



Taking equal opportunities seriously

the extension of positive duties to promote equality

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Executive summary

What is a “positive duty” and why does this paper recommend the introduction of such duties across all equality grounds?

A positive duty is a requirement that organisations promote equality and diversity in all aspects of their work, in a manner which involves employees, employers and service-users alike. It is a proactive approach, with an emphasis on achieving results backed by enforcement mechanisms and the measurement of outcomes.

In 2000, the UK government introduced a positive duty on public sector bodies to promote race equality in the wake of the Stephen Lawrence inquiry. In the light of the experience of that duty, and of similar equality duties in Northern Ireland, Wales, Scotland and elsewhere, this paper recommends a radical change of direction for equality and diversity policies in the UK – the supplementing of the existing limited anti-discrimination legislation with a comprehensive set of proactive positive duties.

These duties, if implemented in the public sector, would be based upon a statutory requirement to eliminate unlawful discrimination and promote equality of treatment. This can be fulfilled by monitoring workforce composition, consulting with relevant groups, carrying out policy impact assessment to determine the impact of particular policies and practices upon disadvantaged groups, and by taking remedial action where necessary.

In an adapted and simplified form, positive duties to promote equality could also provide an effective means of redressing pay and employment inequalities in the private and voluntary sectors. Employment equity and public procurement schemes extending across some or all of the equality grounds are already being implemented in Canada, Australia, Norway and Northern Ireland.

The weaknesses and costs of anti-discrimination approaches

Anti-discrimination law has generated considerable cultural change in society, and has been effective in breaking down many visible

barriers and prejudices. However, it often proves less than adequate in dealing with more complex and deep-rooted patterns of exclusion and inequality. There is too much reliance upon individual enforcement, legal technicalities of interpretation and complex adversarial litigation. It frequently suffers from lack of participation and input of disadvantaged groups themselves. It also encourages a culture of passive compliance with legislation, rather than the taking of proactive action to encourage diversity.

In the public sector, this means that eliminating discrimination is often treated by public authorities as a compliance issue, which carries with it a negative connotation. Policy is often constructed on the basis of assumptions about the needs of disadvantaged groups that do not mirror their own perceptions and actual needs. Equality is not given its necessary place within the central aims of public sector organisations. It is also not treated as being of real importance to their core business, such as the delivery of services to the public and strengthening social cohesion.

In the private sector, equality is easily marginalised as an externally imposed regulatory burden. Little impetus exists to encourage the proactive adoption of best practice in enhancing diversity in the workforce. The anti-discrimination model also encourages a defensive and sometimes confrontational approach, which fails to recognise the relevance of equality to enhanced business performance, effective recruitment and improved employee satisfaction. The lack of a clear legal standard of appropriate equality practice, combined with shifting and incremental case law in the courts and employment tribunals, makes it difficult for employers to know where they stand and what action is necessary.

The persistence of structural patterns of inequality across all the equality grounds also imposes considerable costs on society at large. It impedes effective service delivery, damages the labour market prospects of disadvantaged groups and contributes to patterns of social exclusion and ethnic tensions.

The limitations of mainstreaming and other “soft law” equality strategies

To remedy these shortcomings, various forms of public sector diversity strategies and equality mainstreaming have been adopted throughout the EU and elsewhere, in order to incorporate equality perspectives in all aspects of policy and practice. However, in the absence of comprehensive enforcement, these types of “soft law” have generally proved piecemeal and ineffective. Unless backed by consistent political will, organisational capacity, sustained leadership and expert advice, they tend to be at best procedure-oriented or even to collapse completely.

The “Policy Appraisal for Equal Treatment” guidelines, which were revised and reissued by UK central government in 1998, were essentially voluntary in nature and frequently lacked impact. The 1994 “Policy Appraisal for Equal Treatment” guidelines, which were specific to Northern Ireland, proved similarly lacking. Compliance with the “Equality Standard for Local Government” is a Best Value indicator for local authorities in England and Wales, but the extent of the obligations imposed under it are not clear, and the Audit Commission reports poor progress overall on equality in local authorities.

