant legal powers and policy-making capacity is distributed across different tiers in a system of multi-level governance (e.g. Canada). Moreover, the N.I. equality duty is significant because it enshrines a mainstreaming approach in *constitutional law*.¹⁰ Its statutory basis is therefore of a higher order than regular domestic legislation, in that it relates to the way

⁹ For a discussion of the application of such an approach see - City of Reykjavik (2003) *Policy on Gender Equality of the City of Reykjavik*. Reykjavik: City of Reykjavik

¹⁰ i.e. *The Northern Ireland Act (1998)*

that the overall system of governance is supposed operate (to greater or lesser degrees, this constitutional approach to equality is found elsewhere e.g. Draft Treaty Establishing a Constitution for Europe, Indian Constitution, *Government of Wales Act, 1998*). S.75 is typical of an international shift away from sole reliance upon anti-discrimination law towards positive 'fourth generation' equality duties backed-up by single equality bodies (e.g. GB). Furthermore, the N.I. duty requires the promotion of equality in relation to a number of specified equality strands (an approach that is followed in other countries, e.g. EU). S.75 places key reliance upon equality impact assessments (as practiced for over a decade in, for e.g. the Netherlands). The duty also requires 'screening' - or equality proofing - of public and social policy (as is well established in a number of countries e.g. Sweden and Canada). S.75 has the distinct advantage of being able to compel action from cross-border agencies that are not the responsibility of regional government (e.g. as applies in the case of Scotland).¹³⁵ The legality of positive action quota systems in the employment practices of certain public organisations¹³⁶ echoes the approach developed in India over the past six decades.¹³⁷

A recent review concluded that: 'there exists [a] ... broad (if by no means unanimous) agreement that the benefits of a cross-strand approach within functional units are considerable'.¹³⁸ S.75 is a prominent example of the latter trend in that it moves beyond a sole focus on gender mainstreaming (an approach also found in a number of international polities. e.g. Wales, and the USA). The duty also sets out detailed monitoring and enforcement requirements (e.g. as applies in Great Britain in the case of the *Welsh Language Act, 1993* and *Race Relations (Amendment) Act, 2000*). It allows *amicus curiae* (friend of the court) powers in order that the ECNI can intervene more effectively in relevant cases (as found elsewhere, e.g. Australia). In addition, the Northern Irish equality duty is one of a limited number of 'participative-democratic models' of mainstreaming that relies primarily on the engagement of civic and community groups through a thoroughgoing consultation process (e.g. Republic of Ireland and Canada).¹³⁹ Moreover, the N.I. duty is one of a number of international statutes that requires the promotion of 'good relations' between specified social groupings (as found, for e.g. in the UK *Race Relations (Amendment) Act (2000)*).¹⁴⁰ It is also typical of the international move to link the equality and human rights agenda (e.g. UK, New Zealand, Canada, and Australia).

Yet, despite all the foregoing commonalities with extant practice in a range of countries, the Northern Ireland equality duty is *unique* and *pioneering* in the way in which it combines all of the foregoing factors in a single approach to mainstreaming equality. Whilst acknowledging the problems involved in the comparatively rapid drafting, implementation and 'bedding-in' of the duty, it is likely that in future years the unified yet multi-faceted approach to mainstreaming equality that is underpinned by S.75 will prove to have greater effectiveness than many contemporary approaches operating around the globe. Indeed, as the foregoing review shows, the global trend in the promotion of equality of opportunity and application of mainstreaming principles is broadly characterised by a move away from 'light-touch' approaches where key reliance is placed on consensus and political will to achieve equality outcomes. Instead, as witnessed in N. Ireland, increasing numbers of national and supranational bodies have moved towards the promotion of equality, backed by - what must be seen in an historical context - a comparatively rigorous and prescriptive monitoring and enforcement mechanism.

Necessarily, the foregoing assertion that the S.75 duty exhibits greater effectiveness than existing international approaches and suggests the future trajectory of mainstreaming approaches requires a number of caveats. This is not least because the duty's thoroughgoing nature means that it requires a sustained, extensive and adequate human and financial resource base backed with appropriate levels of skills and expertise. In addition, it demands strategic and political leadership to ensure that: (i). the legal sanctions associated with the S.75 duty do not create an overly litigious culture that is counter-productive to equality outcomes, and (ii). that the duty's 'process-laden' approach does not result in an over bureaucratic, 'tick-box' culture in which managers and officials are more concerned with 'compliant' public administration rather than the delivery of equality outcomes.

Overall, the foregoing survey indicates that, from an international perspective, the S.75 is, in many respects a pioneering legal mechanism for the delivering of mainstreaming. Its strengths lie in its combination and synthesis of many aspects of existing equality practices evident in countries around the world. No longer can such developments be dismissed as 'Celtic exceptionalism',¹⁴¹ Whilst the continuing operationalisation and development of the

duty mean that the next few years will be a crucial test-period, nevertheless, Section 75 may yet prove to be a model that should be adopted widely amongst the international community.

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Useful websites

Mainstreaming Practice (- and Associated Issues): Selected International Web Resources

European Database:

European Database, women in decision making:
<http://www.db-decision.de>

UK Central Government:

womenandequalityunit
<http://www.womenandequalityunit.gov.uk>

Welsh Government:

Welsh Assembly Government (Welsh Executive):
<http://www.wales.gov.uk/wag/wag.htm>

National Assembly for Wales:

<http://www.wales.gov.uk>

Scottish Government:

Scottish Parliament:

<http://www.scottish.parliament.uk>

Scottish Executive:

<http://www.scotland.gov.uk>

Northern Ireland Government:

Northern Ireland Office:

<http://www.nio.gov.uk/>

Northern Ireland Executive:

<http://www.nics.gov.uk>

Northern Ireland Assembly:
<http://www.ni-assembly.gov.uk>

Northern Ireland Assembly Standing Orders:
<http://www.ni-assembly.gov.uk/so.htm>

Equality Commission for Northern Ireland:
<http://www.equalityni.org/>

Canada:

Canadian Indian Affairs and Northern Development:
<http://www.inac.gc.ca>

Gender Equality Analysis and Guide:
http://www.inac.gc.ca/pr/pub/eql/index_e.html

Women's Bureau Human Resources Development Canada:
<http://www.hrdc-drhc.gc.ca>

Justice Department Canada:
<http://www.canada.justice.gc.ca>

Ireland:

Government home pages:
<http://www.irlgov.ie/>

Department of the Taoiseach:
<http://www.irlgov.ie/taoiseach/default.htm>

Sweden:

Swedish Government website: <http://www.regeringen.se>

New Zealand:

www.mwa.govt.nz/pub/gender/fig2.html

Human Rights Watch:

Human Rights Watch Global Report on Women's Human Rights
<http://www.hrw.org/about/projects/womrep/>

European Commission:

http://europa.eu.int/comm/index_en.htm

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<http://www.europarl.eu.int/>

United Nations:
<http://www.un.org/>

United Nations:Office of the Special Adviser on Gender Issues and
Advancement of Women (OSAGI)
<http://www.un.org/womenwatch/osagi/index.html>

U.N. Human Rights Committee:
www.unhchr.ch

U.N. Development Programme:
www.undp.org

International Labour Organisation:
<http://www.ilo.org/>

Council of Europe:
www.coe.int

World Health Organisation:
<http://www.who.int/en/>

World Health Bank:
<http://www.worldbank.org/>

North American Free Trade Agreement Secretariat:
<http://www.nafta-sec-alena.org/>

Commonwealth Secretariat:
<http://www.thecommonwealth.org/>

World Bank:
<http://www.worldbank.org>

Organisation for Security and Cooperation in Europe:
<http://www.osce.org>

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¹³³ Fredman, S. (2000) 'Equality: a new generation'? *Industrial Law Journal*, vol 30, 145- 168. p.152

¹³⁴ For a discussion see for example: Chaney, P. and Fevre, R. (2002) Is There A Demand For Descriptive Representation? Evidence From The UK's Devolution Programme, *Political Studies*, Vol 50, 897-915. And - Mansbridge, J. (1999). 'Should blacks represent blacks and women represent women? A contingent "yes"', *Journal of Politics* 61, 3, 628-57.

¹³⁵ Strictly speaking, Schedule 5, L2, of the Scotland Act (1998) does not impose a *duty* - but sets out the parameters of the Scottish Executive's approach to equality of opportunity.

¹³⁶ 'In the Northern Irish case, positive discrimination in favour of the long term unemployed was permitted in 1998, because of its indirect effect in promoting employment among the historically disadvantaged Catholic-Nationalist population. Recruitment to the reformed police force there also used a religious/political quota system for recruitment. The latter was judicially defended in 2002'. Source: McLaughlin, E. (2004) 'Equality and Equity Policy' in M. Kogan and M. Hawkesworth (eds.) *Encyclopedia of Government and Politics* Second Edition Vol. II, London: Routledge.

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¹⁴⁰ Race Relations (Amendment) Act 2000 Chapter 34 2. - (1) For section 71 of the 1976 Act (local authorities: general statutory duty) there is substituted-(1) 'Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need-(b) to promote equality of opportunity and good relations between persons of different racial groups'.

Northern Ireland Act 1998, Section 75, (2) 'Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group'.

¹⁴¹ See Mackay, F. (2004) Gender and Political Representation in the UK: The State of the 'Discipline', *British Journal of Politics and International Relations*, 6, 1, 99-120.

Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998

*Christopher McCrudden**

Introduction

The statutory equality duty in section 75 of the Northern Ireland Act 1998 (“the Northern Ireland Act”) came into force at the beginning of January 2000. After over four years of experience of the legislation, and six years after its enactment, the British and Irish Governments established a Review of its operation.¹ This paper is a contribution to that Review.²

The argument developed below is that the information available on which to assess the impact of Section 75 is far from optimal and that any overall assessment must therefore be somewhat limited, at this time. Within these constraints, it appears that although section 75 appears to have achieved much, its full potential has not been achieved, and that much can be done within the existing

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¹ The British and Irish Governments agreed that there should be a Review of the operation of section 75 of the Northern Ireland Act 1998 (“the Northern Ireland Act”) in their Joint Declaration of April 2004. The terms of reference of the Review are that the British Government will, with the Equality Commission, “review the operation of the section 75 equality duty including effective monitoring and enforcement mechanisms (without diminishing its current effectiveness in legislation or in the Equality Commission’s Guidelines)” (Joint Declaration, Annex 3, para. 10). According to the statement issued by the British Government subsequently: “The Review will consider the operational arrangements which are in place for implementing the duty, particularly monitoring and enforcement mechanisms. The purpose of the Review is not, however, to investigate individual complaints about the operation” of section 75 (“The Section 75 Equality Duty – Operational Review: Terms of Reference for the Independent Element of the Review” (April, 2004)). The review will “document and analyse the implementation of [section 75] in the period 1998-2004, identify good practice and as and to the extent that may be necessary make recommendations to ensure effective implementation in the future.” An independent element of the Review is the commissioning by the British Government of a report from Professor Eithne McLaughlin and Mr. Neil Faris, assisted by an Advisory Group, and taking into account the views of a larger Consultation Group on the operation of Section 75. Their report is due to be made to the Secretary of State for Northern Ireland by the 30th June 2004. After that, the Government and the Equality Commission “will conclude the review ... in the expectation of publication of the ... response in the Autumn of 2004.”

² This paper was commissioned by Professor McLaughlin and Mr. Faris as one of two papers to be discussed in draft at a conference in June 2004, as part of their work in preparing their report to government. Following the conference, the paper was revised and finalized by the end of July 2004. The review is limited to the consideration of the *equality* duty in Section 75, and within the current statutory framework, and this paper is also so limited.

legislative framework to ensure that public authorities implement the duty more effectively in the future.

The paper is in five parts. Part I consists of an overview of Section 75 requirements and processes. Part II considers the goals that Section 75 attempts to achieve, concentrating particularly on the meaning of “equality of opportunity”, and briefly outlines how section 75 differs from some other government initiatives. Part III considers the development of the institutions and structures for the implementation of Section 75 within central government and the Equality Commission. Part IV attempts to identify the effects of the statutory duty on policy development and service delivery. Part V considers the current debates over issues of implementation and enforcement. Part VI assesses whether actual and anticipated legal developments since Section 75 have rendered it redundant. Part VII contains conclusions and recommendations.

As regards the methodology adopted in preparing this paper, three approaches were adopted. First, as can be seen from the bibliography attached to the paper, there is now an extensive literature on section 75, partly academic but mostly NGO derived. This was assessed and the main issues for section 75 pinpointed. Second, since the advent of section 75, there has been an outpouring of publications from public bodies, in the form of policy discussion papers. The most relevant of these were assessed and the major issues for section 75 distilled. Third, the author has had extensive experience in considering the implications of section 75 in the context of giving advice to public bodies, in his role as a member of a public body, and as a participant in a major review that drew extensively on section 75 for its recommendations.³ A significant part of the methodology adopted is, therefore, a modified and qualified form of participant observation. Lastly, drafts of the paper were circulated to several key actors in the section 75 processes in order to test the author’s perceptions and observations, leading to revisions in the lights of comments received.

³ A Review of Public Procurement, Findings and Recommendations, February 2002.

Part I: Overview of Section 75 requirements and processes

Context of Section 75 of the Northern Ireland Act 1998

Equality and discrimination issues featured significantly in the Belfast Agreement.⁴ Section 75 of the Northern Ireland Act implemented the Agreement's proposals with regard to a new statutory duty on public bodies, an earlier version of which had been proposed in the White Paper that followed a report of the Standing Advisory Commission on Human Rights.⁵ Section 75 followed, and has since been followed by, other important anti-discrimination and equality legislation applying to Northern Ireland.

It would be a mistake to see the development of the Northern Ireland equality-mainstreaming model as divorced from either the constitutional context, which places equality issues high on the political agenda, or the extensive statutory provisions dealing with anti-discrimination and equality, which preceded and followed the Agreement. Section 75 is but one part, although a highly important part, of a body of legislation and other administrative action designed to advance equality in Northern Ireland. What role section 75 plays in this latter context, and the extent to which these measures present a coherent, internally consistent body of measures will be considered subsequently.

Outline of Section 75

Section 75 provides that each designated "public authority" is required, in carrying out its functions relating to Northern Ireland, to have "due regard" to the need to promote equality of opportunity between certain different individuals and groups. The relevant categories between which equality of opportunity is to be promoted are between persons of different religious belief, political opinion, racial group, age, marital status, or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without. This equality duty represents an important shift

⁴ For detailed discussions, see C. McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 *Fordham International Law Journal* 4 (1999) at 1696; Christopher McCrudden, *Equality, in Human Rights, Equality and Democratic Renewal in Northern Ireland* (C. Harvey ed., 2001). See also R.D. Osborne, *Progressing the Equality Agenda in Northern Ireland*, 32 *Journal of Social Policy* 339 (2003).

⁵ Standing Advisory Commission on Human Rights, *Employment Equality: Building For The Future* (HMSO, 1997)

away from relying on the operation of traditional anti-discrimination law to address structural inequalities. Without prejudice to these obligations, a public authority in Northern Ireland is also, 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. In the discussion that follows, prime consideration is given to the equality duty, rather than the good relations duty.

Functions of Section 75

Underlying the Northern Ireland attempts at equality mainstreaming is an important perception: that unless special attention is paid to equality in policy-making, it will become too easily submerged in the day-to-day concerns of policy makers who do not view that particular policy preference as central to their concerns. The motivation for mainstreaming equality lies not only, therefore, in the perception that anti-discrimination law, positive action initiatives, and even traditional methods of constitutional protection of equality are limited, but also in the perception that questions of equality and non-discrimination may easily become sidelined. Mainstreaming, by definition, attempts to address this problem of sidelining, by requiring all government departments and public bodies to engage directly with equality issues.

Which grounds?

Unlike in several other examples of statutory equality duties in the United Kingdom, under section 75, the grounds covered are extensive but not open. As we have seen 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; and (d) between persons with dependants and persons without.

The main disadvantage of adopting this approach is perceived to be that other grounds not included may subsequently be identified, e.g. genetic attributes, which share similar characteristics with those grounds that are included. On the other hand, the major advantage of a closed list is that public authorities are given a

clear legislative steer as to which areas of equality of opportunity are particular policy priorities. In practice, the (pretty extensive) closed list in section 75 does not (at least so far) appear to have generated any particular discussion vis-à-vis the exclusion of other cognate grounds, with the sole exception of socio-economic status, to be discussed subsequently. Arguments are more likely to be heard that the list is too extensive, leading to an inability to focus on (what are perceived by those taking this approach) the real problems of inequality between the two main communities in Northern Ireland, or gender, or disability. In other words, the greater the spread of grounds, arguably the less the attention each receives, given finite public authority resources. We return to this aspect of the issue subsequently.

Which public authorities?

Currently, section 75(3), as amended by subsequent legislation, provides that "public authority" has a limited meaning. Unlike under the Human Rights Act 1998, there is no open-ended definition of public authority. Instead, a closed list approach has been adopted. A public authority is a body that falls within one (or more) of the following categories: (a) any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 (departments, corporations and bodies subject to investigation) and designated for the purposes of this section by order made by the Secretary of State; (b) any body (other than the Equality Commission) listed in Schedule 2 to the Commissioner for Complaints (Northern Ireland) Order 1996 (bodies subject to investigation); (c) any department or other authority listed in Schedule 2 to the Ombudsman (Northern Ireland) Order 1996 (departments and other authorities subject to investigation); (d) the Northern Ireland Policing Board, the Chief Constable of the Police Service of Northern Ireland and the Police Ombudsman for Northern Ireland; (e) the Director of Public Prosecutions for Northern Ireland (but not including any of his functions relating to the prosecution of offences); (f) the Chief Inspector of Criminal Justice in Northern Ireland; (g) the Northern Ireland Law Commission; and (h) any other person designated for the purposes of this section by order made by the Secretary of State.

In contrast, the Human Rights Act 1998 adopted an approach to the issue of designation of covered public authorities in a different way, adopting a broad definition of public authority and leaving it

for subsequent discussion to determine which bodies were covered. In practice, this has led to some uncertainty at the margins and extensive litigation attempting to set the parameters. This has not arisen in the section 75 context to anything like the same extent. To the extent that the closed list approach adopted in section 75 creates a firm public-private divide, raising questions as to the extent to which private bodies carrying out public functions are covered, we consider this subsequently.

Process requirements of equality mainstreaming: equality schemes

Novel and detailed provisions for the enforcement of the Northern Ireland equality duty mark out the Northern Ireland mainstreaming approach as different from several other attempts at equality mainstreaming. In brief, all designated public authorities are required to submit an equality scheme to the Equality Commission. Where it thinks appropriate, the Commission may request any public authority to make a revised scheme. An equality scheme shows how the public authority proposes to fulfil the duties imposed by Section 75 in relation to the relevant functions, and to specify a timetable for measures proposed in the scheme. Before submitting a scheme to the Equality Commission, a public authority is required to consult, in accordance with any directions given by the Commission, with representatives of persons likely to be affected by the scheme, and with such other persons as may be specified in the directions. An equality scheme is required to state the authority's arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity. On receipt of a scheme from a Northern Ireland department or public body, the Commission either approves it or refers it to the Secretary of State. Where the Commission refers a scheme to the Secretary of State, the Commission is required to notify the Northern Ireland Assembly in writing that it has done so and send to the Assembly a copy of the scheme. When a scheme is referred to the Secretary of State, he or she has three options: to approve the scheme, to request the public authority to make a revised scheme, or to make a scheme for the public authority.

Impact assessment

A particularly important technique has been developed to make this idea of equality mainstreaming effective in Northern Ireland. There is a requirement that "impact assessments" be carried out as part of the process of considering proposals for legislation and the operation of policies.⁶ Put simply, the idea of an impact assessment involves an attempt to try to assess what the effect of the legislation or policy is, or would be, on particular protected groups, such as women or those with dependants. Mainstreaming should, thereby, encourage greater resort to evidence-based policy making and greater transparency in decision-making, since it necessitates defining what the impact of policies is at an earlier stage of policy making, more systematically and to a greater extent than is currently usually contemplated. And, to the extent that mainstreaming initiatives can develop criteria for alerting policy makers to potential problems before they happen, it is more likely that a generally reactive approach to problems of inequality can be replaced by pro-active early-warning approaches. Current government policy in many countries in the area of equality has often been criticized as tending to be too reactive to problems that might well have been identifiable before they became problems.⁷

As importantly, impact assessment and the duty to promote equality combine to produce an approach that should encourage a more positive approach to equality, rather than the negative approach often adopted hitherto. In the equality context, this leads to an examination of how far the public body can and should exercise its discretion in such a way as to advance rather than retard equality. This involves examining alternative ways of delivering policies, and examining ways of moderating any adverse effects that may occur. This approach, of emphasising the effect of policies on equality and what the public body can do about it, rather than one that narrowly concentrates on the direct responsibility of the public authority for any breach of equality, seems particularly well suited as a method of addressing a substantive view of equality, an issue to which we turn subsequently.

⁶ For further discussion of the history of policy impact assessments in other contexts, see C. McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 *Fordham International Law Journal* 4 (1999), 1696.

⁷ For further discussion, see C. McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 *Fordham International Law Journal* 4 (1999), 1696

Screening

However, it would be both unrealistic and, arguably, divert scarce resources from being used to address the most substantial issues, if impact assessments were required to be undertaken with respect to all policies and practices. An approach has been adopted, therefore, which permits public bodies to “screen out” those policies and practices which do not require to be made subject to full impact assessment. Permitting this, however, gives rise to a difficulty. Public authorities might take advantage of this to evade impact assessments of the most difficult issues, or might screen out policies simply because they did not identify any problem that needed to be considered further because of the absence of statistical data, even when others would. In particular, screening out policies without appropriate consultation could mean that policies with significant impact on equality are not subject to impact assessment.