Similarly, private sector employers in the UK and elsewhere have been showing an ever-increasing interest in implementing proactive equality policies as part of “diversity management” strategies. However, similar limitations have arisen with these strategies as have arisen in the public sector, such as dependence upon managerial good will and a lack of sustained leadership. In addition, many businesses have simply not adopted any equal opportunities policies beyond those required to secure compliance with anti-discrimination law. A recent survey conducted by the Confederation of British Industry found that the majority of companies (83 per cent) reported having written equal opportunities policies, but few undertook regular monitoring (40 per cent) or even trained line managers on implementing the policy (30 per cent). Certain structural patterns of disadvantage remain deeply rooted in the private sector, and are not breaking down at any appreciable rate.

In both the private and public sectors, proactive equality initiatives all therefore suffer from the lack of clear legal support, leaving them vulnerable to fluctuating political will and competition from other priorities. In the absence of a clear statutory duty, voluntary policies will often not be taken seriously.

A new model for achieving equality

There is evidence that a legislative regime based on positive duties can lead to more effective progress in equality and diversity policies than the current anti-discrimination legislation. Compliance with equality law is potentially made simpler, and the promotion of substantive equality of treatment becomes part of policies of social cohesion, good relations and community relations.

Where existing public and private sector equality strategies lack clarity, strong enforcement mechanisms or legal backing, positive duties remedy these flaws by creating clear obligations to take proportionate and necessary steps to monitor, consult on, and evaluate equality issues, and to take remedial action if necessary. By setting clear legal standards for positive action, they provide a greater degree of guidance to employers than much of anti-discrimination law and constitute valuable tools in breaking down patterns of inequality.

To be effective, positive duties need to have certain key ingredients. They must be proactive, sustainable, effective and outcome-orientated. Duties need to be established in a manner that ensures that they will retain their credibility within both the public and private sector and in the wider community. Excessive bureaucratic load, inconsistency, an over-emphasis on process as distinct from outcomes, and the lack of effective enforcement mechanisms are all potential traps that need to be avoided in designing and implementing duties.

Public sector duties in practice: the RRAA, Northern Ireland, Wales, the GLA and Scotland

In examining the potential of positive duties in the public sector, the impact of the existing duties has to be considered. It is too early to

make definitive statements about the outcomes of the race duty, but the initial progress appears to be promising. The recent independent review of the first year, by Schneider Ross, found wide variations in the response of public sector organizations, but concluded that authorities strongly value the ways in which the duty has improved policy-making and service delivery design.

The report did identify some practical problems with the implementation of the race duty, with the shortage of applicable data for impact assessments, and the lack of a clear position on the action to be taken when a policy is found to have an adverse impact. There are also concerns that the enforcement mechanisms are not adequate, although the remedy for this may lie in the role of the various inspectorates. However, around two-thirds of authorities and over 70 per cent of educational institutions felt there had been positive benefits, rising to 89 per cent in central government and 83 per cent in higher education. Overall the report concluded that the general approach of the race duty is sound, and the emphasis now needs to move towards outcomes, action plans and public accountability. The Commission for Racial Equality (CRE) has identified seven high-level strategic outcomes to provide a focus for implementation.

The Northern Irish duty, which covers nine equality grounds, is the most extensive duty in the UK, and arose partly out of dissatisfaction with the previous voluntary nature of the "Policy Appraisal for Equal Treatment". The recent review of the duty's initial impact has identified its most immediate effect as the creation of a new openness on the part of policy makers to a greater range of perspectives from diverse groups. This has brought about shifts in consultation, monitoring and policy assessment procedures. The duty has also encouraged more extensive equalities training, the overhauling of complaints mechanisms, the collection of hitherto unavailable data, the creation of special units, including Good Relations Units, and greater public access to information and public services, particularly for minority ethnic groups and disabled people. Some specific outcomes of policy impact assessments have included the identification of disability issues as a priority for the Northern

Ireland Housing Executive, amendments to the Criminal Justice Compensation Scheme to mitigate adverse impact on the Roman Catholic community, and the harmonization of prison service allowances for different age groups of prisoners.

Problems with the Northern Irish duty include the lack of any specific requirements for each of the nine strands, creating the risk that certain strands might be neglected. There has been good practice in consultation, but this has sometimes created “consultation fatigue” in the voluntary sector, with a lack of well-organised representative groups for some equality strands. The duty has also been accused of being overly focused on process at the expense of outcome, but it has succeeded in bringing equality to the forefront of public authority business in Northern Ireland.

The Welsh Assembly duty is based on “equality of opportunity for all people”. It has no strong enforcement mechanism, no definition of equal opportunities, and does not list individual equality grounds. Combined with a favourable political climate, it has resulted in the emergence of a proactive equality agenda in Wales. It has encouraged extensive pay audits and changes in recruitment practice in the public sector, and annual policy assessment, including equality mainstreaming in the preparation of the Welsh Budget. A voluntary code of practice has been introduced for private contractors, and equality has been mainstreamed into public procurement processes. The Assembly has revised its own procedures and consultation processes, including setting up four consultative networks, on disability, race, gender and sexual orientation.

Senior public servants and Assembly members have credited the duty with ensuring suitable priority for equality initiatives. Weaknesses include the low awareness of the duty outside public authorities, and the lack of monitoring and enforcement mechanisms, which make progress under the duty very dependent on political will.

The Greater London Authority (GLA) duty covers six strands, and is in some ways a combination of the general Welsh duty and the more specific duties of the Northern Ireland model. Implementation is based on a comprehensive Equalities Framework, including

comprehensive consultation and reporting mechanisms such as the London Older People's Assembly, and the annual Mayoral Equalities Report. Equality has been built into the public procurement process and into the GLA compact with the voluntary sector (the formal agreement on their relationship). Having the six grounds specified does raise consciousness of the need for demonstrable outcomes across all the grounds, and ground-specific initiatives are used to a greater degree than in Wales and Scotland, especially on sexual orientation and age. Once again, however, the lack of an enforcement mechanism leaves the duty vulnerable to changes in political climate.

Although the Scottish Parliament cannot legislate on "reserved matters" such as anti-discrimination legislation, it does have an enabling power to encourage equal opportunities, which allows it to impose equality duties on public bodies in Scotland. The eight equality grounds in the Scotland Act include language and social origin, as well as religious belief. Concrete results have included the insertion of equal opportunities duties in the recent Housing Act, the Local Government Bill and in education policies. There has also been equality mainstreaming in the processes of the Parliament and the Executive. The Scottish power does not constitute a duty, and is unenforceable, but does provide a useful enabling tool.

From these examples, it is clear that there are lessons from all of these duties which can be used in designing a cross-strand set of duties for the public sector throughout Britain. These can be broadly summarized: enforcement mechanisms are important; each of the equality strands has to receive due emphasis; adequate support and guidance for implementing authorities is required, as is strong managerial commitment; and an emphasis upon outcomes is essential.

The potential impact of positive duties for the five other equality strands

It is clear from this experience that positive duties can be implemented in the public sector and can produce results across the various equality strands. The current restriction of positive duties in

Great Britain to race equality is unnecessary and self-defeating. The conclusions of the Schneider Ross survey support this: "The basic principles of the public duty, and the practical steps required to meet these, apply equally to other equality and diversity areas. It is our belief that the progress shown... provides a good foundation for introducing appropriate public duty requirements to the other equality strands. In this way, the concept of the "public duty" could play a major part not only in helping combat racial discrimination, but also in addressing all forms of discrimination and therefore in creating a society that is genuinely inclusive".

It is likely that government will introduce a disability duty in the near future. Potential outcomes in disability might include: a reorientation of the delivery of health services; better access to educational materials; enhanced consultation and outreach; better design of facilities and work practices; a re-examination of community, arts and sports funding priorities; the collection of up-to-date data.

The Employers Forum on Age has argued that ageism in employment costs the UK £31 billion every year in lost production. In addition to tackling this problem, a duty that promoted equality on the grounds of age could also be used to overcome the paternalism and neglect which has traditionally characterized the design and implementation of services for older and younger people. Outputs might include: greater consultation on public transport provision; the monitoring of age diversity profiles in the workforce, with subsequent positive action; a re-thinking of health service design, delivery and resource allocation; a reconsideration of age cut-off points in access to education, training and welfare provision; a re-examination of policing policy towards older and younger people; greater focus on the extent of elder abuse within the family; new methods of information provision; and a reconsideration of compulsory retirement policies.