Participation

Another important feature of the mainstreaming experience in Northern Ireland is the extent to which groups inside and outside the mainstream political process have attempted to use impact assessment as part of a strategy to construct a more participatory approach to public policy debate. In short, groups have the opportunity to use the mainstreaming process to become involved in influencing governmental decision-making. From this perspective, mainstreaming should not only be a technical mechanism of assessment within the bureaucracy, but an approach that encourages the participation of those with an interest. It is true, of course, that good decision-making should, in any event, encourage policy-makers to seek out the views of those potentially affected by the decisions. Unlike more traditional mechanisms of consultation, however, mainstreaming in Northern Ireland attempts to do this by requiring impact assessments of a degree of specificity that establishes a clear agenda for discussion between policy makers and those most affected. We can see, therefore, the inter-linked nature of the two crucial features of mainstreaming: impact assessment and participation.

One of the most far-reaching "by-products" of mainstreaming should be the development of a crucial link between government

and "civil society." This development should encourage greater participation in decision-making by marginal groups, thus lessening the democratic deficit. The requirements in Northern Ireland of extensive consultations throughout equality mainstreaming processes aim to empower individuals collectively to engage with public authorities to address equality issues of relevance to the public authority. Nott distinguishes between two broad models of mainstreaming: the expert-bureaucratic model and the participative-democratic model. In the former, the emphasis is on specialists within the bureaucracy. "Those specialists might be [equality] experts with specialized training ... [or] ... might be seen as the prerogative of administrators."⁸ In the latter the emphasis is on the participation of organizations, groups and individuals outside the bureaucracy through a consultation process.⁹ "This model promotes participation and access to policy-making and emphasizes the accountability of experts and officials."¹⁰ From one perspective, section 75 appears to fit within the participative-democratic model.¹¹

However, this would be a misreading of section 75, for section 75 attempts to combine both models. Harvey has provided an interesting assessment of the potential added value of combining the participative approach with impact assessment.¹² He sees the development of section 75 as both the result of and contributing to notions of deliberative democracy, but also as supplying a critical additional development to such developments: "[D]ialogic models [i.e. approaches that encourage dialogue between conflicting interests] must have 'critical bite'. [T]oo many discussions of participation and deliberation fail to show how policies and institutions might be redesigned to achieve substantive goals. Consultation can be a paper exercise regarded by government as no more than a troublesome mechanism that must be endured.

⁸ F. Beveridge, S. Nott, K. Stephen, Mainstreaming and the engendering of policy-making: a means to an end?, *Journal of European Public Policy*, 2000, Vol 7, Iss 3, pp 385-405, at 390.

⁹ S. Nott, 2000 Accentuating the Positive: Alternative Strategies for Promoting Gender Equality, in F. Beveridge, S. Nott and K. Stephen (eds), *Making Women Count: Integrating gender into law and policy making* (Aldershot, Ashgate, 2000). See also F Beveridge, S. Nott, K. Stephen, Mainstreaming and the engendering of policy-making: a means to an end?, *Journal of European Public Policy*, 2000, Vol 7, Iss 3, pp 385-405, at 390.

¹⁰ F. Beveridge, S. Nott, K. Stephen, Mainstreaming and the engendering of policy-making: a means to an end?, *Journal of European Public Policy*, 2000, Vol 7, Iss 3, pp 385-405, at 390.

¹¹ *Ibid.*, at p. 401: In Northern Ireland, impact assessment seems to have assumed a level of sophistication not currently seen elsewhere in the United Kingdom, and seems to be firmly established in the participatory-democratic mould.

¹² Colin Harvey, *Governing After the Rights Revolution*, 27 *Journal of Law and Society*, 2000, 61-97.

The Northern Ireland provisions indicate how we might move beyond this in the sphere of equality by building learning processes into public decision-making and policy formulation. This is most evident in the equality field where public authorities will be required to construct institutional mechanisms to evaluate and respond to the impact of their work on equality.”¹³ Whether, in combining the participative-democratic and expert-bureaucratic models, section 75 may have inherited the disadvantages associated with both models, rather than the advantages of each, will be considered subsequently.

Legal underpinnings without litigation

The Northern Ireland experience with the non-statutory predecessor to section 75 (PAFT) suggested the inadequacy of a "soft law" approach. Section 75 was developed, therefore, to be an authoritative *legal* requirement on government to ensure that mainstreaming is consistently applied, according to common standards. For some, however, "law" equals "litigation". A novel approach to compliance in the Northern Ireland mainstreaming model is the extent to which a regulatory regime has been established, however, that attempts to avoid a concentration on litigation. The approach adopted in the Northern Ireland legislation is not one that, so far, has encouraged litigation before the ordinary courts.

We have seen that the Equality Commission plays an important role in approving Equality Schemes. The functions of the Commission are broader than that, however. If the Commission receives a complaint of a failure by a public authority to comply with an equality scheme approved by the Commission or made by the Secretary of State, then it is required to investigate the complaint, or to give the complainant reasons for not investigating. If a report recommends action by the public authority concerned and the Commission considers that the action is not taken within a reasonable time, then the Commission may refer the matter to the Secretary of State. The Secretary of State may give directions to the public authority in respect of any matter referred to him or her. Where the Commission refers a matter to the Secretary of State it is also required to notify the Assembly in writing that it has done so. Where the Secretary of State gives directions to a public

¹³ *Ibid.*, at p. 86. See also Jenny Steele, *Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach* (2001) 21 OJLS 415.

authority, he or she shall notify the Assembly in writing that he or she has done so. The remedy for failure to mainstream appropriately is, then, to take action in the political domain, rather than through litigation. The absence of the Assembly during suspension of the institutions has clear implications for this essentially political mechanism and this will be considered subsequently.

Part II: What Section 75 is, and what it is not

A critical question that has continued to divide commentators is whether Section 75 is “fit for purpose”. In part the debate over this issue involves a dispute over how much progress has actually been made in bringing about change, and how far the mechanisms of implementation adopted in Schedule 9 are appropriate, issues we return to subsequently. As importantly, in assessing whether section 75 is “fit for purpose”, we need to have a clear idea of what its purpose is. However, there is considerable debate about what the purpose of section 75 is.

Equality of opportunity: what does it mean?

The principal concept that defines the purpose of section 75 is the concept of “equality of opportunity”. What does this mean? It will be useful at this point to distinguish between two rather different ways of considering the “meaning” of equality of opportunity in section 75. The first is essentially empirical, attempting to answer the question posed by examining how individuals and institutions use the concept. In this approach, what is considered important is how lay interpretations of the law shape human behaviour and action. The “meaning” of the term is to be discovered by examining how in practice individuals and institutions behave. (In some extreme forms of this approach, the concept is seen as having no meaning outside this “social” meaning.) There is, of course, a long tradition of such research. In particular, it pinpoints the difference between the “law in action” and the “law in books”, between empirical reality and the law’s ambition. However valuable such research is, this is not the approach I adopt in this section of the paper.

Instead, I will adopt an approach to the meaning of “equality of opportunity” in section 75 that is more teleological in approach. What is the end being pursued by the provision in question? There

is clearly a relationship between the two meanings, of course. It is likely that how lawyers, for example, interpret a particular legal concept will be influenced by the social meaning of the concept. But the relationship is not a one-way street, with the teleological meaning always determined by the social meaning of the concept. The social meaning of the concept will also be influenced by the teleological meaning. The teleological meaning is not autonomous from the social meaning but neither is it usually entirely externally determined by the social meaning.

What, then, is the teleological meaning to be given to equality of opportunity in section 75? A further distinction needs to be made. Those attempting to give teleological meaning to the concept come from several different disciplines. Much of the more thoughtful writing about section 75 has come from non-lawyers, from example, drawing on approaches derived from politics, philosophy, and sociology. There are, to simplify the debate somewhat, three broadly competing approaches to the non-social meaning of section 75. The first perspective is to view section 75 as essentially another piece of anti-discrimination legislation. In particular, this perspective views section 75 as not about outcomes, as being about persons rather than groups, and not being about affirmative action. This first perspective was, arguably, the dominant approach to the legal interpretation of the old PAFT requirements within the Northern Ireland Civil Service.¹⁴ To the limited extent that section 75 has been used in judicial review proceedings to date, it appears to have largely been presented by counsel from within this limited anti-discrimination perspective,¹⁵ perhaps reflecting a perception of earlier Northern Ireland judicial amalgamation of the concepts of discrimination and equality of opportunity, in the pre-1989 fair employment context.¹⁶

There is also some limited evidence that the anti-discrimination view of section 75 (and a rather narrow one at that) is the default position of some current senior members of the Northern Ireland judiciary. In *Murphy*, for example, the applicant claimed, in part, that regulations made by the Secretary of State making it a requirement that the Union flag be flown on government buildings

¹⁴ C. McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 *Fordham International Law Journal* 4 (1999), 1696

¹⁵ See, e.g., *Re Byers* [2004] NIQB 23 (02 April 2004) in which Weatherup, J. characterises the applicant as having relied on section 75 as ancillary to the discrimination issue.

¹⁶ *In re Northern Ireland Electricity Service's Application* [1987] NI 271, Nicholson J.

discriminated against those who were opposed to the flying of this flag. In particular, he claimed that the regulations were inconsistent with section 75 of the Northern Ireland Act 1998 in that they promoted inequality between persons of different political opinions and thereby placed at an advantage those who favoured the flying of the Union flag over those who opposed it. This aspect of the case was decided on the basis that the Secretary of State was not a public authority for the purposes of section 75, but also (and principally, it would seem) on the basis that had the Secretary of State (“the respondent” in this case) been a public body for the purposes of section 75, there would not have been a breach of the statutory duty. It is the second of the two reasons that is of relevance in the context of the present discussion. Kerr, J. (as he then was) held: “I do not consider that, in making the Regulations, the Secretary of State acted in breach of section 75. As [the Secretary of State] stated, in introducing the Flags Order to the House of Commons, the flying of the Union flag is not *designed* to favour one tradition over another; it merely reflects Northern Ireland's constitutional position as part of the United Kingdom” (emphasis added). He then went on to consider whether section 76 of the Northern Ireland Act (the anti-discrimination provision) was breached, holding that there had been no breach. He held: “The making of the Regulations and the requirement that the Union flag be flown on government buildings do not treat those who oppose this any less favourably. The purpose of the Regulations is, as I have said, to reflect Northern Ireland's constitutional position, not to discriminate against any section of its population.” Equality of opportunity (under Section 75) is thus interpreted as being very similar to non-discrimination.

So too, the recent judicial review of the Secretary of State's decision to put before Parliament proposed legislation to introduce Anti-social Behaviour Orders (ASBOs) also demonstrated a tendency to elide non-discrimination and equality of opportunity.¹⁷ Counsel had sought to argue that the introduction of ASBOs would “disadvantage” children and young people disproportionately. Girvan, J. appeared to interpret the concept of equality of opportunity as essentially similar to the prohibition of indirect discrimination, and rejected the complaint.

¹⁷ *In the Matter of an Applicant for Judicial Review by the Northern Ireland Commissioner for Children and Young People of the Decision Announced by the Minister of State for Criminal Justice, John Speller on 10 May 2004*, High Court, QBD (Crown Side), 23 June 2004 (Girvan, J.) (“the ASBOs case”).

The second perspective views section 75 as broader than anti-discrimination approaches, imposing a positive obligation on public authorities, but one that essentially concentrates on achieving fair procedures and is unconcerned with outcomes. There are several examples of the second perspective. Thus, for example, McVeigh expresses scepticism about the potential of section 75 for several reasons. “There is a big difference between equity at one end of a continuum and equality of outcome at the other. ‘Equality of opportunity’ sits neatly at the equity end of the continuum and allows governments to appropriate the language of equality without any serious threat to the status quo.”¹⁸ Osborne, Livingstone, Wilford and Wilson take a similar approach. Section 75, they write, “is unable to address the substance of inequality rather than the processes in which public authorities engage. It will not matter if a range of inequalities in Northern Ireland remain (sic) entirely unchanged by [section] 75 – as, in large measure, they probably will. Equality schemes will still be accepted by the Equality Commission or, if passed upwards, by the Northern Ireland Secretary, as long as public bodies go through the requirements of schedule 9 of the act (sic). Schedule 9 ... focuses entirely on the processes on which compliance is seen to depend. No substantive achievements are required at all. (...) It is an administrative-bureaucratic instrument, rather than being policy-driven, and considerations of effectiveness and efficiency have hardly figured in its elaboration.”¹⁹ Not only has section 75 been seen as not requiring substantive outcomes, it has sometimes been seen as hostile to such outcomes. Concerns have been expressed by those concerned in particular with gender equality that section 75 requires men and women to be treated on the basis of formal equality and therefore will undermine action taken on an asymmetrical basis to compensate for disadvantages suffered by women.²⁰

A third perspective views section 75 as centrally concerned with outcomes, and as radically more egalitarian than either of the first two perspectives. There are several examples of the third perspective. In a collection of essays examining the equality duty in section 75, McCann writes that “[t]hese new duties are aimed at

¹⁸ Robbie McVeigh, *Equality: What's Wrong with the Equality Agenda?*, in Gerard McCann (ed.), *The Equality Duty: Voluntary and Community Sector Responses to Section 75 of the NI Act (1998)* (West Belfast Economic Forum, 2001) at 63, 64.

¹⁹ R D Osborne, SW Livingstone, R Wilford and R Wilson, *Equality and Institutional Change in Northern Ireland* (Report to the ESRC, 2000), p. 5.

²⁰ Judy Seymour, *Stealing the equality cake*, *Scope*, February 2003, p. 21.

securing fair representation of under-represented groups in the workforce, fair access to education, training, goods, facilities and services and a fair distribution of benefits.”²¹ While Beveridge, Nott, and Stephen point to the attractiveness of the mainstreaming model to administrators “because they perceive them to adhere to the ‘equality as equal treatment’ standard (because policies are assessed for adverse impact on women *and* men)” and that “[i]n consequence, the strategy has met with little resistance from those who would find positive discrimination unpalatable”, they argue that “mainstreaming has the potential to deliver far more radical change than positive discrimination and may therefore be a more constructive approach”²²

Those who have argued for the second or third meanings have done so largely from a political rather than a legal perspective. In particular, those who have adopted the second perspective tend to be influenced by political theory discussions of the meaning of “equality of opportunity” without appearing to appreciate that the concept of “equality of opportunity” is now a legal concept, which must be interpreted from a legal perspective and that while this legal interpretation is likely to be influenced by political theory discussions, it will not be determined by them. An appropriate legal analysis of the meaning of “equality of opportunity” in section 75 will be much more sensitive to legal context and concepts of authority than non-legal commentators sometimes are.

First, there is the question of authority and Parliamentary intention. The Equality Commission has the statutory function, as we have seen, of drawing up guidance on the meaning of the duties in section 75. As the expert body in the field, the meaning of equality of opportunity adopted by the Commission has a legal status. This is not a determinative legal status, and the courts may decide that the Commission is wrong in its legal interpretation, but the status of the Commission is nevertheless one that deserves respect unless it is found to be incorrect. The Equality Commission’s current Guide to the Statutory Duties states that the statutory duties “require more than the avoidance of discrimination. Public bodies should actively seek ways to encourage greater equality of

²¹ May McCann, Women and Equality, in Gerard McCann (ed.), *The Equality Duty: Voluntary and Community Sector Responses to Section 75 of the NI Act (1998)* (West Belfast Economic Forum, 2001), p. 75 at p. 77

²² F. Beveridge; S. Nott; K. Stephen, Mainstreaming and the engendering of policy-making: a means to an end?, *Journal of European Public Policy*, 2000, Vol 7, Iss 3, pp 385-405 at 391

opportunity and good relations ...”.²³ The Guide quotes the responsible Minister during the passage of the legislation as making clear that section 75 “means that public authorities are bound to have regard to the need for affirmative action when considering their duty under the clause.”²⁴

Second, there is the importance of legal context. The concept of “equality of opportunity” is one that has a relatively long legal usage in Northern Ireland, particularly in the fair employment context. This is clearly relevant to understanding its meaning in the section 75 context. The Standing Advisory Commission on Human Rights, in its 1987 Report on fair employment defined “equality of opportunity” as existing “when different sections of the community have similar access to facilities by which the full development of the abilities and aptitudes of the members of both sections of the community may be achieved; similar opportunities for becoming aware of employment opportunities; similar opportunities for obtaining qualifications for employment; and similar opportunities for obtaining employment, taking into account the ability and potential of candidates.”²⁵ The Fair Employment Act 1989, section 20(2), like the earlier section 3(2) of the Fair Employment Act 1976, has, according to Hepple,²⁶ “translated this into a legal form” which emphasizes that persons of one religious belief must have the “same opportunity ... as [a person of any other religious belief] has or would have in [any circumstances, due allowance being made for any material difference in their suitability.” The 1989 Act went further, however, than the 1976 Act in making an explicit connection with affirmative action. Section 20(3) provided that “... a person is not to be treated as not having the same opportunity as another person has or would have by reason only of anything lawfully done in pursuance of affirmative action.” A clear connection between equality of opportunity and substantive equality is again apparent.

Third, it is important that a legal interpretation of the meaning of “equality of opportunity” in section 75 should be set in the evolving meaning of “equality of opportunity” in the European Community

²³ Para 2.5.

²⁴ House of Commons, Official Report, 18 November 1998, cols 1069-1070 (Mr. Murphy).

²⁵ SACHR Report, Religious and Political Discrimination and Equality of Opportunity in Northern Ireland: Report on Fair Employment, Cm 237, HMSO, October 1987, paras 4.18 and 7.12.

²⁶ Bob Hepple, Discrimination and Equality of Opportunity: Northern Irish Lessons, 10(3) Oxford Journal of Legal Studies (1990), 408 at 411.

legal context. The 1976 Equal Treatment Directive incorporated the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions. Article 2(1) of the directive provided that that principle “shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.” Article 2(4) provides that the directive shall be without prejudice to the right of member states to adopt or maintain in force “measures to promote *equal opportunity* for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).” The meaning of “equal opportunity” has been subject to extensive interpretation by the European Court of Justice, in the context of how far affirmative action measures are permitted by the Directive under Article 2(4). The extensive discussion of the meaning of “equal opportunity” by Advocate General Saggio in *Badeck* is particularly important for our purposes.²⁷

26. (...) As we know, [equal opportunity] is a concept which may vary from one legal order to another and which is subject to constant change to meet social needs, with the result that it may, in the course of time, take on different meanings even within one and the same legal order. (...) In my view, bearing in mind the wording of those provisions on national measures to guarantee equal opportunities to persons who find themselves at a disadvantage by reason of their sex, and the present aim and objective of positive action for women in various national legal orders, we cannot in principle hold national provisions involving the actual recruitment or promotion of female candidates to be precluded by Community law.

Moreover, while as I have already pointed out, it is true that the legality of such measures depends on whether the positive action can be reconciled with the general principle of non-discrimination, it is equally true, as various learned writers have often pointed out, that the principle of non-discrimination, designed - for the purposes of the present case - to ensure equal treatment for employees, and the principle of equal opportunity - on which positive action is based - designed to

²⁷ *Re Badeck and others (Landesanwalt beim Staatsgerichtshof des Landes Hessen and Hessischer Ministerpräsident intervening)* [2000] All ER (EC) 289, [2000] IRLR 432 (ECJ).

ensure equality in the actual conditions of employees, or in other words the principles of formal and substantive equality, are not completely at odds: if substantive equality can be achieved by measures that are, by their very nature, discriminatory, then such measures are in fact pursuing the same objective as the first principle, but with the additional twist that the legislature finds itself obliged to remedy a situation where some sections of the population face a real difficulty which cannot be addressed by applying the general principle of non-discrimination. If we follow this line of reasoning, we may come to doubt whether substantive equality is the exception to the rule of formal equality or, in other words, whether the provisions on which positive action is based-in this case art 119(4) of the EC Treaty and art 2(4) of the directive-are in the nature of exceptions and must therefore be interpreted strictly.

27. I therefore consider that there is nothing, at Community level, to prevent a national legislature from adopting positive measures that actually reinstate the group at which they are aimed in cases where the group in question, that is to say women, are in a particularly difficult situation and where the mere guarantee of equal treatment and observance of the (negative) principle of non-discrimination by the state authorities does not adequately protect their position. Such measures may therefore be designed not merely to guarantee women an equal opportunity at the starting point by creating the conditions to enable them to compete on an equal footing for each particular post, but to have a real effect on their social integration by giving them actual priority in appointment and promotion.

28. Lastly, I should add that, if the need to reconcile the general principle of non-discrimination with positive action for women simply means that any positive action that seeks to achieve an actual result, such as appointment to a post, is unlawful, it would enormously reduce the scope of such action, depriving it of substance and according it the status of an auxiliary measure, which is not always effective in redressing social inequalities.

The concept of “equality of opportunity” in section 75, as interpreted by the authoritative statutory body, and consistent with the approach to the meaning of equality of opportunity in other

areas of Northern Ireland and EC law, thus incorporates but goes beyond any of the limited concepts of discrimination. Non-discrimination is a baseline that must be attained if equality is to be effectively promoted through section 75. All policies must be legal, but section 75 involves not only a duty on the public authority to eliminate discrimination from its activities, which is seen as merely one example of where equality of opportunity is denied, but actively to take steps to promote greater equality of opportunity through its activities. The first perspective identified above is, therefore, much too limited. But which of the other two perspectives is correct? From our analysis, we can say that neither fully captures the legal meaning of equality of opportunity under section 75. The references to “affirmative action” imply that, under this approach, a public authority to which this duty applies is under a duty to do more than ensure the absence of discrimination from its employment, educational, and other specified functions, but also to act positively to promote equality between different groups throughout all policy-making and in carrying out all those activities to which the duty applies. It would be reasonable, therefore, to expect to see outcomes change and inequality between the groups identified by section 75 reduced over time. Section 75 is thus aiming at a reduction in inequality between groups. Practically, legislation aimed at promoting equality of opportunity must in some way focus on the fact that inequality affects some groups in society more than others.

The implications of this analysis are of considerable practical importance. One example must suffice. We have seen concerns expressed about the supposedly symmetrical nature of section 75 in the context of gender and the extent to which this might undermine gains made by women. On the basis of our analysis, we can see that such an approach represents a serious misinterpretation of what the legislation actually requires. Section 75 requires “promoting equality of opportunity between men and women generally”. This requires looking at the position of women and men in reality, highlighting the differentials, and then targeting resources to ensure that the differentials are addressed. Section 75 should be seen as an attempt to give greater focus to the disadvantaged position of women than had hitherto been the case under traditional anti-discrimination legislation. Section 75 requires public bodies to consider how each policy can be redesigned to promote gender equality. Where necessary, positive action will

need to be adopted. The Equality Commission Guidelines are very clear about this.

This is not to say, however, that section 75 is simply to be interpreted as requiring equality of outcome. This is important in two respects. Whilst section 75 is concerned to deliver outcomes, processes are necessary not least to ensure that bureaucratic organisations deliver section 75 in a clear and consistent way. Second, the responsibility of the public body is to have ‘*due regard*’ to the need to promote equality of opportunity. That appears to mean that it is to be regarded as expressing a strong public policy preference in favour of this policy. It is more than simply a “relevant consideration”, which would have been expressed by using language such as “regard”. This does not, of course, mean that the duty overrides other statutory duties, and when such other duties stand in the way of taking the equal opportunity duty into account fully, then the other existing duty prevails. An example may be in the area of public procurement by local government bodies. Were such a body to conclude that the equality duty would be forwarded by inserting equality requirements into its procurement contracts, then it would have to be sure that it did not breach the limitations imposed by EC law.

Nor does the approach suggested above imply that there is no room for extensive debate about the specific actions that the positive duty requires. There is clearly extensive scope for such discussions to take place, hence the importance of consultation and participation, issues we return to consider subsequently.²⁸

Is section 75 a zero sum game for groups? Is group conflict inevitable?

Apart from the question of the meaning and reach of “equality of opportunity”, several other concerns have been expressed that section 75 is not fit for purpose. McVeigh has argued that “[w]hether by accident or design, this equality agenda project pitches equality constituency against constituency. Instead of generating a political alliance committed to equality, it reduces the project to competing constituencies.”²⁹ One of the groups in

²⁹ Robbie McVeigh, *Equality: What's Wrong with the Equality Agenda?*, in Gerard McCann (ed.), *The Equality Duty: Voluntary and Community Sector Responses to Section 75 of the NI Act (1998)* (West Belfast Economic Forum, 2001) at P. 66:

society most obviously disadvantaged is women. As we have seen, a recent concern has been expressed that, somehow, section 75 risks undermining gender equality.³⁰ Since women are one of the nine categories, it is said, section 75 means that they will be restricted to one-ninth of the resources that should flow from the operation of section 75.³¹ These arguments, I suggest, indicate a fundamental misunderstanding about section 75, for reasons additional to those already considered. To begin with, section 75 has no budget attached to it; there is not, therefore, a defined cake which has to be distributed between the groups or constituencies. One of the sources of opposition to section 75 within the civil service is precisely that there is no clear limit to the financial commitment taken on by the public service under section 75. The stopping point is political and economic, not legal. To assume, therefore, that the competition for resources is between the groups themselves, rather than between the groups and other items of expenditure, is to skew the debate in a way that is detrimental to all of the groups. Intentionally or not, the effect of these arguments is paradoxically to promote the type of destructive competition between the groups that the commentators appear to be so determined to avoid.

Equality and good relations: what is the relationship?

There is a third argument made consistently by a group of commentators that the priority accorded the “equality of opportunity” duty in section 75 over the “good relations” duty is objectionable in principle, and ultimately detrimental to achieving equality. The reason this was included was to prevent the argument being made that equality programmes had to be limited because they might lead to community tensions. The issue raised focuses attention on how to address sectarianism, and the extent to which sectarianism and inequality intersect. Some, for example, argue that sectarianism is the real problem in relations between the two main communities in Northern Ireland and that an emphasis on equality misses what should be this real target. This sometimes goes so far as to suggest that focussing on equality and on groups underpins rather than undermines sectarianism.

³⁰ Judy Seymour, *Stealing the equality cake*, *Scope*, February 2003, p. 21.

³¹ The perception that section 75 is somehow antagonistic to women’s interests is all the more surprising, and troubling given that origins of section 75 were significantly bound up in legal challenges to the implementation of PAFT brought by Unison on behalf of their women members.

Others argue, however, that if inequality is not tackled, sectarianism will not be tackled. Community relations activity that is not based on a notion of tackling inequality is community relations built on sand. For those who argue thus, the idea that community relations is in some way in constant tension with equality is a dangerous notion. It is either an attempt to retain the status quo with respect to existing levels of inequality or it is an attempt to retain policy making and administrative turf, neither of which is a suitable way of dealing with the problems. Community relations strategies to date have clearly not been a notable success story. Much work needs to be done to develop good relations in Northern Ireland, but it is not acceptable that equality should be subordinated to this goal. The stronger we make the equality goal, the more we will lay good foundations for improved relations across all communities (a prime aim of community relations policy) in Northern Ireland. Indeed, recently published research appears to show that one of the few areas in which separation between the two communities has diminished has been in employment, exactly the area of activity that has seen the more sustained application of equality legislation over the past two decades.³²

Equality and poverty: what is the relationship?

A third argument is made that section 75 misunderstands the nature of the problem that needs to be tackled in a somewhat different way: in failing adequately to define the issue as one of poverty, and class inequality. One of the categories omitted from section 75 is class, or socio-economic status. An argument has been advanced that since section 75 does not include socio-economic status among its categories, this means that the equality duty ignores the class dimension of inequality and discrimination. McVeigh, for example, argues that “[t]he omission of class was not surprising, ... since its inclusion would turn the project from reformism to a revolutionary policy. The simple inclusion of ‘class’

³² Christopher McCrudden, Robert Ford, and Anthony Heath, *The Impact of Affirmative Action Agreements*, in Bob Osborne and Ian Shuttleworth, *Fair Employment in Northern Ireland: A Generation On* (Blackstaff, 2004), chapter 7. See also, Christopher McCrudden, Robert Ford, and Anthony Heath, *Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment*, *Oxford Journal of Legal Studies* (2004).

in ... Section 75 ... would transform the Act.”³³ A proposal has, indeed, recently been made that Northern Ireland equality duty should be broadened to incorporate a “socio-economic” ground into the list of protected categories.³⁴ This is not the place to discuss this issue in detail, but that particular proposal seems to me to be deeply problematic, for several reasons, some practical, some fundamental. The existing equality-mainstreaming model has not yet bedded down in the Northern Ireland context, and remains controversial. How far it will be successful is anything but clear, even as regards its current limited scope. For the existing model to be subject to major revision at this time is likely to be severely disruptive and thus to further delay the implementation of the existing obligations. It is also likely to provide an opportunity for the existing model to be weakened rather than strengthened, and likely to overburden an already intensive process.

More fundamentally, section 75 does not side step the context of disadvantage; rather it emphasises the disadvantage of those that are specifically protected by section 75. As was recently argued, “[c]ertain Section 75 groups are more likely to face poverty and social disadvantage.”³⁵ The breadth of the categories of those that are included in section 75, combined with disadvantage, is pretty wide. But section 75 is not about economic disadvantage as such; it is about *comparative disadvantages* between groups (including economic advantages but not limited to those). An anti-poverty strategy is needed; not one that replaces section 75, but one that complements it. Both are necessary; both are valid. But they are different.

A final issue involves the question of resources. The approach taken to equality in Northern Ireland is one that is significantly redistributive in its aims. Redistribution is essentially what a good equality mainstreaming process should result in. What this requires is the reallocation of resources to, or the targeting of resources at, those most in need among the protected groups. This is where the need to link mainstreaming and other social

³³ Robbie McVeigh, Equality: What's Wrong with the Equality Agenda?, in Gerard McCann (ed.), The Equality Duty: Voluntary and Community Sector Responses to Section 75 of the NI Act (1998) (West Belfast Economic Forum, 2001) at P. 67:

³⁴ Grainne McKeever and Fionnuala Ni Aoláin, Enforcing Social and Economic Rights at the Domestic Level – A Proposal, European Human Rights Law Review (forthcoming).

³⁵ OFMDFM, New TSN – the way forward (OFMDFM, April 2004): page 53. See further P. Hillyard, G. Kelly, E. McLaughlin, D. Patsios and M. Tomlinson (2003), Bare Necessities, chapter 6; T. Dignan and E. McLaughlin (2002), TSN and Poverty Research, Belfast.

spending programmes becomes crucial. Clearly one of the features of the Northern Ireland model of mainstreaming is that it does not have a budget attached to it. So, once a public body discovers adverse effects through impact assessments, or decides that it should exercise its discretion in a different way to further equality of opportunity, it is left uncertain as to where to secure the resources to address those issues.

Public bodies and the private sector: how far do the obligations extend?

Section 75 applies to “public authorities”. We have seen that, in contrast with the Human Rights Act 1998, the Northern Ireland Act adopts a closed list approach to the meaning of public authority for the purposes of section 75. Section 75 does not apply directly, therefore, to bodies that are not specifically included within the list of public authorities described in section 75(3). This has had important implications in particular contexts. So, for example, the challenge in *Murphy*³⁶ to the requirement in the Regulations that the Union flag be flown on government buildings was dismissed in part on the ground that the Secretary of State was not covered by section 75. Kerr J. said: “It is not strictly necessary for me to decide this point in order to reach a conclusion on the application of section 75 to the making of the Regulations but I am confident that the respondent's argument must prevail. Only those bodies or agencies specified in section 75 (3) of the Act are to be public authorities for the purpose of the section. The fact that the Secretary of State was performing a function that, in other circumstances, might have been carried out by the Assembly could not bring him within the provision. In this context it is worthy of note that section 76 (7) provides that a public authority shall include a Minister of the Crown. If it had been intended that the Secretary of State should be subject to section 75, that could have readily been made clear, as it has been in section 76.” There is clearly an important issue about how far particular bodies should be designated, and we shall see that there was controversy over which bodies should be included in designation orders. To some extent that controversy continues, with the issue of whether the Secretary of State for Northern Ireland should be designated, whether the Treasury should be designated, and whether the BBC and the Northern Ireland Assembly should be designated.

For some commentators, however, it is the non-inclusion of the *private* sector that constitutes a more severe limitation on the coverage of section 75, leading some to challenge its utility.³⁷ Such conclusions do not adequately address, however, whether and

³⁶ *In the Matter of an Application by Conor Murphy for Judicial Review*, The High Court of Justice in Northern Ireland, Kerr, J.

³⁷ Charlie Fisher, *Employment and Religious Differentials*, in Gerard McCann (ed.), *The Equality Duty: Voluntary and Community Sector Responses to Section 75 of the NI Act (1998)* (West Belfast Economic Forum, 2001), p. 106 at 106.

how far public authorities that are included within the coverage of section 75 have any obligation to ensure that certain private bodies provide equality of opportunity. In order to examine this issue, it will be useful, following the typology articulated by Shue, to distinguish three somewhat different obligations on the state that may arise in the human rights context: the duty to *respect* human rights; the duty to *protect* human rights; and the duty to *fulfil* human rights.³⁸ These obligations may be either legal, or moral, or both. Although often used in the context of discussions of social and economic rights,³⁹ the typology is as useful in identifying various equality obligations. The obligation to *respect* equality requires that states refrain from infringing a human right directly through its own actions. The obligation to *protect* equality corresponds places the state under a duty to prevent equality from being infringed by actors other than the state. The obligation on the state to *fulfil* equality requires states to facilitate access to equality, or to provide equality directly through the use of state power.⁴⁰

Since the equality duty in section 75 (1) is a positive obligation to promote equality of opportunity, this would in general require that, where the public authority knows, or ought to know, of a real and immediate risk to a particular individual or group, there is an obligation on it to take reasonable steps to address that risk.⁴¹ So, for example, where a local authority contracts-out provision of residential care to a private organisation, and it considers that conditions at the care home may involve the risk of racial discriminatory, then it would be likely to be in breach of its positive obligation to “have due regard to the need to promote equality of opportunity ... between persons of different racial group” if it failed to address that risk. Similar arguments apply in the context of other relationships between public bodies and private bodies, such as where the public authority is involved in awarding licenses to, or giving grants to private bodies. More broadly, the positive obligations approach to equality of opportunity would also require

³⁸ H. Shue *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd ed Princeton University Press Princeton 1996. International human rights texts use similar language of “recognise, respect, protect and fulfil.” For discussion of these terms by the UN High Commissioner for Human Rights, see <http://www.unhchr.ch/html/menu6/2/fs21.htm>.

³⁹ Craig Scott and Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. Pa. L. Rev. 1 (1992)

⁴⁰ The “positive obligations” doctrine in the ECHR jurisprudence deal with violations by private persons in part by requiring the *state* to ensure an effective legal framework.

⁴¹ A similar approach is adopted by the Joint Parliamentary Committee on Human Rights in the context of discussing responsibilities under the Human Rights Act 1998, *Seventh Report: The Meaning of Public Authority under the Human Rights Act*, 3 March 2004, HL 39/HC 382.

public authorities to work with private sector bodies to advance equality of opportunity.

The inclusion of the private sector is now, apparently, uncontroversial among public bodies, at least in principle, if not in practice. A recent example must suffice. The Strategic Investment Board's recent standardization of PPP contracts in Northern Ireland⁴² includes a clear statement of the position: As a minimum, an Authority should require a Contractor not to discriminate against any of the categories of persons set out in Section 75. An Authority may want to go further and impose obligations in the Contractor to cooperate with its ongoing statutory duty and build this into the Specification. (...) There will be a statutory duty on an Authority to continuously monitor a PPP Project for equality compliance. For example, where a public authority is concerned that hospital services are not being accessed by members of ethnic minorities the Authority will have to take action, this can be provided for in the change mechanism."

There are limits, however, to the extent to which public authorities can be seen to be under an obligation to cascade an equivalent obligation into the private sector, although where those limits lie precisely is as yet unclear. Where reasonable steps have been taken by public bodies to ensure that services are contracted out to organisations that will not act contrary to equality of opportunity, and they have done what they can to advance equality of opportunity positively through private bodies with which they have a direct relationship, no positive obligation on the public authority would be likely to arise, whereby the contracting-out public body would be liable under section 75 for discriminatory actions by the contracted-to service provider, or failure to further equality of opportunity positively.

Some indications are given, however, in several cases dealing with an early (less elaborate) predecessor to the public sector duty relating to racial equality in Britain, which was imposed on local authorities by the Race Relations Act 1976. Section 71 provided that '[w]ithout prejudice to their obligation to comply with any other provision of this Act, it shall be the duty of every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need (a) to

⁴² Strategic Investment Board, Standardisation of PPP Contracts, Northern Ireland ("Northern Ireland Guidance"), Revised, 2004 (draft 08/03/04), para. 15.7.8

eliminate unlawful racial discrimination and (b) to promote equality of opportunity, and good relations between persons of different racial groups’.

In *Wheeler v Leicester City Council*,⁴³ the council banned a rugby football club from using city recreation grounds for 12 months for its failure to take sufficient action to persuade its members not to play in South Africa, then enforcing a policy of apartheid. The House of Lords held that the council had power under s 71 to consider the best interests of race relations when exercising its statutory discretion in the management of the recreation ground. However, in the absence of any infringement of the law or any improper conduct by the club, the ban was unreasonable, and a misuse of its statutory powers. However, Lord Roskill, delivering the leading speech, rejected the argument put forward on behalf of the club members that s 71 should be given a narrow construction so that its effect would be limited to the actions of the council as regards its own internal behaviour only. In *R v Lewisham LBC, ex p Shell UK Ltd*,⁴⁴ it was held, on the basis of *Wheeler*, that ‘though the scope of s. 71 of the 1976 Act is wide and embraces all the activities of the council, a council cannot use its statutory powers in order to punish a body or person who has done nothing contrary to English law’.⁴⁵ The court held, given the multi-racial character of the borough, that the duty permitted the council to decide that trade with a particular company should cease because of that company’s links with South Africa. However, since the purpose of the boycott of the company by the council was broader, exerting pressure to sever all trading links between the company and South Africa, and was not therefore restricted to a wish to impose race relations in the borough, the actions of the council were unlawful. We need, however to treat these precedents with some caution, given the extent to which the meaning of equality of opportunity has now gone beyond simple non-discrimination.

Part III: Development of structures for the operation of Section 75 within central government and the Equality Commission

We turn now from the more theoretical issue of attempting to define the purpose and scope of section 75 to considering the

⁴³ [1985] AC 1054.

⁴⁴ [1988] 1 All ER 938.

⁴⁵ per Neill LJ.

issues of delivery and practice. We begin by providing an overview that attempts to sketch the main developments in the formal operationalisation of Section 75. These fall into several main sections: the role of the Secretary of State, the development of structures within government, and the role of the Equality Commission.

Role of the Secretary of State

For most purposes, the role of the Secretary of State has been three fold: the bringing into force of section 75, the designation of public bodies, and the approval of Equality Commission guidance. As regards commencement of the legislation, section 75 became operational on the 1st January 2000.⁴⁶ Section 75 has been amended several times since 1998, in order to add to the list of public authorities automatically covered by the statutory duties, particularly in the field of criminal justice (broadly defined).⁴⁷ The second role of the Secretary of State involves the issue of the designation of those public authorities that were not automatically covered by the provisions of section 75. Initially, it would appear, the Northern Ireland Office simply invited departments and public bodies to submit themselves to the section 75 duty. Perhaps not surprisingly, few did and when the Equality Commission was notified of those few that had, it requested the Secretary of State to consider whether, in the public interest, other bodies should be included. Political endorsement for a much more comprehensive designation had come from the OFM-DFM Ministers. There was increasing concern among NGOs both at the delay in designation itself, but also at the range of functions that could escape the statutory duty if the relevant UK body were not to be designated. Designation orders made by the Secretary of State in July 2000 and April 2001 included 23 UK wide public authorities.⁴⁸ Further UK public authorities were designated in 2003.⁴⁹

Structures within central government

The development of structures within government to assist and monitor the implementation of section 75 is crucial. Within the OFM-DFM, a new Equality Unit was created, headed by two junior Ministers, one an Ulster Unionist, the other from the SDLP, as part

⁴⁶ 1 January 2000: see SI 1999/2204, art 4. Sub-ss (1), (2), (3)(b), (c), (5): Appointment: 1 January 2000: see SI 1999/2204, art 4. Sub-s (3)(a), (d): Appointment (for the purpose of making designations): 1 March 1999: see SI 1999/340, art 2(4). Sub-ss (3)(a), (d): Appointment (for remaining purposes): 1 January 2000: see SI 1999/2204, art 4. Sub-s (4): Appointment (for certain purposes): 1 October 1999: see SI 1999/2204, art 3. Sub-s (4): Appointment (for remaining purposes): 1 January 2000: see SI 1999/2204, art 4.

⁴⁷ Police (Northern Ireland) Act 2000, s 78(1), Sch 6, para 24(1), (2), brought into force on the 4 November 2001: see the Police (Northern Ireland) Act 2000 (Commencement No 3 and Transitional Provisions) Order 2001, SR 2001/396, art 2, Schedule; Justice (Northern Ireland) Act 2002, s 38(1), (2), (3); s 85(1), Sch 12, paras 62, 63.

⁴⁸ Northern Ireland Act 1998 (Designation of Public Authorities) Order 2000, SI 2000/1787; Northern Ireland Act 1998 (Designation of Public Authorities) Order 2001, SI 2001/1294

⁴⁹ Northern Ireland Act 1998 (Designation of Public Authorities) Order 2003, SI 2003/55

of a wider Directorate on equality, human rights and community relations. The unit was intended to be the central mechanism for ensuring the success of the section 75 public sector duties, and the major player in ensuring that equality issues gained a higher political profile. Arrangements were made to ensure that the Unit would have staff heading it at a more senior level than hitherto in order to ensure that its views should carry weight with other departments. It was also envisaged that the Equality Unit staff would service the main inter-departmental committee discussing equality related issues, the Social Steering group, composed of senior departmental civil servants from each department. In January 2000, the OFM-DFM published its first Circular on the section 75 duties and the importance of departments ensuring that the duties were taken seriously.⁵⁰

These structures have been modified over time and the current structure, which evolved under devolution but continued under direct rule, is that there are now several units tasked with taking forward broad equality and social need policies and strategies and in providing statistical and research support.⁵¹ Within OFMDFM, an Equality and Social Needs Division has been formed. Within this, a Statutory Duty Unit has responsibility for the implementation, among the Northern Ireland Civil Service (NICS) Departments, of the Section 75 duties. The main functions of the Unit are, according to the OFMDFM website, to promote and advise within the NICS on the implementation of the statutory duties and the drafting of departmental equality schemes; to act as a central contact point for advice and guidance on equality schemes, equality impact assessments, consultation and publication of results of assessments; to advise on monitoring, in conjunction with Northern Ireland Statistical Research Agency (NISRA); and to provide advice on training issues for all aspects of equality of opportunity. OFMDFM has had an important role in managing the implementation of section 75 within departments. Only some examples of its role must suffice. In 2000 OFMDFM produced an influential draft model equality scheme to help central government departments prepare their equality schemes.⁵² Subsequently,

⁵⁰ OFMDFM, Circular 1/00 Northern Ireland Act 1998 Section 75 Statutory Equality Obligation (January 2000).

⁵¹ See OFMDFM Cross-Departmental Equality and Social Need Research and Information Strategy (2003?)

⁵² Equality Commission for Northern Ireland, Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities, 1 January 2000 – 31 March 2002 (Equality Commission, 2003), para 2.7:

OFMDFM chaired a review of consultation within Section 75 processes, reporting in 2004.⁵³ What is unclear, however, is how far the “challenge” function of OFMDFM as regards section 75, meaning the role of the Department in challenging other departments to implement section 75 more effectively, is being successfully carried out.

In addition, the Equality and Social Need Steering Group (ESNSG) is a cross-Departmental group comprising senior officials and chaired by the Head of the Equality, Human Rights and Community Relations Directorate within the Office of the First Minister and Deputy First Minister (OFMDFM). The ESNSG is tasked with taking forward the broad equality and social need agendas within Government and to maximize the impact of joined-up Government action in the various areas covered by equality and social need. The Equality and Social Need Research and Information Group (ESNRIG) is a sub-group to the ESNSG and comprises members of the Northern Ireland Statistics and Research Agency (NISRA), including NISRA representatives located in the various Government Departments. In addition, representatives from both the Equality Commission and the Northern Ireland Council for Voluntary Action are members of the ESNRIG. The function of ESNRIG is to provide research and statistical support to the work of the ESNSG. This group is chaired by the Northern Ireland Statistics and Research Agency (NISRA), with the support of OFMDFM Research Branch. All government departments are members of this group. ESNRIG has been influential in developing a strategy for addressing the information and data needs of departments undertaking screening and impact assessments under the legislation.

Equality Commission

The Equality Commission played a key role in the implementation of section 75, even before the Commission came into formal existence. For those bodies automatically subject to the duties, the equality duty came into effect from 1 January 2000. The legislation provided that each public body should submit a draft equality scheme within six months of this date, by 30 June 2000. This involved a significant burden on both the public bodies and on the

⁵³ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 16; J. Kremer, Report on Consultation Processes Within Section 75 (OFMDFM, 2004)

Equality Commission itself, due to the statutory requirement that the public bodies produce such schemes in accordance with guidelines issued by the Commission. The initial task of the Commission was to produce such guidelines.

Prior to the amalgamation of the various statutory equality bodies into the Equality Commission, a Working Party had been established by the Government, chaired by an independent outside expert, consisting of representatives from each of the equality bodies to be amalgamated. As one of its tasks, it commissioned a set of draft guidelines on the section 75 duties (from the author) that would be ready for the new Commission to consider when it came into office. This was included in the published report of the Working Group.⁵⁴ Following the first formal meeting of the new Commission, this draft was issued for consultations. Following this round of consultations, the draft was revised and sent to the Secretary of State in late December 1999 and was simultaneously sent for legal advice. Following receipt of legal advice, an amended version was sent for formal approval in mid-January 2000. The letter giving formal approval from the Secretary of State was received on 23 March, and the guidelines were formally launched on 31 March. The one major change to emerge as a result of the consultation process, apart from restructuring of the content, was that public authorities were permitted to set out their arrangements for determining which specific policies would be subject to impact assessment, rather than have to identify the specific policies in the scheme itself.

A related issue was the development of guidance more specifically on the conduct of equality impact assessments (EQIAs). The process of devising the initial guidance was not complicated further at this initial stage by attempting to provide detailed guidance on the conduct of EQIAs. This issue came to the fore during 2001 particularly, when some public bodies were beginning to undertake such assessments, leading to the Commission developing and publishing its “Practical Guidance on Equality Impact Assessment” during March/April 2001.⁵⁵ Subsequently, both sets of guidance were reviewed in the light of experience of their operation. As part of the Equality Commission’s review of the Practical Guidance on

⁵⁴ Report of Equality Commission Working Group (March 1999).

⁵⁵ Equality Commission for Northern Ireland, Report on the Implementation of the Section 75 Equality and Good relations Duties by public authorities, 1 January 2000 – 31 March 2002 (Equality Commission, 2003), para 1.4, para 3.1.

Equality Impact Assessment and the Guide to the Statutory Duties, a research report was commissioned analyzing completed equality impact assessments, reporting in November 2002. In addition, a consultation exercise was undertaken which provided an opportunity for the Commission to engage widely with public bodies and NGOs, enabling it to gain a broadened perspective on the implementation of section 75. The Commission's review of the Guide to the Statutory Duties, and Practical Guidance on Equality Impact Assessment was completed and revised documentation issued for consultation.⁵⁶ In 2004, the Commission finalized a new set of Guidance on the statutory duties and EQIAs.

As well as devising statutory guidance for public authorities, the Commission also needed to establish appropriate internal structures. The Commission's Statutory Duty Committee was formed early in 2000 to assist with strategic management and monitoring of the implementation of section 75.⁵⁷ A Statutory Duty Directorate was established to make progress on the implementation of the duty and service the Committee. Subsequently, a Section 75 Investigations Committee was established to consider potential investigations of section 75 complaints received by the Commission.⁵⁸

Initially, in 2000, the principal issues confronting the Commission, apart from the production of the statutory guidance, involved assisting the production of and scrutinizing the drafts of equality schemes produced by public bodies. However, a preliminary issue arose as to whether some public bodies should be exempted from some or all of the procedural requirements of the legislation.⁵⁹ The issue was the time limits imposed by the legislation on the production of such schemes. The length of time taken to secure approval by the Secretary of State of the Commission's Guidance meant that some public authorities subject to the requirement to produce an equality scheme began to worry that they would be unable to prepare a draft scheme, consult effectively, redraft the scheme and submit it to the Equality Commission in time to meet

⁵⁶ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 14:

⁵⁷ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 13.

⁵⁸ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 14:

⁵⁹ Equality Commission for Northern Ireland, Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities, 1 January 2000 – 31 March 2002 (Equality Commission, 2003), para 1.4.

the statutory deadline. In particular, they argued to the Equality Commission that the Commission could and should exercise its statutory power to exempt these bodies from the duty to submit the draft schemes by 30 June. The Commission considered, however, on the basis of legal advice and taking into account the statement by the responsible Minister in Parliament at the time of enactment, that such exemptions should be rare, and refused to grant any exemptions on this basis. During 2000-2001 the Commission did, however, approve the Department of Health, Social Services and Public Safety's request to initiate a two-stage screening process and this model was subsequently included in the Commission's best practice template.⁶⁰ The scrutiny of the draft equality schemes, and the approval of schemes involved intense work during 2000 and the first part of 2001 in particular. The equality schemes of all Northern Ireland government departments were approved early in 2001.⁶¹ By the end of March 2003, 177 public authorities had been designated and 154 equality schemes approved.⁶²

It was clear from before the legislation came into effect that the burdens on the community and voluntary sector were also likely to be significant, in terms of the consultation requirements of section 75. A significant issue for the Commission, therefore, involved the question of capacity building among the community and voluntary sector, to enable them to participate effectively in the extensive consultations envisaged by the legislation. Commission staff was heavily involved in working with NGOs, providing briefing and information to them. During 2000-2001, the Commission established an "advisory support programme" to enhance the capacity of the community and voluntary sector to assist the introduction of the statutory duties to public authorities. Through the Commission's "Advisory Support Programme", £90,000 was awarded to 12 voluntary or community sector organizations. Groups could apply for up to £10,000 to work with their

⁶⁰ Equality Commission for Northern Ireland, Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities, 1 January 2000 – 31 March 2002 (Equality Commission, 2003), para 3.1:

⁶¹ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 45:

⁶² Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 11:

constituencies on capacity building and consultations on the equality duty.⁶³

The Commission has a statutory responsibility to monitor the implementation of the statutory duty on a continuing basis. This has involved receiving and scrutinizing the EQIAs produced by the public bodies, and organizing and receiving yearly progress reports for public bodies. A template for such reports has been devised and the Commission has so far published two reports summarizing progress on the implementation of the duties, one during the first two years of the initiative, and a second up to March 2003. During 2005-6 the Commission will carry out a formal review of section 75 in line with statutory requirements.⁶⁴

Finally, the Commission has the role of receiving complaints, and initiating investigations to consider alleged failures to fulfil the statutory requirements. During 2003-2004, the Commission focused on addressing how to handle complaints and investigations. The revision of the Guide resulted in significant improvements of those sections dealing with complaints and investigations. In addition, the Commission developed detailed internal structures and policies to resolve complaints and for the initiation of investigations.⁶⁵

Part IV: Identifying effects of the statutory duty on policy development and service delivery

Different types of effect

The Equality Commission has characterised the impact that section 75 has had on Government departments as falling under three broad headings: increased awareness of equality considerations in the design, delivery and monitoring of policies and services; increased engagement with Section 75 groups and

⁶³ Equality Commission for Northern Ireland, Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities, 1 January 2000 – 31 March 2002 (Equality Commission, 2003), Para 6.8.

⁶⁴ Equality Commission, Corporate Plan 2003-2006 (Equality Commission, April 2003), p. 25.

⁶⁵ Equality Commission, Commission Generated Procedure (CGP) Investigations Under Paragraph 11 of Schedule 9 of the Northern Ireland Act 1998 (March 2003); Equality Commission, Individual Complaints Procedure (ICP) Under Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998 (March 2003); Equality Commission, Protocol on Commission Investigations Under Paragraph 11 of Schedule 9 of the Northern Ireland Act 1998 (21 April 2004).

the wider social economy; and changes and adjustments to policies and the associated delivery of services.⁶⁶

Some examples may be given of various types of changes that are attributable to section 75. One clear indication of changes resulting from an EQIA can be identified in the employment area. In the education sector, the EQIA of the Code of Procedures for Recruitment, Selection and Promotion and the Internal Trawl, identified several potential barriers to the promotion of equality of opportunity, from the operation of the “internal trawl”, and potential adverse impacts on several section 75 groups due to a minimum service requirements when applying for promotion. This led to the Staff Commission/Boards proposing a range of positive measures to eliminate adverse impacts, including a reduction in the number of posts subject to the internal trawl, and the removal of the minimum service requirement for promotion to higher grades.⁶⁷ As regards the implications of section 75 for grant giving, it was reported that Ballymena provided an “example of promoting Section 75, and ensuring compliance, by requiring all recipients of Council funding to sign a Section 75 declaration.”⁶⁸ In addition, the Arts Council also asked “all organisations applying for Council funding to complete an Equality of Opportunity Commitment, which was incorporated into its grants compliance requirements.”⁶⁹ There have also been examples of significant changes in contracting out. One of the clearest examples of an existing policy being changed as the result of an EQIA was reported by the Craigavon and Banbridge HSS Trust. As a result of an EQIA and associated consultation on Catering and Domestic Services provision, a decision was made to return these previously outsourced employees in-house.⁷⁰

Section 75 has become involved in high-level policy development and assessment, to some extent encouraged by the Equality Commission and others, such as the drawing up of the Programme

⁶⁶ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 20

⁶⁷ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 57-58.

⁶⁸ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 84:

⁶⁹ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 97

⁷⁰ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 74:

for Government and the Budget for 2003-4.⁷¹ There has also been a significant increase in data collection and analysis relevant for equality screening and impact assessments. A new NISRA's Equality Research and Information website was designed with the aim of collating and disseminating statistics and research relevant to equality of opportunity and its promotion within the public sector, and launched in April 2004. So too, it appears that, in the course of reviewing New TSN, independent external evaluation pointed to the need for indicators to be more sensitive to trends among different population groups such as those defined in Section 75.⁷² "In assessing these indicators, the evaluators felt they should focus more on differences between groups and should cover longer timeframes. The indicators should be capable of examining the incidence of key trends by a range of population groups including Section 75 groups, social class and vulnerable or disadvantaged groups."⁷³ To these developments we can add the Department of Finance and Personnel's Review of Public Procurement Policy, the Office of the First Minister and Deputy First Minister's Review of Opportunities for Public Private Partnerships in Northern Ireland, Working Group Report, the Department of Finance and Personnel's Review of the Appointment and Promotion Procedures for the Senior Civil Service of the Northern Ireland Civil Service (Ouseley Report), and the Department of Finance and Personnel's Strategic Review of Government Office Accommodation, all of which consider the implications of section 75 for their work, and in some cases deal with the issue extensively.⁷⁴

Assessments of extent and depth of change

However, although we can point to important examples of change, how wide and deep are the changes that are occurring as a result of section 75? Academic assessments have diverged considerably. On the one hand, Donaghy has noted that even at the first stage of the process, the development of equality schemes by the public bodies, the "participative-democratic approach has already produced clear benefits ... Namely, the Northern Ireland

⁷¹ The Executive's Position Report to the Assembly: Developing the Programme for Government and the Budget for 2003-04, paras 109-111.

⁷² OFMDFM, New TSN – the way forward (OFMDFM, April 2004), p. 8.

⁷³ Para 2.14.

⁷⁴ On procurement, see, for example, R. Fee, Contract compliance: subnational and European influences in Northern Ireland, *Journal of European Social Policy*, 2002, Vol 12, Iss 2, pp 107-121

bureaucracy has undergone a significant shift in the consideration it gives to equity in policy making: their interpretation of 'equality' has been broadened; policy outcomes in Northern Ireland are now intended to be designed and developed in a manner in which equality of opportunity is at every stage possible encouraged, instead of overlooked; and the relationship between civic groups and government has been formalised and developed under a governance structure."⁷⁵ She continues:

“Analysis shows the first stage of the process provided the basis for dramatic reform in Northern Ireland through greater consideration being given to equality throughout all aspects of public authorities' policy making. Equality has been prioritised as part of the government agenda and the new duty has ensured that, unlike previous equality priorities, Northern Ireland now gives greater consideration to a broad range of groups. The model of consultation argued for by civic groups in the drawing up of the Act has had a flow-on impact and has been applied to wider government activities, such as the Programme for Government (PfG). While the PfG did not undergo the mainstreaming process, it did undertake a broad consultative process and incorporate an equality statement. Other developments have seen the process of drawing up equality schemes catapult issues of equality into bureaucrats' and politicians' considerations in policy development in a way previously unmatched. Community groups' perspectives have been given a formal means through which they can access government and have their concerns and perspectives heard, while there is an increased awareness on behalf of government of the equality expertise within the community and the benefits of consulting with these experts.”

Other commentators, however, have pointed to an apparent lack of impact that the legislation appears to have had at the higher levels of civil service policy making. Osborne writes, for example: “While there has been effective compliance in the fulfilling of the procedural requirements of the statutory obligations, something public officials are comfortable with, there is little evidence as yet that public organizations are taking mainstreaming to mean the

⁷⁵ T. Donaghy, *Mainstreaming: Northern Ireland's Participative-Democratic Approach*, Centre for Advancement of Women in Politics, School of Politics, Queen's University Belfast, Occasional Paper No. 2, February 2003, p. 8.

wholesale reconsideration of how things are done both internally and in terms of how they formulate and deliver policy.”⁷⁶

Problems in reaching a conclusion

There is a problem in deciding which of these varying conclusions is more accurate. There is a dearth of detailed academic empirical research of the impact of section 75. Across-the-board assessments (positive or negative) of using section 75, and allocation of responsibility for shortcomings, may be simply precipitate, therefore. And the absence of such research is hardly surprising. At March 2004, most public authorities were only at the end of year 3 of the implementation of their five-year equality schemes. We can agree with Ellis that, “more depth research ... would be most relevant once the full policy apparatus has been implemented.”⁷⁷ A recent two-year study for the ESRC on *Gender and Constitutional Change* in all of the devolved administrations concluded: “Equality Mainstreaming, including statutory duties, has been introduced relatively recently and much work is still at the stage of ‘process’ with the development of instruments and the preparation of schemes. It is therefore too early to assess the impact of mainstreaming in producing ‘better policy’ and in reducing inequalities.”⁷⁸

Identifying accurately the effects of the statutory equality duty is important for the future for several reasons. First, if we do not know what is happening, it is difficult to estimate accurately what is *not* happening, and therefore we do not know where reforms are most needed. Second, any under-reporting of effects is likely to create the impression among those participating in the section 75 consultation processes that their considerable efforts are a waste of time, possibly leading to a falling off of interest in participating in the future, contributing to the gradual decline in the importance attached to section 75. The effect would be likely to be to marginalize section 75 and get a subliminal message across about its irrelevance. Third, given the resources that are expended on

⁷⁶ R.D. Osborne, Progressing the equality agenda in Northern Ireland, *Journal of Social Policy*, 2003, Vol 32, pp 339-360, at p. 365.

⁷⁷ G. Ellis, Social exclusion, equality and the Good Friday Peace Agreement: the implications for land use planning, *Policy and Politics*, 2001, Vol 29, Iss 4, pp 393-411 discusses the implications of section 75 for land use planning, but describes his assessment as “interim” (p. 395).

⁷⁸ Fiona Mackay and Elizabeth Meehan with Tahyna Donaghy and Paul Chaney, *Gender and Constitutional Change* (ESRC, 2004), available at <http://www.regard.ac.uk/regard/home/index.html>.

section 75 within public bodies, misreporting of section 75 activity is likely to lead to persistent calls for the section 75 process to be modified to make it less burdensome, or even that it should be scrapped. Any lack of clarity in whether or how section 75 affects policy developments is therefore of some considerable importance.

Whilst we cannot say definitively that there is a problem, because of the absence of research, there appears to be sufficient sporadic evidence to conclude that there *may* be a problem with regard to reporting of progress. There is some evidence, for example, that published reports prepared by Departments on policy initiatives that were based in part on section 75, or were imbued with a section 75 approach, may not mention section 75. The most notable example of this is the report of the Department for Education and Learning, Report of the Taskforce on Employability and Long-Term Unemployment, which reported in December 2002. Somewhat peculiarly, section 75 is (so far as I have been able to ascertain) not mentioned at all in the report of the Taskforce, thus appearing to give the impression that it did not feature in the discussions, which would be surprising.

Reading the two progress reports published by the Commission so far could also give an impression that less was happening when policies are being reviewed within departments or on a cross-departmental basis than was actually the fact. Thus the Commission progress reports either do not mention, or significantly underplay such important developments as the Department of Finance and Personnel, Review of Public Procurement Policy, the Office of the First Minister and Deputy First Minister's Review of Opportunities for Public Private Partnerships in Northern Ireland, Working Group Report, the Department of Finance and Personnel's Review of the Appointment and Promotion Procedures for the Senior Civil Service of the Northern Ireland Civil Service (Ouseley Report), and the Department of Finance and Personnel's Strategic Review of Government Office Accommodation, all of which, as we have seen, consider the implications of section 75 for their work.

It is unclear why this apparent under-reporting occurs. It may be because the Commission reports only on what the department reports to it, rather than undertaking any independent assessment, or it may be that the Equality Commission has preferred to concentrate instead on the (perhaps) more easily understood

changes in service delivery. There is also some evidence that those preparing departmental progress reports that are sent to the Equality Commission are not aware of, or downplay, important policy initiatives that have been affected by section 75 and its ethos. In particular, public authorities may not report to the Equality Commission everything where section 75 has had an impact because in some cases its impact was related to other requirements, for example requirements arising from disability discrimination legislation.⁷⁹ Even an assiduous reader of the way in which these issues are dealt with might well get the impression that, rather than section 75 being a major influence in the way these issues were debated, it is New TSN that appears to be the driving force. One gets a strong sense that some central government initiatives that involve equality are pressed into service as an example of the operation of New TSN, which is then heralded as the main social inclusion/equality initiative, rather than section 75.

If there is a current problem of misreporting, will the problem be reduced in the future? More worrying than the existing lack of information would be if a situation were to develop whereby, despite the emphasis given to the importance of reporting by the legislation itself, in the form of requirements on public bodies to produce annual reports of progress, and on the Commission to produce its assessment of progress, sufficiently accurate or detailed information was unavailable in the future. Changes are currently being undertaken by the Equality Commission that may help to address the issue. The Commission has recently required public authorities to report on all aspects of its work when section 75 has had an impact. The template used by the Commission to structure reporting by public authorities has been further refined to ask for more specific information. There will remain a dilemma, however. The more section 75 is mainstreamed into policy processes, becoming a normal part of decision-making, the more difficult it may become to measure the specific impact of section 75 on those processes. Integration of section 75 into policy making can be difficult to measure where public authorities are being encouraged to mainstream equality as a matter of their everyday business. It may be time to develop techniques, therefore, or a research programme, that attempts to track such effects, even

⁷⁹ Communication from D. Lambe, Equality Commission.

where those reporting from the public bodies do not themselves fully appreciate the effect of section 75.

Part V: Section 75: Issues of Implementation and Enforcement

Although there is some lack of clarity as to how far it is reaching its potential, commentators tend to identify one or more of four sources of problems in the implementation of section 75: the procedural aspects of section 75, problems with participation and consultation, the capacity and political willingness of the public bodies to operate section 75, and problems with the methods of ensuring compliance that the legislation adopts. We will consider each in turn. Our assessment is necessarily tentative and preliminary, given the limitations in empirical evidence available at this time. At the very least, the assessment points to the issues that future research should consider, perhaps in the context of the forthcoming review of equality schemes by the Equality Commission in 2005.

Processes and procedures: a help or a hindrance to achieving equality?

There is a significant emphasis in the legislation on procedures. This is hardly surprising given the failure of the non-procedural PAFT approach that preceded the Section 75 duty. Procedural implementation is necessary in the absence of trust. Trust had clearly and undoubtedly been lost between the PAFT-groups and those tasked with implementing PAFT. On the one hand, some will argue that the emphasis on procedures may further undermine trust. On the other hand, attempting to roll back, or deliberately to avoid, the procedures that have been established to deal with the original lack of trust may encourage more suspicion. The fact that there has been so much talk about changes to the procedures⁸⁰ in so short a period of time further undermines trust, and further delays the opportunities that will be available later to demonstrate that a lighter touch regulatory system may be sufficient. It appears, therefore, that in the medium term the only way to deal with the lack of trust is to ensure that public bodies conform, as closely as possible and in good faith, to the existing requirements.

⁸⁰ As well as the current Review, we can identify the Kremer Review, the Equality Commission revisions of its Guidelines, the Task Force on Resourcing the Voluntary and Community Sector, the Report to the ESRC, and the forthcoming Equality Commission 5 Year Review as all having implications for procedures and practice under Section 75.

There are, however, certain procedural issues that can be successfully addressed without necessarily undermining trust. Osborne has pointed, for example, to the “increasing web of equality-related policy interventions and bodies to which [the public sector] must respond and promote . (...) While each of these initiatives has its own logic, and can be supported as seeking to provide greater equality in Northern Ireland, together they risk providing a maze of separate bureaucratic and audit procedures which could generate policy paralysis. There is a strong case for considering how these separate initiatives might be streamlined and integrated when they are reviewed in the next few years.” Here, the Single Equality Bill may have a role to play, discussed below.

Equality mainstreaming under section 75 is not the only example of the use of impact assessments in public policy making in Northern Ireland government. The following table, adapted from a recent government publication,⁸¹ sets out the variety of different types of impact assessment currently in use, and their status.

Type of Assessment	Status
Equality Impact Assessment	Statutory Duty
Community Safety	Good practice (agreed with NIO)
Health Impact Assessment	Executive policy
Human Rights	European Convention on Human Rights and Human Rights Act
New Targeting Social Need	Executive policy
Public Expenditure and Public Service	Good practice
Regional Development Strategy compliance	Executive policy and statutory requirement (Strategic Planning (NI) Order 1999)
Regulatory Impact	Executive policy

⁸¹ Integrated Impact Assessment, available at <http://www.ofmdfmi.gov.uk/ia/>.

Assessment	
Rural Proofing	Executive policy
State Aid Compliance	European Commission, Treaty of Rome, Article 87
Strategic Environmental Assessment	EU Directive wef July 2004
Sustainable Development	Good practice, in pursuit of agreement at 1992 UN Conference on Environment and Development ('Earth Summit'), Rio de Janeiro
Victims	Good practice

The Equality Commission has reported in its first progress report that one of the factors that public bodies reported had impeded strategic implementation was the difficulty of establishing methods to conduct meaningful EQIAs in the wider context of equality, human rights, New TSN and rural proofing considerations.⁸² Integrated impact assessment is being piloted by the Department of Rural Development in the context of water reform.⁸³ It will be seen, however, that equality impact assessment is, together with requirements deriving from European Community law, a statutory duty, thus marking it out from many of the other examples of impact assessment in operation.

Participation and consultation: what role for the community and voluntary sector?

One central aspect of the section 75 process that has stimulated much debate is the issue of consultation and how it can be made more effective. On the one hand, as O’Cinneide has argued, “[t]he consultation process represents the main way in which a public authority can be challenged in its decisions and conclusions. If the consultation process is ineffective, either through the inadequate actions of the public body or because the voluntary and community sector is unable to respond appropriately and effectively, then much of the dynamic for change will be absent.”⁸⁴

⁸² Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities, 1 January 2000 – 31 March 2002 (Equality Commission, 2003), para 7.31

⁸³ Information supplied by Danny Lambe, Equality Commission.

⁸⁴ Colm O’Cinneide, Taking equal opportunities seriously: the extension of positive duties to promote equality (Equality and Diversity Forum 2004), p. 349

On the other hand, there are likely to be tensions between the aim of section 75 to promote innovative, community-based solutions and the aim of delivering tangible improvements rapidly.⁸⁵ Bates, a senior administrator with considerable experience of these issues, has discussed the “negativity” towards the equality duty found among those in the public service as taking two forms: that it constituted a diversion of scarce resources that would be better spent in carrying out the primary function of the public body, and a scepticism that increased public participation will add value to decision making by professionals.⁸⁶

In its first progress report, the Equality Commission identified several factors that public bodies regarded as impeding the process of strategic implementation including the need for better resourcing of consultee organisations, and consultation fatigue.⁸⁷ In its second progress report, it reported that although in the past several departments had cited “consultation fatigue” as one of the impediments to strategic implementation, the Commission noted that reference to “consultation fatigue does not occur in any of the 2002-03 progress reports.”⁸⁸ In the local government sector, however, bodies continued to refer to such fatigue, and mentioned also the “lack of capacity of consultee groups and a poor response from consultees” as factors impeding the process of screening and EQIAs.⁸⁹ Osborne has drawn attention to the demands placed on both public bodies and community and voluntary groups by the consultation requirements, resulting in complaints of consultation fatigue.⁹⁰ Several articles in the popular press have appeared in the recent past also raising the question of “consultation-fatigue”.⁹¹

Unfortunately, however, some of the commentaries to date have

⁸⁵ Cf similar dilemmas within the (British) Neighbourhood Support Fund, launched in March 2000, see David Turner and Steve Martin, Managerialism meets community development: contracting for social inclusion?, *Policy and Politics*, 32(1), 21-32.

⁸⁶ Evan Bates, A Viewpoint from the Royal Hospitals, in Gerard McCann (ed.), *The Equality Duty: Voluntary and Community Sector Responses to Section 75 of the NI Act (1998)* (West Belfast Economic Forum, 2001), 30 at p. 34

⁸⁷ Equality Commission for Northern Ireland, *Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities, 1 January 2000 – 31 March 2002* (Equality Commission, 2003), para 7.31.

⁸⁸ Equality Commission, *Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003* (Equality Commission, 2004), p. 33-34:

⁸⁹ Equality Commission, *Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003* (Equality Commission, 2004), P. 79, 89

⁹⁰ R.D. Osborne, Progressing the equality agenda in Northern Ireland, *Journal of Social Policy*, 2003, Vol 32, pp 339-360.

⁹¹ See, e.g., Bimpe Fatogun, North is hit hard by consultation fatigue, *Irish News*, April 2, 2003.

failed adequately to distinguish between the need for consultation, and the way in which consultation has been organized by public bodies. Until recently, reactions from central government to the problem have sometimes appeared to be hostile to the consultation requirements and to be unsympathetic to requests for resources from the voluntary and community sector to enable them to participate effectively in section 75 consultations. For Donaghy, the biggest limitation in the section 75 process was the absence of adequate funding for groups and organizations that were being consulted by the public bodies.⁹² “Analysis of the process shows that the greatest structural limitation of Northern Ireland’s participatory-democratic approach lies with its lack of supporting financial arrangements, which may not have had a substantial impact on the first phase of implementing the mainstreaming approach, but clearly has implications for its long term sustainability.”⁹³ She continues: “Clearly, along with the fact that payment was ‘too difficult’, the assumption was made that these groups and individuals would facilitate public authorities in meeting their duty free of charge because they had supported and lobbied for [section 75]. Questions are yet to be asked about this assumption, and the value associated with the time and work undertaken in the voluntary and community sector compared to the private sector. It seems unlikely that profit-orientated groups would have been expected to provide that the same depth and quality of consultations pro bono on a continuing basis.”⁹⁴

Since Donaghy wrote that, there have been several initiatives within government to attempt to address the issues. Two are of particular importance. One review⁹⁵ arose out of the work of a subgroup on consultation of the Joint Government and Voluntary Sector Forum and a conference held by that group on 16th April 2002. Following that seminar, OFMDFM Ministers agreed that a review of consultation should take place. A Consultation Advisory Group was set up, comprising representatives from Northern Ireland Departments and public authorities, and from the voluntary and community sector, including representatives of groups within all nine Section 75 categories. An independent report was commissioned from Dr. John Kremer of Queen’s University.

⁹² T. Donaghy, *Mainstreaming: Northern Ireland’s Participative-Democratic Approach*, Centre for Advancement of Women in Politics, School of Politics, Queen’s University Belfast, Occasional Paper No. 2, February 2003.

⁹³ P. 10

⁹⁴ P. 11

⁹⁵ J. Kremer, *Report on Consultation Processes Within Section 75 (OFMDFM, 2004)*.

Dr Kremer's report included research by interview and written questionnaire with public authorities and consultees. He consulted with both public and voluntary/community sectors on his research findings, and made recommendations which took into account the views received. The report of this review has not, it seems, yet been published.

The second review arose not from concerns surrounding section 75 consultations but appears to have become the main forum for considering this issue within government. In April 2000 an inter-departmental group published a Consultation Document on Funding for the Voluntary and Community Sector. The Report, often referred to as the Harbison Report, made a number of recommendations and noted that it was important to achieve proper strategic management of the limited resources delivered through the voluntary and community sector. The series of recommendations generated by the Report outlined a framework for a more co-ordinated and strategic approach to the funding of the voluntary and community sector. One of the recommendations of the Harbison Report was to set-up a Task Force to consider the further diversification of funding sources for the sector. The Task Force was established in February 2003.⁹⁶ Work within the Task Force appears to accept that consultation in the context of section 75 has important implications for the issues of funding that the Task Force was set up to consider. A Position Paper "Pathways for Change" has recently been published. This Paper considers that "[a] new relationship has developed between Government and the sector arising from statutory duties concerning equality of opportunity and good relations in Section 75 of the Northern Ireland Act 1998. This requires public authorities to consult on matters relating to statutory duties and to ensure that equality considerations are fully mainstreamed into policy development across Government. Voluntary and community organisations already have a central role in the design and implementation of effective mechanisms of consultation and this will be important as we consider the future support Government might provide for the sector."⁹⁷

Useful as this is, such assessments seem to underplay the importance of consultation and the role it plays in section 75. At

⁹⁶ <http://www.taskforcevcsni.gov.uk/>

⁹⁷ Task Force on Resourcing the Voluntary and Community Sector, Pathways for Change, para 3.9.

this point, it is useful to introduce the concept of the “epistemic community.”⁹⁸ An epistemic community consists of a network of professionals with recognized expertise in this particular domain and an authoritative claim to knowledge within that domain who have a shared set of normative beliefs, shared causal beliefs, shared notions of validity, and a common policy enterprise. The debates about the extent to which equality should play a central role in government decision-making can be seen to involve a clash of two different epistemic communities: one involving primarily professional administrators, and one involving those primarily with an equality perspective.⁹⁹ The former sometimes appear to regard the involvement of the latter as unproductive and expensive. The latter often regard including the former in equality interpretation as dangerous. The latter argument runs as follows: the epistemic community that consists of public administration professionals with a predominant non-equality orientation will have a dominant position of interpretation of their functions. To the extent that equality values are exogenous to that epistemic community, but are given to such administrators for their interpretation, such values may be underestimated in importance in interpretation, or given an interpretation different to what an equality body would give them. It is, therefore, better not to try to integrate equality into governmental decision-making in the way that mainstreaming envisages, because the equality dimension will lose out. The interpretation of equality instruments should be concentrated in bodies whose primary function is equality interpretation, otherwise equality will become domesticated, stripped of their radical promise.¹⁰⁰

⁹⁸ P. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, (1992) 46 *International Organization*, 1-35.

⁹⁹ At the risk of stating the obvious, but to prevent any possible misinterpretation, this paragraph should not be read as assuming that everyone who is not from a specifically *legal* equality background has a non-equality perspective.

¹⁰⁰ We see a similar debate currently taking place in discussions involving the relationship between human rights and international economic policy issues. U. Petersmann, From “Negative” to “Positive” Integration in the WTO: Time for “Mainstreaming Human Rights” into WTO Law, 37 *Common Market Law Review* (2000) 1363-1382; Philip Alston, Resisting The Merger And Acquisition Of Human Rights By Trade Law: A Reply To Petersmann, *EJIL* 2002.13(815). Human rights professionals perceive a risk of growing “economization” of human rights interpretation and implementation by epistemic communities in the international economic policy area, and some argue that it is better to stick to tried and tested methods of implementation where interpretation of human rights is in the hands of an epistemic community of human rights professionals. Is it worth running risks with linking trade with human rights, for example, when there are alternative policy instruments available with fewer problems? Is there a danger that the different conceptions of human rights that are in play in the different spheres become homogenized into a “trade view” of human rights?

There is a danger of oversimplification in posing these two epistemic communities as in perpetual and inevitable opposition, of course. It is possible, even likely, that some of those within the professional administrator community share the normative beliefs of those in the equality community and that they may share a common policy (and vice versa). That is not, however, as we shall see below, a widely held perception amongst the equality community in Northern Ireland, at least at the moment. In addition, some of the concerns that have arisen in other parts of the world about the dangers of mainstreaming derive from an understanding that without the participation of affected groups, mainstreaming is likely to result in no one taking care of equality issues;¹⁰¹ it is the discipline of participation that reduces this danger in the Northern Ireland context. (In this context, it is worth noting that some arguments have been put forward suggesting that section 75 should be replaced by the emerging British race, disability and gender approaches to mainstreaming. In Britain, however, the approach under the Race Relations Amendment Act 2000 is essentially to put the Commission for Racial Equality in the driving seat, rather than the people most directly affected.)

Given the importance of consultation in the structure of section 75, it is, therefore, somewhat surprising that two relatively recent judicial review decisions in which section 75 featured, consultation arguments were given short shrift. In the first case, *In the matter of an application by D for judicial review and in the matter of decisions of the Chief Constable of the Royal Ulster Constabulary and the Department for Regional Development*,¹⁰² Coughlin J held that “Section 75(2) of the 1998 Act, in itself, placed the Department under a formal legal obligation to consult with any particular person, body or section of the community prior to granting a consent under the provisions of Article 73 of the 1993 Order.”¹⁰³ Second, in the more recent ASBOs judicial review (discussed above) Girvan J was so apparently dismissive of the complaint by the Commission for Children that the Minister had failed to consult, particularly to consult with children on the proposed legislation. Although the alleged inadequacy of consultation does not appear to have been made as part of a section 75 argument, it would be worrying if it reflected what the judiciary were likely to make of

¹⁰¹ C. McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 *Fordham International Law Journal* 4 (1999), 1696.

¹⁰² Queen’s Bench Division (Crown Side), 19 September 2002,

¹⁰³ Para 33.

such arguments under section 75. Girvan J. stated: “Consultation, to be a meaningful exercise, involves consulting with interested parties who are in a position to put forward measured and meaningful responses. ... [O]ne wonders in practical and realistic terms what meaningful response could be obtained from children ...”¹⁰⁴ There was, in any event, “no right to be heard or consulted before the making of primary or delegated legislation, unless it is provided by statute.”¹⁰⁵ Unfortunately, it does not appear that in either case the most appropriate argument was considered. In the first case, the issue should have been addressed as part of a consideration of what Schedule 9 required, and Girvan J should have considered whether section 75, and in particular Schedule 9 of the 1998 Act, enacted a statutory right to consultation.

Public bodies’ capacity and political will: how can we enhance both?

The ability of section 75 to achieve substantive change depends on several major actors: civil society in Northern Ireland, the civil and public service, politicians, and the Equality Commission, OFMDFM, and the Northern Ireland Office, among others. Despite all of the arguments for mainstreaming, one should not overlook the fact that building such a requirement into civil service decision-making requires considerable cultural change in public bodies. Apart from practical issues of competing priorities and risk-aversion, there are the problems of departmental exclusiveness. Mainstreaming may well cut across the working practices, and even, potentially, the ethos, of the civil service bureaucracy.

The Equality Commission, among others, has become increasingly critical of what it sees as the failures of public bodies to implement section 75 effectively, whilst acknowledging that significant change has also taken place. Several issues recur in the two periodic reports. One issue is a continuing concern about screening. As regards screening by Northern Ireland Central Government Departments, the Commission in its second progress report considered that the sections of the progress reports devoted to screening and EQIAs “were very disappointing.”¹⁰⁶ In a number of cases policies relating to employment and procurement were

¹⁰⁴ Para 12.

¹⁰⁵ Para 12.

¹⁰⁶ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 18

screened out.¹⁰⁷ An apparently peculiar example of screening was that the DSD “did not identify ... any significant equality implications in relation to” the Victoria Square Redevelopment and it was therefore screened out.¹⁰⁸ The Commission was “extremely disappointed at the screening out of policies by departments without consultation.” There was “little evidence to suggest that departments are taking active measures to inform consultees of the outcomes of screening exercises and EQIAs.” In the health sector, several EQIAs completed “did not identify any adverse impact, raising the question of whether the sector was using screening properly to identify the most important policies from an equality perspective. It is arguable that the sector might have better promoted equality by applying the screening criteria more rigorously and focusing more on policies that do create adverse impacts.”¹⁰⁹ The Commission’s revised Guide now requires that screening be accompanied by consultation.

A second limitation was the absence of equality expertise within the bureaucracy. Woodward has usefully discussed the different uses to which outside experts can be put in the gender mainstreaming process, and the relationship between these outside experts and internal staff of public bodies. Her points appear equally valid in other contexts of mainstreaming. “Of course governments can choose between having their own personnel attempt to make previously gender-insensitive policy better or using external consultants with special gender competency. The use of an expert consultant fits in well with this technocrat approach to rational administration. Gender awareness can be marketed as a technical expertise. To be able to calculate gender effects can become a specialization much like those of consultants working on environmental effects. Furthermore, much of the rhetoric of mainstreaming is rather hermetic. It is transparent only to the initiated. (...) However, if the goal of mainstreaming is transformation of the perception of the average bureaucrat and institutional transformation, then external experts need to be coupled to a training and evaluation process to create

¹⁰⁷ Equality Commission for Northern Ireland, Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities, 1 January 2000 – 31 March 2002 (Equality Commission, 2003), para 11.6

¹⁰⁸ Equality Commission for Northern Ireland, Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities, 1 January 2000 – 31 March 2002 (Equality Commission, 2003), para 7.35

¹⁰⁹ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 67, 72: on relationship between screening and EQIAs.

learning carry over. Otherwise, the departure of the expert will mean the departure of awareness.”¹¹⁰ In the Northern Ireland context, Donaghy has argued that “[B]y not having an expert within the bureaucracy to support the development of the mainstreamed approach, the Northern Ireland participative-democratic model can be seen to rely almost entirely on outsourced expertise.” The Equality Commission has noted in its second progress report that “[m]any [authorities] had used consultants to undertake Section 75 work, particularly in relation to EQIA work. This raised questions about ‘ownership’ of statutory duty work in public authorities, as well as effectiveness of mainstreaming.”¹¹¹

A third issue identified by some commentators is more far reaching. This critique runs as follows. Some public servants, particularly some in those public bodies outside the main civil service are doing good work. Their arguments are being listened to, and results are being achieved. Others working on these issues, however, are much more marginal to where the real decision making takes place and their arguments seem increasingly to fall on deaf ears. Some in the higher policy grades of the Northern Ireland Civil Service, where decisions are being made have long seemed to see section 75 as either an irritant, or fundamentally misguided. Indeed, it is clear that there is sometimes almost a distaste for section 75. This appears to have contributed to a lack of commitment to making section 75 work. This aversion to section 75 is not consistently exhibited, and certainly not all senior civil servants share it, but there appears to be a sufficient dragging of heels for Section 75 to be failing to deliver to the extent that it should.

This more far-reaching critique is suggested in Osborn and Shuttleworth, where the authors consider the issue of why there may be an absence of change resulting from section 75. After referring to the “mixed record of the NICS” in implementing the mainstreaming duties, they continue: “While there is little questioning of the NICS commitment at the top level to these policy initiatives, critics express doubts about the NICS capacity to achieve effective implementation when faced with all-department initiatives such as these. It is not clear to those who are frustrated

¹¹⁰ A. Woodward, (2003), *European Gender Mainstreaming: Promises and Pitfalls of Transformative Policy*, *Review of Policy Research* 20 (1), 65-88, at p. 73.

¹¹¹ Equality Commission, *Report on the Implementation of the Section 75 Statutory Duties*, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 133:

by a lack of substantial progress whether what is perceived as a modest performance to date arises from initiative fatigue and/or an inability to effectively co-ordinate actions. A continued lackluster performance will inevitably prompt a further view that there is also the possibility that, as an essentially conservative organization, the NICS may not be fully convinced of the equality agenda, either as a policy imperative or as a set of actions capable of being successfully operationalised.”¹¹² They continue: “Continued failure to achieve greater equality may require Section 75 to be recast with a new emphasis on regulation (including sanctions) and outcome measures.” Nor are they alone in their criticisms. O’Brien has raised similar concerns: “While there are a few exceptions to this, at the highest levels mainstreaming equality into decision-making does not seem to be fully embraced. (...) There seems to be an ideological problem with equality at the highest levels of decision-making in Northern Ireland, which will tolerate the promotion of equality further down the food-chain but will not implement at the top. When it comes to the big decisions, with resource implications, equality is being given insufficient regard.”¹¹³ McVeigh has referred to public bodies “covering their backs in terms of their equality scheme obligations under the Act.”¹¹⁴

A fourth issue that has arisen in relation to the implementation of section 75 is the impact of direct rule on the operation of section 75. Although there was less than full implementation of section 75 by devolved Ministers, some of these Ministers were very effective indeed in ensuring that civil servants got the message that there was strong ministerial support for seeing progress. There is a growing impression among some observers that direct-rule Ministers, however, are becoming actively hostile to section 75. Those civil servants who wish to remain “on message” are likely to see advocacy of section 75 as at best quixotic, or at worst dangerous to their careers. So too, the absence of the Assembly lessens the opportunity for section 75 issues to be ventilated in a public forum. Assembly committees were beginning, slowly and not very surely, to use their powers to probe departments on how

¹¹² R.D. Osborne and I. Shuttleworth, “Fair Employment in Northern Ireland”, in Bob Osborne and Ian Shuttleworth, *Fair Employment in Northern Ireland: a generation on* (Blackstaff Press, Belfast, 2004), p. 9

¹¹³ Martin O’Brien, *Section 75 – A view from the voluntary and community sector* (September 2003)

¹¹⁴ Robbie McVeigh, *Equality: What’s Wrong with the Equality Agenda?*, in Gerard McCann (ed.), *The Equality Duty: Voluntary and Community Sector Responses to Section 75 of the NI Act (1998)* (West Belfast Economic Forum, 2001) at P. 65

progress under section 75 was developing. Suspension of the institutions has meant that the role of politicians in pressing for section 75 has almost entirely been diverted into other issues.

Ensuring compliance: political, regulatory or legal methods?

Turning now to the “enforcement” aspects, there are three approaches taken which are significant and which are closely linked. The first mechanism is “internal”: the development of institutional scrutiny within government to ensure effective self-regulation of the duty. The second is the role of NGOs, or civil society, with which government bodies are required to consult and engage in the process of change. The third is the Equality Commission, which provides assistance and, ultimately, has a complaint resolution and investigation function. This interlocking set of mechanisms creates an essentially triangular relationship between the civil society, government and the Commission. The compliance strategy is, essentially, akin to a three-legged stool. If any one of the legs (civil society, the public sector, the Equality Commission) is broken, then compliance will be less than optimal.

Up to this point in this Part of the paper, we have concentrated largely on the role of government and of civil society. We need to turn now to the role of the Equality Commission. O’Cinneide has characterized the Commission’s compliance strategy as a “name and shame” approach, “rather than actively making use of its enforcement powers to bring recalcitrant public authorities into line, but there has been little compliance failure so far.”¹¹⁵ A significant growth area of work has been in the area of informal resolution of complaints. For the Commission, such informal resolution is seen as beneficial in addressing issues raised by complainants and achieving a desired outcome, but without the need for formal investigation. Assessments of the Commission’s record in securing compliance with section 75 have been somewhat at variance. On the one hand, Donaghy has written that “the process of drawing up equality schemes established the Equality Commission as a body committed to the seriousness of the duty and to ensuring that public authorities took their equality responsibilities seriously. From the outset, the EC demonstrated a commitment to the

¹¹⁵ Colm O’Cinneide, Taking equal opportunities seriously: the extension of positive duties to promote equality (Equality and Diversity Forum 2004), p. 53:

mainstreaming duty and to rigorously monitoring it.”¹¹⁶ On the other hand, O’Brien has articulated a concern “that Section 75 is not as central to the work of the Equality Commission as it should be. Insufficient resources have been allocated within the Commission to the Statutory Duty Unit (...). [T]here needs to be confidence that the Commission has the resources and capacity to deal with situations in which public bodies fail to comply with their Equality Schemes.”¹¹⁷ The appearance of conflict between these commentators may simply be due to a difference in the time at which the assessment was made. Donaghy discusses the position at the beginning of the period under review, whilst O’Brien is discussing the position, as he sees it, much later on. It appears likely that the earlier co-operative approach may simply be reaching the end of its sell-by date.

Up until now, the strategy of those advocating section 75 has been essentially consensual and political, in line with the idea that, as part of the Belfast Agreement, that was the type of politics that should be being generated. Unfortunately, those hostile to section 75, or those with other priorities, may see this as a sign of weakness rather than strength. Clearly there are political mechanisms that will need to be considered to address the problems but it would be naïve to trust entirely in their success. It is in this context that the idea of developing a litigation strategy comes into play. Section 75 shares many similarities with New TSN, but in one major respect it differs from New TSN. Section 75 creates legal obligations on public bodies. This aspect of section 75 has, so far, been emphasised largely in the context of discussions and negotiations within the public service, and between the public service and the Equality Commission and civil society, but it has been largely held in reserve, in anticipation that persuasion would be successful without resort to legal methods.

Increasingly, however, we are likely to see resort being had to more formal methods of complaint, using both the internal methods of complaints established within the public bodies, and the complaint mechanism established by the Equality Commission. I would predict also that the Equality Commission will at some point

¹¹⁶ Donaghy T., *Mainstreaming: Northern Ireland’s Participative-Democratic Approach*, Centre for Advancement of Women in Politics, School of Politics, Queen’s University Belfast, Occasional Paper No. 2, February 2003, p. 8.

¹¹⁷ Martin O’Brien, *Section 75 – A view from the voluntary and community sector* (September 2003)

embark on a targeted use of investigations. O’Cinneide correctly argues that using the enforcement mechanisms should be used as a last resort, only after advice, conciliation and “naming and shaming” have proved unsuccessful. “However,” he continues, “there is a need for a strong enforcement framework as a last resort, to plug the gaps that auditing mechanisms may not reach. This framework also has to be capable of being enforced by both the commission(s) and by individuals, through cost-effective mechanisms with adequate powers. Positive duties are more concerned with culture change than the creation of enforceable legal rights: effective enforcement can however link both these aspects of the fight against discrimination so that positive duties can also give rise to legally enforceable rights.”¹¹⁸

We do not know, however, whether the complaint and investigation processes are likely to result in public bodies taking section 75 more seriously; it is too soon to tell. It may, however, have the perverse effect that public bodies will rush decision-making through in order to have controversial policies being implemented before the complaints or investigations processes have time to reach a conclusion, and it is a truism that it is much harder to change a policy once it is up and running than it is to alter it at the planning stage. There is already some recent evidence that Ministers are becoming unwilling to delay legislation in order to comply with the procedural requirements of section 75.

Part VI: Are there better existing alternatives?

We have so far discussed issues of interpretation and implementation of section 75 mostly in isolation from several different legal developments regarding mainstreaming in the rest of the United Kingdom, the development of the common law in the area of equality, and the discussions regarding the possibility of a Single Equality Bill. A common theme links our consideration of these developments. Do they render the particular approach adopted in section 75 redundant?

Other relevant mainstreaming initiatives in GB

Mainstreaming equality is not unique to Northern Ireland.¹¹⁹ In some cases, legislation is now operating that seeks to mainstream

¹¹⁸ p. 84.

¹¹⁹ Equality Authority, Report on conference: Mainstreaming Equality: Models for a Statutory

equality in other public authorities in the United Kingdom. Legislation applying to several specific public authorities imposes a broad duty of equality of opportunity applying to several different groups. The Broadcasting Act 1990, for example, provides that certain television and sound broadcasting licences shall include conditions requiring the licence holder 'to make arrangements for promoting, in relation to employment by him, equality of opportunity between men and women and between different racial groups'.¹²⁰ The Greater London Authority is required to 'make appropriate arrangements with a view to securing that' in the exercise of its powers, in the formulation of its policies and proposals, and in their implementation, 'there is due regard to the principle that there should be equality of opportunity for all people'.¹²¹ In addition, the Greater London Authority Act 1999 places the Greater London Authority, the Metropolitan Police Authority, and the London Fire and Emergency Planning Authority under a duty, in exercising their functions, 'to have regard to the need 'to promote equality of opportunity for all persons irrespective of their race, sex, disability, age, sexual orientation or religion', 'to eliminate unlawful discrimination', and 'to promote good relations between persons of different racial groups, religious beliefs and sexual orientation'.¹²² The Learning and Skills Council for England is required, in exercising its functions, to 'have due regard to the need to promote equality of opportunity between persons of different racial groups, between men and women, and between persons who are disabled and persons who are not'.¹²³ Child-care providers need to provide information on their commitment to equality of opportunity.¹²⁴ The members of particular public bodies are under specific personal obligations to 'carry out their duties and responsibilities with due regard to the need to promote equality of opportunity for all people, regardless of their gender,

Duty, Thursday, 27th February 2003 (Equality Authority, 2003); F. Beveridge, S. Nott, K. Stephen, Mainstreaming and the engendering of policy-making: a means to an end?, *Journal of European Public Policy*, 2000, Vol 7, Iss 3, pp 385-405 place the Northern Ireland developments in the context of mainstreaming developments in the rest of the United Kingdom; Colm O'Conneide, Taking equal opportunities seriously: the extension of positive duties to promote equality (Equality and Diversity Forum 2004); Fiona Mackay and Kate Bilton, *Learning from Experience: Lessons in Mainstreaming Equal Opportunities*, Governance of Scotland Forum, University of Edinburgh, Scottish Executive Social Research, 2003

¹²⁰ Broadcasting Act 1990, ss 34, 38, and 68.

¹²¹ Greater London Authority Act 1999, s 33.

¹²² *ibid* s 404.

¹²³ Learning and Skills Act 2000, s 14.

¹²⁴ Tax Credit (New Category of Child Care Provider) Regulations 2002, SI 2002/1417, Sch 2, Pt I, para 1.

race, disability, sexual orientation, age or religion, and show respect and consideration for others'.¹²⁵

In other cases, there is an equivalent duty applying to a wide group of public authorities, but with the narrower focus of only applying in the racial context. In particular, the Race Relations (Amendment) Act 2000 requires that each of a specified list of public bodies must, in carrying out its functions, have due regard to the need to eliminate unlawful racial discrimination; and to promote equality of opportunity and good relations between persons of different racial groups.¹²⁶ The Race Relations (Amendment) Act 2000 differs from section 75 of the Northern Ireland Act 1998 in several respects.¹²⁷ First, the duty applies only to racial and ethnic equality, rather than covering a broad range of grounds. The Act requires that each of a specified list of public bodies must, in carrying out its functions, have due regard to the need to eliminate unlawful racial discrimination, and to promote equality of opportunity and good relations between persons of different racial groups.¹²⁸ The Secretary of State has made an order that imposes certain specific duties on a more limited group of public bodies and other persons who are also subject to the general duty.¹²⁹

In addition to the general duty discussed above, more specific duties are imposed on some public bodies for the purpose of ensuring the better performance of the general duty. The Order imposes on these specified bodies a duty to publish a Race Equality Scheme, that is a Scheme showing how it intends to fulfill the general duty and its other duties under this Order. The Order imposes on specified educational bodies duties to prepare a statement of its race equality policy, to have arrangements in place for fulfilling duties to assess and monitor the impact of its policies on different racial groups, and to fulfill those duties in accordance

¹²⁵ Conduct of Members (Principles) (Wales) Order 2001, SI 2001/2276, Sch, para 7; Conduct of Members (Model Code of Conduct) (Wales) Order 2001, SI 2001/2289, Sch, Pt II, para 4; Local Government Act 2000 (Model Code of Conduct) (Amendment) Order 2002, SI 2002/1719; Relevant Authorities (General Principles) Order 2001, SI 2001/1401, Sch, para 7; Local Authorities (Model Code of Conduct) (England) Order 2001, SI 2001/3575, Sch 1, para 2 and Sch 2, para 2; Parish Councils (Model Code of Conduct) Order 2001, SI 2001/3576; National Parks and Broads Authorities (Model Code of Conduct) (England) Order 2001, SI 2001/3577; Police Authorities (Model Code of Conduct) Order 2001, SI 2001/3578.

¹²⁶ Section 71. See, in general, Colm O'Conneide, *The Race Relations (Amendment) Act 2000*, [2001] PL 220. In relation to the carrying out of immigration and nationality functions, however, the duty is more limited: to have due regard to the need to eliminate unlawful racial discrimination and to promote good relations between persons of different racial groups.

¹²⁷ See also S. Fredman, *Equality: A New Generation*, (2001) 30 *Industrial Law Journal* 145.

¹²⁸ Section 71.

¹²⁹ Race Relations Act 1976 (Statutory Duties) Order 2001.

with such arrangements. The Order imposes on bodies a duty to have in place arrangements for fulfilling duties to monitor, by reference to racial groups, various aspects of education and employment at educational establishments, and to fulfill those duties in accordance with such arrangements. The Order also imposes on other specified bodies a duty to have in place arrangements for fulfilling duties to monitor, by reference to racial groups, various aspects of employment by those bodies, and to fulfill those duties in accordance with such arrangements. The Secretary of State has approved the Commission for Racial Equality Code of Practice relating to these statutory duties.

Unlike the Equality Commission under section 75, if the Commission for Racial Equality (CRE) is satisfied that a person has failed to comply with any duty it may serve on that person a compliance notice, which requires the person concerned to comply with the duty concerned and to inform the CRE, of the steps that the person has taken, or is taking, to comply with the duty. The CRE may also require the person concerned to furnish it with such other written information as may be reasonably required by the notice in order to verify that the duty has been complied with. The CRE may apply to a designated county court for an order requiring an authority subject to the statutory duties to furnish any information required by a compliance notice if the person fails to furnish the information to the CRE in accordance with the notice, or the CRE has reasonable cause to believe that the person does not intend to furnish the information. If the CRE considers that a person has not, within three months of the date on which a compliance notice was served on that person, complied with any requirement of the notice for that person to comply with a duty imposed by an order, it may apply to a designated county court for an order requiring the person to comply with the requirement of the notice. The advantages, if any, of this approach over the Northern Ireland approach have yet to be tested, although it will be important to continue to keep such developments under close consideration in the future.

Equality as a common law principle

Section 75 grew up in a legal context where the common law's control of public authorities was usually thought to be weak in so far as equality issues were concerned. Since 1998, the common law has developed considerably. On the one hand, this might be

thought to give common law support to the section 75 equality duty; on the other hand, it might be thought to undermine the need for section 75.

One of the principal ways in which equality is given legal form in public law is in judicial review of administrative action. The rule of law has been interpreted, for example, as including a right of access to the courts, which upholds an important element of the idea of equality before the law.¹³⁰ Inequality of treatment and discrimination are seen more generally, however, in the guise of 'unreasonableness'. There are different formulations of the unreasonableness standard. The formulation by Lord Greene in the *Wednesbury* case¹³¹ that the courts can only intervene if a decision 'is so unreasonable that no reasonable authority could ever come to it' is the principal source of the *Wednesbury* test. In the *GCHQ* case,¹³² Lord Diplock reformulated the test somewhat, allowing the courts to intervene where the public body's decision 'is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'. The example of dismissing a teacher because of the colour of her hair has frequently been seen as the paradigmatic example of unreasonableness in these senses.

More recently, the test of reasonableness has been interpreted more broadly. It has been held to be a 'cardinal principle of good public administration that all persons in a similar position should be treated similarly'.¹³³ In *Matadeen*,¹³⁴ Lord Hoffmann said that '... treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational'.¹³⁵ Such cases have led the authoritative de Smith, Woolf and Jowell to conclude that decisions taken in violation of the principle of equality ('which requires decisions to be consistently applied and prohibits measures which make unjustifiable or unfair distinctions

¹³⁰ *R v Lord Chancellor, ex p Witham* [1998] QB 575

¹³¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

¹³² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

¹³³ *R v Hertfordshire CC, ex p Cheung*, *The Times*, 4 April 1986, per Lord Donaldson MR.
¹³⁴ [1999] 1 AC 98.

¹³⁵ Citing Jeffrey Jowell, QC, *Is Equality a Constitutional Principle?*, (1994) *Current Legal Problems*, 1 at 12-14 and de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed., 1995), paras 13-036–13-045.

between individuals'¹³⁶) constitutes a common law or constitutional principle such that decisions taken in violation of it constitute a distinct way in which power may be improperly exercised for the purpose of *Wednesbury* review.¹³⁷ In *Colman v General Medical Council*,¹³⁸ an argument was put that, on the basis of *Nagle v Feilden*¹³⁹ and *Cummings v Birkenhead Corp*,¹⁴⁰ there was now 'a general principle of equality of treatment under the law, namely that administrative action should not, without an objective or rational justification, treat similar groups differently, or different groups similarly'. Auld J, however, held that 'equality of treatment in this context ... is surely an aspect of rationality and are really examples of the *Wednesbury* approach'. The cases cited 'are authorities for the proposition that a decision which is so unreasonable as to be capricious is ultra vires', and that discrimination can be unreasonable.

This is not to say, however, that the approach taken by the courts in judicial review amounts to a particularly intense type of scrutiny, or that the test adopted is a model of clarity. Rather the contrary. The principle of consistency has not been welcomed judicially without reservation.¹⁴¹ De Smith, Woolf and Jowell observe, 'the courts have to guard against ... having to second guess administrators who are entitled to a "margin of appreciation" of the facts or merits of a case'.¹⁴² Arguments concerning inequality in electoral boundaries were rejected, in part on the ground that review of the Boundary Commission for England should not interfere with tasks properly allocated to Parliament.¹⁴³ Discrimination by a local authority on the grounds of religion,¹⁴⁴ by

¹³⁶ *ibid* para 13-005.

¹³⁷ See, in particular, the uses made of the principle of consistency by the Northern Ireland courts in *In the matter of an application by Wright and Fisher for Judicial Review* (QBD, 20 December 1996, Girvan J); *R. v. Northern Ireland Civil Service Commission, ex p Keleghan* (Girvan J); *Re Croft's Application* [1997] NI 457, 491 per Girvan J; *Re Morrison and Kinkead* (27 February 1998, Kerr J); *Re Colgan* [1996] NI 24 per Girvan J.

¹³⁸ *The Times*, 14 December 1988, QBD, Crown Office List.

¹³⁹ [1966] 2 QB 633, CA.

¹⁴⁰ [1972] Ch 12.

¹⁴¹ The approach adopted in *R v Secretary of State for the Home Department, ex p Urmaza* [1996] COD 479 was criticized by Hurst J in *R v Secretary of State for the Home Department, ex p Gangadeen and Kahn* [1998] FLR 762, which cited with approval the approach in *R v Secretary of State for the Home Department, ex p Ozminnos* [1994] Imm AR 287. *Gangadeen* was cited with approval in *R (on the application of Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359.

¹⁴² De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed., 1995), para 13-007.

¹⁴³ *R v Boundary Commission for England, ex p Gateshead BC* [1983] QB 600, 635-636, CA, per Sir John Donaldson MR.

¹⁴⁴ *Ahmad v Inner London Education Authority* [1978] QB 36, CA.

the armed forces on the grounds of sexual orientation,¹⁴⁵ and by immigration authorities on grounds of sex,¹⁴⁶ have been held not to be *Wednesbury* unreasonable. It is unclear how decisions held to be unreasonable can be clearly distinguished from those that are held not to be unreasonable.

Equality in this sense essentially requires that where the exercise of governmental power results in unequal treatment, it should be properly justified, according to consistently applied, persuasive and acceptable criteria. However, a general idea of equality as rationality cannot operate without criteria of likeness, difference, acceptability and justification, as Lord Hoffmann said in the important Privy Council decision in *Matadeen v Pointu*.¹⁴⁷ *Wednesbury* unreasonableness has more recently been developed to prevent public bodies from exercising their powers in such a way as to result in status-harms arising of a type similar to, but going beyond, the anti-discrimination legislation considered in this section. This development may be seen to have been anticipated in *Cummings v Birkenhead Corp*,¹⁴⁸ where parents of children from Roman Catholic primary schools challenged circulars sent out by the local education authority that confined parents' choice to Roman Catholic secondary schools and denied their children the opportunity of being considered for non-Roman Catholic schools. Although the Court of Appeal held that there was no ground for saying that the authority had acted unreasonably. Lord Denning set out the test for discrimination-related claims under the *Wednesbury* reasonableness test as follows: 'if this education authority were to allocate boys to particular schools according to the colour of their hair *or, for that matter, the colour of their skin*, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be ultra vires altogether, and this court would strike it down at once. But, if there were valid educational reasons for a policy, as, for instance, in an area where immigrant children were backward in the English tongue and needed special teaching, then it would be perfectly right to allocate those in need to special schools where they would be given extra facilities for learning English. In short, if the policy is one which could reasonably be upheld for good educational

¹⁴⁵ *R v Ministry of Defence, ex p Smith* [1996] QB 517.

¹⁴⁶ *R v Entry Clearance Officer (Bombay), ex p Amin* [1983] AC 818, 833, per Lord Fraser: '... not all sex discrimination is unlawful ... Discrimination is only unlawful if it occurs in one of the fields in which it is prohibited in the [SDA 1975].

¹⁴⁷ [1999] 1 AC 98

¹⁴⁸ [1972] Ch 12.

reasons it is valid. But if it is so unreasonable that no reasonable authority could entertain it, it is invalid.’¹⁴⁹

More recently, litigation arose concerning the criteria for qualification for payment from a fund established by the UK government to provide ex gratia payments to internees of the Japanese during the Second World War. Two separate cases challenging the criteria of eligibility illustrate the emerging state of the law, and the extent to which status-harms appear now to attract a different level of scrutiny than where such harms are not apparent. In the first case, a challenge was made to the decision that in order to qualify a civilian had to be a British subject who was born in the United Kingdom or whose parents or grandparents had been born in the United Kingdom. These criteria were, it was alleged, unlawful because they were ‘irrational’ and (separately) because they breached the ‘common law principle of equality’. It was held, however, that the criteria were not irrational, because the government was entitled to take the view that the recipient had to have had strong links with the United Kingdom at the time of internment in order to benefit from the compensation. Nor were the criteria contrary to any common law principle of equality: ‘if the decision assailed in the present case withstands attack on the ground of unreasonableness there is no basis for concluding that it falls on the ground of inequality’.¹⁵⁰

In the second case, however, several Nepalese nationals who had been members of the Gurkha rifle brigades as part of the Indian Army and had been interned by the Japanese, successfully challenged the criteria of eligibility for compensation as irrational on *Wednesbury* grounds.¹⁵¹ The relevant criteria challenged were those which limited eligibility to surviving former members of the UK armed forces, or surviving former servicemen who received payments under provisions of the 1951 Treaty of Peace with Japan, under the auspices of the UK government. The claimants did not fall within these categories, or any of the other categories laid down. The effect of the distinctions between those who qualified and those who did not was to make eligible ‘European’

¹⁴⁹ *ibid*, emphasis added.

¹⁵⁰ *R (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2002] EWHC 2119; *The Independent*, 31 October 2002, QBD (Admin Ct), per Scott Baker J at [54]. Art 14 ECHR was not applicable because no substantive right was engaged. Ex gratia payments of the type in issue in this case, fell outside the scope of Art 1 of Protocol 1.

¹⁵¹ *R (on the application of Gurung) v Ministry of Defence* [2002] EWHC 2463; *The Times*, 28 December 2002, QBD (Admin Ct).

officers in the Gurkhas because they had been included in the peace treaty, but not 'natives' in these regiments. The distinction was ostensible drawn on the basis that the two groups were subject to different disciplinary codes. The basis for the distinction, however, was found by the court to be 'a clear distinction drawn on "de facto" racial grounds (disguised as "de jure" Constitutional ones)'.¹⁵² To apply that distinction to the new scheme 'undermines the rationality of the exclusion' of the Gurkhas.¹⁵³ The court distinguished this case from the previous case: 'The distinction drawn upon racial grounds was not present' in the former.¹⁵⁴ Even though the decision-makers did not appreciate the racial basis of the distinction, it was unlawful. The court adopted the extra-judicial argument of Lord Steyn regarding the development of *Wednesday* unreasonableness in situations of status discrimination.¹⁵⁵

Although it is clear that judicial developments at common law underpin the non-discrimination requirements of section 75, they clearly do not come close to being an adequate substitute for the positive equality of opportunity requirements. Not only does the common law not oblige public authorities actively to promote equality in this way, it placed some limits in the way of particular authorities that chose to do so. In general, public authorities are prevented from doing anything not specifically authorized, particularly where it may be in tension with other more specific obligations.¹⁵⁶

¹⁵² *ibid* at [56].

¹⁵³ *ibid* at [56].

¹⁵⁴ *ibid* at [56].

¹⁵⁵ Lecture given by Lord Steyn, 18 September 2002, 18, quoted *ibid* at [36]: "The importance of the development of constitutional rights has not come to an end with the advent of the Human Rights Act. One illustration is sufficient. The anti-discrimination provision contained in Article 14 of the European Convention is parasitic in as much as it serves only to protect other Convention rights. There is no general or free-standing prohibition of discrimination. This is a relatively weak provision. On the other hand, the constitutional principle of equality developed domestically by English courts is wider. The law and the government must accord every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which must be applied without fear or favour. Except where compellingly justified distinctions must never be made on the grounds of race, colour, belief, gender or other irrational ground. Individuals are therefore comprehensively protected from discrimination by the principle of equality. This constitutional right has a continuing role to play. The organic development of constitutional rights is therefore a complementary and parallel process to the application of human rights legislation."

¹⁵⁶ So, more recently, do those cases considering how far the pursuit of ethical policies may be lawfully pursued by a local authority. In *Ex p Fewings*, for example, a local authority sought to ban hunting on common land appropriated by the authority. It was held that the powers of the authority over the land were not wide enough to permit the decision. It is unclear how far these restrictions would be held to constrain public authorities from promoting equality of opportunity without statutory authorization and support. *R v Somerset CC, ex p Fewings*

Single Equality Bill and Section 75: what is the relationship?

The Single Equality Bill is of potentially considerable significance if it were to put private sector organisations directly under a duty to promote equality of opportunity, as some have advocated. However, if, as seems likely, direct rule will continue for some significant time to come, the section 75 process will become an increasingly important forum in which sub-constitutional political debate will be played out. Although there has been considerable work carried out within OFMDFM on a Single Equality Bill, and a second consultation document is due for publication by the end of June 2004, it is unlikely, for example, that there will be swift movement on the adoption of a Single Equality Bill while direct rule continues. If that is so, then section 75 is likely to become something of a proxy for such legislation, being used to challenge instances of discrimination not currently addressed by the existing piecemeal anti-discrimination legislation. In any event, the type of positive duty actively to promote equality encompassed by section 75 is as yet only to be found in Northern Ireland anti-discrimination law in the context of fair employment and (to a more limited extent) in the context of the reasonable accommodation duty in disability legislation. Even if there is a Single Equality Bill in the near future, it is unlikely to adopt the section 75 approach consistently throughout the legislation. The need for section 75 remains.

Part IV: Conclusions and recommendations

Strategic focus

The application of section 75 lacks an overall strategic focus, producing many individual initiatives but little overall focus on strategic objectives, and its implementation is too concentrated on process as opposed to outcomes. Implementation by government lacks an overall strategic goal to which the programmes of departments and their public bodies should contribute individually and collectively. Correspondingly, it lacks strategic targets, making it difficult to measure progress in promoting equality in Northern Ireland. There is a need to better understand what section 75 aims to achieve and for proposed actions to be more clearly linked to specific outcomes.

[1995] 1 WLR 1037. See also *R v Liverpool City Council, ex p Secretary of State for Employment* [1989] COD 404 (imposing certain conditions on receipt of grants unlawful).

Crucially, there is a need for a strategy to be adopted within government for the implementation of section 75, with the highest level Ministerial support. A revised strategy should focus more on the outcome of key actions taken to address inequality among the section 75 groups. Progress towards this objective should be measured against specific targets. There should be a clear strategic framework, with several high level priorities: building capacity in the voluntary and community sector to participate; building section 75 considerations into high-level policy making; and cross departmental co-ordination and integration. There should be a co-ordinated approach to equality impact assessments and greater emphasis on improving their somewhat variable quality. A broad range of high-level equality indicators should be adopted to monitor progress. Effective mainstreaming of section 75 should ordinarily be included in the job descriptions and performance appraisals of senior public sector managers.

Co-ordination within government

The revised strategy should be co-ordinated through a high level (preferably permanent secretary level) inter-departmental and inter-sectoral committee, with independent members, plus an equality forum comprising representatives of key public authorities and other stakeholders. It should be the job of the committee and the forum to oversee the implementation of the strategy across government, including monitoring targets for promotion of equality and processes against these. Priorities should be set for equality impact assessments.

These ideas are hardly new and are reflected in the recent consultative paper on New TSN. They are also similar to aspects of the Civic Forum's Regional Strategy for Social Inclusion¹⁵⁷ adopted in May 2002 and reflect the Northern Ireland Council for Voluntary Action's view that: "A proactive policy approach is needed to achieve a change in societal dynamics and attitudes in

¹⁵⁷ Civic Forum's A Regional Strategy for Social Inclusion, May 2002, para. 5.4.4: "5.4.4 First and foremost, a clear strategy is needed, to which all departments and agencies buy in, and as a policy imperative—not a new auditing requirement. Secondly, political leadership must come from the highest level—the Northern Ireland Executive in general and the First Minister and Deputy First Minister in particular. Thirdly, there must be an appropriate administrative vehicle—not, as currently, where within OFMDFM the various egalitarian initiatives of the 90s (section 75, TSN, PSI) have not been cohered within the equality, human rights and community-relations division. And, fourthly, there needs to be pressure from outside government for momentum to be sustained—a forum for wider debate, able critically to evaluate progress."

Northern Ireland, not another auditing requirement or box to tick – real and measurable objectives should be set for each department in areas relevant to its work.”¹⁵⁸ In order to prevent misunderstanding, however, it should be made clear that nothing suggested would replace the need for current equality impact assessment procedures.

An important issue of co-ordination that needs to be addressed in the future arises from the complexity of decision-making in modern government. The evolution, adoption and delivery of a policy by government, more often than not, involve several different public bodies at different stages of the process. Applying section 75 effectively to this complexity involves choices. Is the stage of evolution of the general policy the best stage at which to apply impact assessment? Or should impact assessments be carried out at the stage of delivery? Or both? To the extent that equality impact assessments have been incorporated into policy development, does that mean that choices as to how to deliver that policy do not require impact assessments, and can thus be screened out? These issues are essentially left initially to the public authorities to address, without detailed statutory guidance. More attention should be paid to ensuring that a more coherent, workable, and transparent system of allocating responsibility is developed for the future than seems to have operated in the past.

Resourcing Section 75

There should be much more attention paid to how social spending programmes can be linked to Section 75 to provide more resources to tackle the social and economic disadvantages that are revealed by way of impact assessments. Crucially, this is where the link between New TSN (or its replacement) and Section 75 could be made more effective. More attention needs to be paid to how New TSN could be linked to section 75, to provide more targeted resources to tackle the disadvantages that are revealed by way of impact assessments. We have seen that section 75 does not have a budget attached to it. Once adverse impacts are uncovered, for example, there needs to be some mechanism to ensure that the resources will be made available to address these. In this context, therefore, the apparent shift that seems to be proposed in the recent discussion paper on New TSN is potentially

¹⁵⁸ Northern Ireland Council for Voluntary Action, Response to the consultation document: A Shared Future (August 2003), para 8.7.

important, although much will depend on the detail. The consultation paper reports that independent external evaluation of New TSN pointed to the need for indicators to be more sensitive to trends among different population groups such as those defined in Section 75.¹⁵⁹ “In assessing these indicators, the evaluators felt they should focus more on differences between groups and should cover longer timeframes. The indicators should be capable of examining the incidence of key trends by a range of population groups including Section 75 groups, social class and vulnerable or disadvantaged groups.”¹⁶⁰

Reporting and research on effect of section 75

The Commission intends to further develop progress-reporting information during 2003-4, in anticipation of the five-year review of the implementation of equality schemes.¹⁶¹ This needs to be considerably revised to provide more accurate reporting by public bodies, and the Commission needs to consider how best the annual progress reports can communicate the most important developments. In addition to fuller and more accurate reporting of what has been achieved, there is also a need for a more sustained analysis of progress achieved that is particularly relevant to each ground. Although there have been individual academic assessments of progress to date for some grounds,¹⁶² there is no such regular assessment that is updated periodically. I understand that this is now being considered by the Commission and should be remedied in the next Commission annual progress report.

¹⁵⁹ OFMDFM, New TSN – the way forward (OFMDFM, April 2004), p. 8:

¹⁶⁰ Para 2.14:

¹⁶¹ Equality Commission, Report on the Implementation of the Section 75 Statutory Duties, 1 April 2002 – 31 March 2003 (Equality Commission, 2004), p. 11.

¹⁶² M. Livingston, Note: Out of the “Troubles” and into Rights: Protection for Gays, Lesbians, and Bisexuals in Northern Ireland through Equality Legislation in the Belfast Agreement,, 2004, 27 Fordham Int’l L.J. 1207,

Impact assessment

More policy co-ordination in the area of impact assessments by the public bodies will be useful, if carried out sensitively. Provided a more integrated approach to impact assessment recognises the legal nature of the impact assessment required to be carried out under section 75, there are arguments that a more streamlined approach to impact assessment may be desirable, and moves in this direction are taking place which should be encouraged.¹⁶³

A more strategic approach to screening and priorities for impact assessment should be adopted, following review of schemes next year. Departments should focus on the real priorities. It would also be helpful if NDPBs and departments could be encouraged to examine the same issues at roughly the same time. This is likely to lead to a more focussed and orderly approach from public authorities and civil society. For example, if it is known that public procurement is going to be examined by public authorities in year 3, that gives departments, NDPBs, local authorities, and civil society the chance to prepare and focus on this in year 3. By contrast, if groups are faced with procurement being assessed by trusts in year 1, but by departments in year 4, and by local authorities in year 2, it would be difficult to secure the benefits of co-ordination.

Consultation and participation

Undoubtedly, there is a problem with the form consultation often appears to take. The key question is how to identify and promote best practice so that the dialogue envisaged by the legislation between civil society and the public sector fulfils its potential. But we should be careful to distinguish between several different options. Five options can be identified: cutting consultation, centralising consultation, delegating consultation, more targeted consultation, and direct funding of those in the community and voluntary sector who wish to participate. Of these, I would suggest, the only acceptable options are the fourth and the fifth: better targeting would be useful, as would increasing resources, issues that I consider below in more detail. The other options are flawed.

¹⁶³ Integrated Impact Assessment in Northern Ireland: <http://www.ofmdfmi.gov.uk/ia/>

Cutting participation would go to the very heart of what section 75 espouses: a form of participatory democracy, involving people in decision-making that affects their life chances. Not only is a closed system of the knowledgeable, in which elites made decisions for people an outdated notion of governance, however prevalent it still is in practice, mainstreaming equality is positively dangerous if it is done without extensive participation.

Turning to the second option, centralisation, there has been a school of thought that argues that because government departments are having problems with consultation, there should be a more centralized mechanism, with some sort of one-stop shop where the consultation efforts of several different bodies are centralised in another body that acts on their behalf. In this model, the consultation takes place at one remove from the policy makers. But one of the objectives of participation is precisely to engage with those who are directly responsible for dealing with the problem. Hiving off consultation away from the decision-makers to a centralised body that does the consultation on their behalf would be a mistake. Building relationships is what section 75 is partly about. People are now speaking to each other about issues of equality that would never have done so in the past. Relationships will not be developed if there is a centralised body doing the participation for another body. Equally, the increasingly common practice of delegating equality impact assessments to consultants seems to me to be mistaken for another reason: it is precisely the people who are making the decisions on policy that ought to be doing such assessments since only they can address effectively issues of defining the policy, assessing its impact, and imagining appropriate mitigation methods.

As regards better targeting and the under-performance of civil society, the solution is partly in the hands of the public bodies themselves. As regards better targeting, there needs to be considerably better co-ordination; there is too much ill-digested material, and the more paper in circulation, the more likely it is that the consultation will be a wasted opportunity, and unlikely to achieve value for money. From the perspective of those being consulted, too much paper makes effective participation less rather than more likely, given that in general the more paper, the less attention is paid to it. Participating groups need also to be given considerably better and more timely feedback on the results of their participation than many now appear to receive. In addition,

public bodies need to recognise that they either have a responsibility to provide resources directly to those that they are engaged in consulting, or some other body (such as the Equality Commission) needs to be funded to provide such support on their behalf. In particular one of the Working Groups¹⁶⁴ of the Task Force discussed above considered that “[w]ith regard to Section 75 in particular, the need for support to enable the voluntary and community sector to properly engage in the process of policy making will need careful consideration. There is no easy answer to what the best means of support might be and this will need further exploration with the sector. While core funding is likely to be issue, other support such as training in policy work to empower groups to be effective consultees and the provision of “hard” resources such as computers may also need consideration.”

There is, however, a legitimate fear that more “targeted” consultation may result, intentionally or unintentionally, in certain consultees being favoured by government, not because they are the most relevant participants to engage with, but because they are in other respects more acceptable to the public body concerned. The aim should be to achieve more effective consultation without creating mechanisms that are capable of such manipulation.

More thought needs to be given by the voluntary and community sector to making their contribution more effective. First, one problem that needs to be addressed is constant tension that is set up between “good relations” and “equality”. Clearly, as with the debate about the relationship between poverty and equality, good relations and equality should be seen as complementary. It is surely self-evident that good relations cannot be built on the basis of inequality and disadvantage. Unfortunately, on occasion, this inter-dependence is not sufficiently recognized. While it is natural for those working on community relations to consider this their primary interest, it is important that they do not inadvertently undercut arguments for equality. There are some who are likely to wish to divert the equality debate and who, unfortunately, deploy “good relations” arguments to do so, arguing that equality is somehow “divisive”. This is unacceptable.

¹⁶⁴ Working Group on Government Policy for Support and Funding of the Voluntary and Community Sector: Report to the Task Force on Resourcing the Voluntary and Community Sector, 11 September 2003 , WGGP 13, para 9.

Second, complaining about consultation-fatigue sends a mixed message, and one that can be clearly misinterpreted. Quite inadvertently, these complaints may be contributing to a general sense that consultation itself is a waste of time. Instead, a clearly articulated set of goals for achieving better consultation is urgently required. Third, a key priority for consultees is that they develop the skill of asking the right questions, of the right people, at the right time. This is not frequently enough the case at the moment. Consultees need to focus more on what issues are essential, and what interventions are likely to be effective. Consultees need to decide what is a priority, and then seek ways to try to deliver on those priorities.

Compliance

A much stronger approach by the Equality Commission will be needed than has so far been forthcoming. Although the Commission has increased staffing resources used on section 75, it is likely that more staff working on compliance with mainstreaming will be necessary than is envisaged at the moment. There has to be much more mainstreaming of the equality duty and linkage between the different sectors within the Commission itself. The Commission also needs to develop an enforcement strategy. When some of the worst examples of deficient equality impact assessments come into the Commission, or the Commission is alerted to the problem, they must develop the capacity and willingness to address the problem, indicating clearly what is acceptable and what is not, and this means that an efficient complaints handling and targeted investigations strategy should be adopted.

More imaginative ways of dealing with compliance problems will have to be considered. Arguably, there is more that the Equality Commission can do in requiring Equality Schemes to incorporate mechanisms of compliance than has hitherto been attempted. Hadden, for example, has suggested that Equality Schemes might provide for an effective trigger mechanism for an immediate impact assessment in certain circumstances,¹⁶⁵ and the feasibility of this should be considered further.

¹⁶⁵ Tom Hadden, Addressing Equality, Fortnight July/August 2004, p. 7

Litigation

However, both because of the uncertainty of the ultimate success of the investigation/complaint mechanism, and because of the danger that policies will be implemented before investigations and complaints are completed, it is necessary to consider more seriously the idea of developing a litigation strategy, based on judicial review. On the one hand, it is clearly preferable to create a situation where resort to judicial review is unnecessary. On the other hand, we need to consider whether attention can once again be refocused back onto section 75 by using resort to litigation to provide an incentive to public bodies to refocus attention and resources to implementing it more vigorously. A litigation strategy could also have other beneficial effects: providing a basis on which to focus the attention of civil society. It could also provide the basis for focussed media attention. Judicial review, in my view, should be seen as part of the armoury of weapons available to both the Equality Commission and non-governmental organizations in seeking compliance with section 75 in the future.

There is another potential benefit to judicial review. One of the functions that litigation plays is to enable contending parties to achieve a judicial determination of a legal issue that is in contention between them. In addition to the central question of the meaning of “equality of opportunity”, there are several other issues of legal uncertainty that have already arisen. There is some lack of clarity as to how far consultation requirements under section 75 are legally enforceable.¹⁶⁶ Osborne drew attention to several issues that he regarded as unresolved at the time of writing, in particular surrounding the requirements of EQIAs, and the concept of “adverse impact” on which they are based.¹⁶⁷ “Problems emerged on how this could be measured and what scale of adverse impact was sufficient to trigger a policy response”; how potential differences between the interests of different groups should be resolved; how conclusions based on statistical assessments should be weighed against evidence based on qualitative data, for example where quantitative data was hard to collect.” Another issue he raises relates to the meaning of “due

¹⁶⁶ *In the matter of an application by D for judicial review and in the matter of decisions of the Chief Constable of the Royal Ulster Constabulary and the Department for Regional Development*, Queen’s Bench Division (Crown Side), 19 September 2002; ASBOs case.

¹⁶⁷ Osborne R.D., *Progressing the equality agenda in Northern Ireland*, *Journal of Social Policy*, 2003, Vol 32, pp 339-360, p. 350

regard”, and in particular “whether this test will be satisfied if procedural rather than substantive implementation is adopted, carrying out an EQIA, consulting but deciding not to change a policy with clear adverse impact on a particular group?”

If such a litigation strategy were to be developed, there are several factors that would need to be addressed. First, those few, sporadic instances in which section 75 has been used in judicial review appear to reflect either a judicial or a practitioner assumption that section 75 is, in essence, simply another anti-discrimination provision, one which does not add much to the existing anti-discrimination provisions in Northern Ireland law. Equally, previous cases have raised the question of the appropriateness of resorting to judicial review where there are other procedures for resolving complaints set out in the legislation.¹⁶⁸ Issues are also likely to arise as to the standing of either the Equality Commission or non-governmental organizations to take judicial review. There are also clearly issues surrounding the ability of the Commission to combine its complaint and investigation roles with taking judicial review. There is also a risk that bad precedents could wreak havoc and would be difficult to overturn by legislation.

Both the practising Bar and the judiciary will need to be educated much more in the intricacies of section 75, if they are to become major players in its implementation. I know of no major conference or seminar directed primarily at training either judges or practitioners in section 75. I understand that the Equality Commission has begun participating in the training of the judiciary on equality issues. Section 75 should become a major part of this training. This should be a priority item in the coming year. Education and training may come in several guises, however, other than formal conferences, and one method of educating the judiciary may be through seeking to intervene in judicial reviews that raise section 75 arguments, to assist the judiciary to understand the nuances of the process, and its fundamental aims. Where, for example, applications for judicial review have considerable implications for section 75 implementation, but neither the principal NGOs that focus on section 75, nor the Equality Commission, are parties to the litigation, they must make

¹⁶⁸ See *Re Byers* [2004] NIQB 23 (2 April 2004), in which the applicant relied on section 75 as ancillary to the discrimination issue. Weatherup J considered (para 42), that “Section 75(4) and schedule 9 provide for enforcement of equality duties through the Equality Commission so the provisions do not contribute to the present application.”

sure that they become aware that the application has been made and consider whether to seek leave to intervene.

A final issue is, of course, the problem of costs and resources. It is unlikely in the early days of a judicial review strategy that legal victories will materialise, and we must assume that the costs of both the applicant and of the public body may have to be paid. In addition, for litigation to be a serious threat, it would need to be undertaken using a high level of professionalism. Both these will require adequate funding. This funding will, in the case of the Equality Commission, derive from government, and this will test the current political commitment to section 75. In the case of NGOs, the funding issue is complicated in other ways. To the extent that sources of funding exist other than from government, they should be actively explored.

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**THE SECTION 75 EQUALITY DUTY – AN OPERATIONAL REVIEW:
The independent report of Eithne McLaughlin and Neil Faris**

Please complete and return this questionnaire (details at the end) **by Monday 31st May 2004** at the latest. Your response is confidential to the Chairs of the Review, unless you choose to have it attributed to you or your organisation.

EXPECTATIONS OF SECTION 75

- 1 What were your expectations of the statutory duty and have these been realised? If not, why not? Please tick one of the boxes and expand if you wish in the text box.

Partly Not At All Completely

Policy Expectations:

- 2 Has the operation of the statutory duty influenced better decision-making in your organisation? If so, in what way? What outcomes has it had for your organisation? Please give details in the text box.

S75 organisational outcomes:

- 3 Do you think the statutory duty as it is being operated by public authorities meet the expectations for equality gain intended when the legislation was introduced? If not, why not? And in what ways? Please tick one of the boxes and expand if you wish in the text box.

Partly Not At All Completely

Expectations:

- 4 Do you think consultees have engaged with the statutory duty in the way intended when the legislation was introduced? If not, why not? Please tick one of the boxes and expand if you wish in the text box.

Partly Not At All Completely

Engagement of consultees:

EQUALITY OF OPPORTUNITY

- 5 Has the concept of 'equality of opportunity' been straightforward to implement? For example, is it's meaning clear and unambiguous? Please tick one of the boxes and expand if you wish in the text box.

Unproblematic Problematic Problematic at times

Meaning of equality of opportunity:

- 6 Has it been possible to use New Targeting Social Need (New TSN) and the statutory duty together in policy-making and planning to promote equality? Does the relationship of New TSN to the statutory duty need to be clarified? Please tick one of the boxes and expand if you wish in the text box.

Yes No

Relationship with New TSN:

RESOURCES

- 7 Has your role and work in relation to the statutory duty been adequately and properly resourced? Please tick one of the boxes and expand if you wish in the text box.

Yes, adequate resources

Initial difficulties but now satisfactorily resourced

Resources have been a continuous problem

Resources:

- 8 Have resource constraints on the part of actual or potential consultees adversely affected the implementation of the statutory duty? Please tick one of the boxes and expand if you wish in the text box.

Yes

Initial difficulties but now satisfactory

Resource constraints among consultees have been a continuous problem

Resource constraints:

SCREENING

- 9 Are you aware of any difficulties with the implementation and practice of screening? Please tick a box and expand if you wish in the text box.

Yes No From time to time

Screening:

- 10 Are you aware of any designated public authority:
- (a) screening a policy in for Equality Impact Assessment (EQIA) when you feel it should have been screened out?
Yes No Don't know
- (b) screening a policy out for EQIA when you feel it should have been screened in?
Yes No Don't know
- 11 How important has screening been in mainstreaming equality in your organisation?

Very/
Often Occasionally/
or a little Not at all/
Never

COVERAGE OF SECTION 75

12 Do you believe all public authorities which should be covered by the statutory duty have been designated by the Equality Commission (*a list of designated bodies is available on the Review website – details of the website are available at the end*). If not, which additional authorities do you feel should be designated or de-designated? Please tick a box and expand if you wish in the text box.

Yes No

Coverage:

13 Of all designated public authorities what proportion do you think have now implemented their statutory duty fully or partially? Please comment on variations on compliance and provide specific examples of compliance problems in the text box. Please provide fractions or percentage figures as you wish in the boxes below.

Proportion fully implemented

Proportion partially implemented

Other/don't know

Extent of Compliance:

EXAMPLES OF GOOD PRACTICE

- 14 Are you aware of good examples of the operation of the statutory duty? If so, where and when?

Good Practice:

- 15 Are you aware of poor examples of the implementation of the statutory duty? If so, where and when?

Poor Practice:

GUIDANCE

- 16 How useful to you has been the guidance on the statutory duty produced by the Equality Commission (that is, the “Guide to the Statutory Duties” and the “Practical Guidance on Equality Impact Assessments”)? Please tick one box and expand your answer if you wish in the text box.

- Very useful
- Useful
- Not useful
- Not useful currently
- More useful now than initially

Guidance:

MONITORING AND ENFORCEMENT

17 The Equality Commission is charged with monitoring and enforcing the statutory duty. Are the requirements of monitoring proportionate to it's effectiveness? Please tick one box and expand if you wish in the text box.

Yes Sometimes No Don't know

Monitoring:

18 How effective has the Equality Commission's enforcement role been? Please tick one box and expand if you wish in the text box.

Very Sometimes Not at all Don't know

Enforcement:

19 In your view, are additional or alternative monitoring and enforcement mechanisms necessary? Please tick one box.

Yes No Don't know

Monitoring and Enforcement Mechanisms:

ADVICE AND SUPPORT

- 20 Have you received advice and support from the Equality Commission? If so, how important has it been to you? Please tick one box and expand if you wish in the text box.

Very important

Somewhat important

Not important

Advice and Support:

IMPLEMENTATION ACROSS DIFFERENT AREAS

- 21 In your experience and view, has the statutory duty been equally well implemented across all the dimension of (in)equality cited in the Northern Ireland Act, or has it been better in relation to some than others?

Much the same across all

Better in relation to some than others

If better in relation to some dimensions than others, please indicate below which category has been implemented better or worse.

	Better with regard to	Worse with regard to
persons with different religious belief	<input type="checkbox"/>	<input type="checkbox"/>
persons of different political opinion	<input type="checkbox"/>	<input type="checkbox"/>
persons of different racial group	<input type="checkbox"/>	<input type="checkbox"/>
persons of different age	<input type="checkbox"/>	<input type="checkbox"/>
persons of different marital status	<input type="checkbox"/>	<input type="checkbox"/>
persons of different sexual orientation	<input type="checkbox"/>	<input type="checkbox"/>
men and women generally	<input type="checkbox"/>	<input type="checkbox"/>
persons with a disability & persons without	<input type="checkbox"/>	<input type="checkbox"/>
persons with a dependents & persons without	<input type="checkbox"/>	<input type="checkbox"/>

Give examples of the way in which the statutory duty might have varied across the 9 dimensions and the reasons why this may have been the case.

Examples of differential implementation:

EQUALITY IMPACT ASSESSMENT

22 Do you believe any of the following problems exist with equality impact assessment as it has developed over the last 3 years of the operation of the statutory duty in Northern Ireland (please tick all you think might apply)?

insufficient scoping of the policy to be assessed?

conclusions being reached which are not supported by the evidence?

lack of definition of the objectives of the policy?

assessment not conducted on policies it should have been?

assessments relying on out-of-date or flawed information and evidence?

assessments relying on inadequate or incomplete consultation processes?

assessments conducted at ineffective stages in the policy-making process?

assessments going through the motions?

23 Do you believe any of the following benefits have resulted from the practice of equality impact assessment over the last 3 years of the operation of the statutory duty in Northern Ireland (please tick all you think exist)?

improved standards of policy-making?

removal of direct discrimination in the delivery of public services?

removal of indirect discrimination in the delivery of public services?

increased equality of outcome and condition?

equality considerations now an integral part of policy-making/development (ie mainstreamed)?

equality considerations now an integral part of service delivery and planning (ie mainstreamed)?

24 How important has policy-proofing been in mainstreaming equality in your organisation?

Very/ Often Occasionally/ or a little Not at all/ Never

25 Has the operation of the statutory duty – through screening, equality impact assessment and consultation – mainstreamed equality within public authorities and public policy-making? What other methods of implementing the statutory duty would further promote mainstreaming of equality?

Mainstreaming:

26 What aspects of operating the statutory duty have public authorities dealt with most/least effectively?

	Most effectively	Least effectively
Screening	<input type="checkbox"/>	<input type="checkbox"/>
Equality impact assessment	<input type="checkbox"/>	<input type="checkbox"/>
Consultation/participation	<input type="checkbox"/>	<input type="checkbox"/>
Monitoring/review	<input type="checkbox"/>	<input type="checkbox"/>

27 Do you know of any services, projects or policies which have been significantly improved as a result of the statutory duty? Or policies or decisions which have been abandoned or reversed? If so, please specify in the text box.

Yes No

Change Examples:

28 **ABOUT YOU**

Have you been personally involved in the operation of the statutory duty? If so, how and when? (Please tick all that apply)

As a consultee in the voluntary/community sector [e.g. an employee or volunteer in a community organisation]

As a private individual

As a member of staff of a public authority (Non-Departmental Public Body or Department)

As a member of a political party

Other

When was your involvement? 1999-2000

2000-2001

2001-2002

Continuous to present

29 Do you have any recommendations for improving the operation of the statutory duty? If yes, what are these?

Yes

No

Don't know

Your Recommendations:

- 30 If you have anything specific to your experience or circumstances with regard to the statutory duty that you wish to draw to our attention, please feel free to do so below.

Other comments:



That concludes the questionnaire. Thank you for your contribution to and participation in the Review.

Visit our website at <http://www.section75review.info/>

PLEASE RETURN THIS QUESTIONNAIRE VIA ONE OF THE FOLLOWING METHODS:

ELECTRONICALLY/EMAIL: responses@section75review.info

You can fill it in on-line or email your completed questionnaire back to the following email address. If you require this questionnaire in an alternative format please contact the Administrator at 028 90 523143, or by post/email or via the website.

BY POST:

**The Administrator
Section 75 Review
FREEPOST BEL3989
94 University Avenue
Belfast BT7 1BR**

You can fill it in by hand and post it back using the FREEPOST address supplied.

BY FAX:

028 90 523323

RESPONSES REQUIRED ON OR BEFORE 31st MAY 2004

Do you wish your responses in this questionnaire to be attributable to you/your organisation:

Yes No

If Yes, please supply you name and/or affiliation here:

.....
.....
.....

Conference Small Group Reports

Group 1 - led by John Kremer and Deirdre Vaugh

Before discussing the topic allocated to the Group, participants requested the opportunity to briefly revisit the concerns raised before lunch re: the independent review. The following concerns were highlighted:

- 1. Timeframe:** participants were concerned at the short time allocated to the independent review.
- 2. Methodology:** participants felt there was an over reliance on the use of the questionnaire as the main method of obtaining feedback. Concerns were raised regarding the design of the questionnaire and in particular the use of the one single form to capture information from both public authorities and consultee groups.
- 3. Analysis:** participants requested clarity on how different views would be weighted.
- 4. Consultation:** participants emphasised that the advantage of consultation was that it provided an opportunity to tease out issues being raised. Again, concerns were raised regarding the time afforded to consultation and the approach adopted.

In conclusion participants questioned why so little time had been allocated to the independent review. They felt that the independent element was a crucial stage of the process and asked what if any flexibility the experts had in conducting the review. They also reinforced their concerns about the design and use of the questionnaires. It was felt that the short period time allocated for their completion was unacceptable as it did not provide an opportunity to gain the approval of their organisation instead generally reflected the view of a single member of staff.

At this stage John Kremer gave a brief introduction to the main topic for discussion.

Topic 1 - Policy

General

Whilst participants did not seek to define a policy, the view was that in terms of definitions and process “one size does not fit all”. Participants felt that functions were generally too broadly defined to provide a policy framework but equally to rely on the screening of every individual policy to create an EQIA timetable could lead public authorities into an unmanageable process. There was consensus on the need to screen and consult on screening outcomes. From a consultee perspective it was pointed out that generally more attention would be given to consultation on EQIAs than screening.

Screening of Policies

Participants felt with the benefit of hindsight that this process could have been more focussed. In terms of the screening criteria, given the data deficit this was often a subjective process, which was considerably enhanced where consultation took place. In terms of the screening process a view was expressed that factors such as “economic need” could in some circumstances be difficult to define. Some participants felt that a less perceptive approach to screening with a robust paper trail which demonstrated the reasons for the public authorities’ decision and provided for consultation with effective groups would be more beneficial.

New Policies

Some participants felt there was merit in building in the seven stages of the EQIA process into policy development. Thereby “equality proofing” policies at the developmental stage.

Thematic Approach

A number of participants were attracted to the recommendations made by Chris McCrudden around this approach.

Such an approach was felt to be beneficial where there is a:

- Cross cutting programme of work
- Strategic top level issues
- Top level commitment and involvement.

Other participants felt it was less useful for smaller public authorities and in local government, namely District Councils. The policy making process in local government tended to be slower given its structure.

EQIA Desk Audit

Participants indicated that it was an unrealistic expectation to anticipate that the Equality Commission could have a detailed grasp of such a large range of public authorities. Participants who had experience of the Commission's Desk Audit felt it was "unacceptable" and it clashed with diversity.

Equality for All versus Nine Categories

Participants felt that the nine equality categories were the minimum – with this proviso. They had no difficulty with the notion of equality for all.

Good Relations

Participants noted that the Equality Commission were shortly to issue good practice on the promotion of good relations. Whilst this was to be welcomed participants were keen that it would not restrict creativity and the good work currently being undertaken by some public authorities.

Topic 2 - Enforcement

Most participants were of the view that they had nothing to fear from the enforcement of the legislation, indeed some felt it would be positive in areas where little progress had been made. Concern was expressed, however, that if the Equality Commission was seen as the enforcement body that this may deter public authorities from approaching the Equality Commission for advice and support on implementation issues and when confronted with problems in regard to Section 75.

Topic 3 - Resources

Participants welcomed the work being undertaken by NISRA. They felt that there was also a considerable amount of data and

research compiled by the community and voluntary sector and the catalogue of same would be beneficial.

Group 2 - led by Frances McCandless and Seamus Camplisson

Topic 2 - Enforcement

- Note flawed process – what weight being given to this element.
- Fact that it is statutory duty is the strongest element of enforcement.
- No sanctions imposed yet – ECNI now has mechanisms in place – being tested.
- Separate implementation and enforcement – early stages were about setting up.
- No enforcement strategy – ECNI has number of routes.
- No fear of sanction in some public authorities – some would fear unfavourable reports – ‘teeth’ not necessary?
- Strategy should include range of things – informal and formal.
- ECNI sees informal resolution playing a key role.
- Not solely matter for ECNI – equality actions are in Department plans and targets. Departments should act if not met.
- NIO attitude – wait for SOS to act eg ECNI guidelines.
- Message that equality is not a priority.
- Naming and Shaming?
- Political will?
- SoS could make an annual statement on part of compliance strategy.
- Eg of ASBOS – Children’s Law Centre led to believe informal resolution taking place – nothing happened – 10 NGOs lodged complaint in NIO and ECNI – ECNI investigation could take 7-9 months – too late for legislation.
- consultation and EQIA failures;
- alternative emergency procedures.
- Timeframes don’t work.
- Fast track mechanism needed.

- PAs setting very tight deadlines to resolve complex issues.
- Ministerial confusion between legal duty and responses from locally elected bodies.
- All legislation, including read-across from GB should cover S75 considerations including screening.
- Advice to Ministers on proposed legislation should have fuller information on S75 – template?
- Mediation process clarified pre-enforcement if more ‘teeth’ added – PAs still learning – requires good faith on both sides.
- Staging of enforcement as organisations learn.
- Quality of implementation – eg EQIAs – make sure more than ticking boxes.
- EQIAs means to an end, rather than end in themselves.
- Need for guidance on enforcing mainstreaming? Beyond EQIAs in future?
- Raw data for EQIAs sometimes doesn’t exist.
- PAs could be using secondary data/early consultation for EQIAs where data imperfect.

General Comments regarding the process

- This conference can’t compensate for consulting affected groups.
- Timescale too short.
- Questionnaire not addressing NGOs?
- Public authorities felt the same – hybrid quest.
- Covering material unclear? - Independent nature too independent? - Obscure.
- No questionnaire to NIO?
- New ECNI guidance will close loopholes eg screening.
- Who dictated the rush? Is there movement on deadlines?
- Will independent element be listened to?
- Timescale doesn’t comply with good practice (even though this not technically consultation).

- Responses so far show there is great need for a proper process.
- Low level of response from organisations – time needed for organisational decision making – ‘personal opinions’ important but only go so far.
- Need to ask organisations to respond – can take 3 months.
- Unhappy with conclusions drawn on basis of questionnaire – interpretation of data questionable.
- How will ‘partly’ be interpreted?
- Start again with 2 separate questionnaires and ask for organisational responses.
- May not be confidence in results after today.
- Recognise that timeframe has been impossible.
- Advisory group could advise abandonment?
- Why hold conference on day of elections? - need political parties together with others.
- Suspension of Executive has made big difference.
- Some politicians did not understand S75.

Group 3 – led by Daryl Young and Elizabeth Beattie

Topic 3 - Resources

(a) Capacity

- Equality is much broader than just Section 75 Equality.
- Small organisations have to deal with a broad equality agenda within which Section 75 is one aspect.
- Section 75 is closely linked to other equality issues.
- There is a perception in some organisations that Section 75 diverts precious resources from other front line/direct services.
- However, if no resources are specifically allocated to Section 75 a negative image is generated that Section 75 is of no real importance.
- This marginalises the issue rather than mainstreams it.
- It was suggested that Section 75 needed to be built into a holistic view of service delivery and provision.
- The group strongly agreed that there was a need for more resources (time, money, and staff) to deal with Section 75 effectively both in Public Authorities and within the Voluntary Sector.
- There was a need for a cultural shift within organisations in relation to assigning resources to Section 75.
- The group believed that there had to be a commitment from the top, particularly a political commitment, to commit resources to Section 75.

(b) Consultation

- This issue related primarily to the resources the voluntary sector had to deal effectively with the amount of consultation documentation they received on a regular basis in relation to Section 75.
- It was pointed out that time and space was needed within voluntary sector organisations to enable them to give a meaningful response to many consultations.
- There were also practical feedback issues such as the way consultations were undertaken and suggestions were made

that use should be made of text phones, different font sizes for such documents, etc.

- There was the issue of selectivity – in order to manage limited resources voluntary organisations had to be extremely selective in the consultations they choose to participate in.
- It was suggested that public authorities could talk to the voluntary sector before undertaking EQIA's or even developing policies – undertaking pre-work/pre-consultation activities could help make the consultation process more effective.
- It was also felt that a high level commitment to the consultation process, its relevance and timing was required.
- Various innovative approaches to consultation were outlined - such as the use of focus groups by a Health Trust which had been low cost and required low effort but which had generated extremely worthwhile results.
- It was noted that Equality Schemes committed public authorities to resourcing Section 75.

(c) Resources for the Voluntary Sector

- It was felt that there needed to be adequate resources provided to the voluntary sector if Section 75 was to be effective.
- There needed to be a commitment by central government to give this support.
- Concern was expressed at the poor response by public authorities to the submissions made by the voluntary sector as part of the consultation process – ie, acknowledgement of suggestions, taking on board of concerns/suggestions, etc.
- Concern was also expressed at the number of EQIA's generated each year.
- The issue of relationship building was explored and it was felt that the appointment of consultants to carry out consultations on behalf of public authorities did not help. This created a barrier with the policy maker.
- It was felt that the knowledge and expertise on Section 75 within an organisation (both a PA and Voluntary Sector) was an essential resource and needed to be nourished and developed.

- Representatives from the voluntary sector also commented that the further from the centre the public authority lay, the better was their relationship with that authority.
- Queries were raised re a Capacity Fund but it was pointed out that the Equality Commission has no statutory power to fund such an undertaking.
- The voluntary sector is under resourced and this also applies to the administrative back up needed for Section 75 responses.
- It was pointed out that the voluntary sector should be viewed as a valuable resource in relation to Section 75 and it was suggested that the voluntary sector itself could establish a form of consultancy service.

Topic 4 – Political Will

- The group pointed out that it was not just politicians who had to demonstrate a commitment to Section 75.
- It was commented that we should not underestimate the power and influence of the Head of the Civil Service and the Permanent Secretaries.
- They need to be taking equality seriously.
- Reference was made to the way in which the Anti-Social Behaviour legislation had been made and it was felt there was a weakness in Section 75 in relation to UK wide legislation.
- Much concern was expressed in relation to consultation problems with UK wide legislation, in particular the fact that consultations take place in GB earlier than in NI. It was suggested that simultaneous consultation in GB and NI should take place.
- There was a perception that GB legislation was a ‘done deal’.
- Various members of the group expressed the view that building political will with local politicians was easier than with GB Ministers.
- It was pointed out that Section 75 Equality and Good Relations was a reserved matter and there was a duty of care inherent on the Ministers to ensure it was enacted correctly.
- It was suggested that the GB Ministers should be educated in the relevance of Section 75 in order to demonstrate a clear commitment from the top.

- The suggestion by Chris McCrudden relating to the setting up of a Strategy Group at the highest level was felt to be an excellent suggestion in giving credence to Section 75.
- The independent input onto this Group should come from the voices of those affected.
- Gatekeeping issues in relation to the voluntary sector were also discussed and concern was expressed at some perceptions of the role played by various voluntary organisations.

Topic 1 - Enforcement

- A suggestion was made that financial penalties should be introduced for Section 75 Equality in the same way that they existed for other equality areas.
- The money generated should go back to resource Section 75.
- The comment was made that the Equality Commission needed more of a 'stick' to ensure compliance.

General Comments

- Various members of the group expressed concern at the process used for the operational review.
- Concerns were raised regarding the short period of time allocated for the undertaking of the review.
- It was felt that the process could be viewed as 'flawed' – particularly the use of data based on a majority of responses from public authorities.
- Queries were raised in relation to trust in the process and there were concerns that political will and resources seemed to be lacking.
- Concern was expressed that only one side of the coin (the public authorities) had been adequately consulted and it was suggested that the process should find a way to talk to both sectors – public authorities and the voluntary sector.
- It was suggested that, at the very least, the report should include a precise description of the review process and of the data sources used in the report. In this way readers of the review would be more aware of its potential weaknesses.