Religion has been neglected in equality policies, both as a component of self-identity and as a common root cause of discriminatory treatment. There is also a significant lack of data on the disadvantages suffered by groups such as Muslims. A duty that promoted equality on the grounds of religion or belief would not

entail the promotion or prioritization of religious beliefs, nor need the perspectives of humanists or secularists be overlooked. Such a duty could result in an improved responsiveness to religious sensitivities and practice; a greater focus on crime and hate speech linked to religious hatred; improving police practice towards particular religious groups; workplace recognition of non-Christian religious festivities and practices; and greater outreach through community religious institutions.

A duty that promoted equality on the grounds of sexual orientation could result in: a greater focus on homophobic bullying in education; better data collection, consultation and outreach; more specific health care provision; improved police practice; and a reconsideration of policies on partner benefits. It could also support wider inclusion of lesbian, gay, bisexual and transsexual people in employment, training and promotion.

The government is committed to introducing a duty to promote equality between the sexes “when legislative time allows”. Such a gender duty could result, for example, in revisions in health, social welfare and transport policy, resource allocation and service provision; a refocusing of crime priorities to give greater priority to domestic violence; the challenging of sex stereotyping in education and training; pay audits and positive action on workforce under-representation; and making part-time workers more central to employment policy.

Establishing positive duties across the six UK equality strands would not be a panacea, but would be an invaluable tool for advancing the equality agenda and improving public sector performance, as well as increasing the accountability of the public sector. If certain grounds are excluded or subjected to limited duties, there is a real danger of maintaining and reinforcing a “hierarchy of inequalities”. This would also have major negative implications for the resourcing and priorities of the future Commission for Equalities and Human Rights.

Designing equality duties for all the equality strands: the public sector

The objective of introducing a set of equality duties across all the

strands would be to change the way that public authorities perform their functions, by making equality a priority goal of their day-to-day activities, and preventing the side-lining of equality concerns. A general duty to promote equality on public authorities, backed by strand-specific duties as necessary, would appear to be the best model for designing an effective scheme of public sector duties to achieve these goals. Such a scheme could be integrated effectively within existing frameworks, providing a cost-effective focus for equality initiatives and avoiding unnecessary duplication of work. This set of duties would be based upon the recognition of shared principles common to all of the equality grounds, which also apply effectively to overlapping forms of discrimination, while recognising that there are specific considerations relevant to each equality ground.

The scope of the general and specific duties should extend to employment, service delivery and policy formation across all the different equality strands. This would maximize their impact, enhancing diversity and improving service delivery while remedying some of the limitations in scope of much of existing anti-discrimination law. The general equality duty would be the focus of most equality work, ensuring a general cross-strand approach and minimizing unnecessary duplication of effort: the strand-specific duties would supplement this by requiring the appropriate action specific to each particular strand. Interesting questions also arise as to how a duty to promote good relations could apply across the different equality grounds (to be covered by future research for the Equality and Diversity Forum).

An emphasis on outcomes should be central to any such scheme, as well as adequate guidance and consultation. Adequate enforcement measures also have to be in place, to allow the equality commissions (or a single equality commission), as well as individuals, to seek redress against authorities who fail to fulfil the duty. This must include the ability to make a complaint without having to embark upon the tortuous route of judicial review. Without such effective enforcement measures, the impact of the duties may be limited.

Designing equality duties for all the equality strands: the voluntary sector

Voluntary sector employers should also be subject to modified equality duties, while making some allowance for the diverse nature, purposes, size and scale of many not-for-profit organisations. In terms of service delivery, “compacts” with the public sector may represent the most appropriate way of mainstreaming equality in the voluntary sector.

Designing equality duties for all the equality strands: the private sector

A further step is the consideration of positive duties in the private sector, even though some different issues apply. It is evident from the data on gender, race and disability that progress towards equality of opportunity in the private sector has been limited. Positive duties can again have an effective impact in this context. Such private sector duties should not be seen as an alien carry-over from the public sector: in reality, they would mirror precisely in nature, form and content what is generally accepted to be best equal opportunities human resources practice currently in evidence across the private sector.

Contract compliance mechanisms can be used in the context of public procurement and Private Finance Initiatives (PFI)/Public-Private Partnership (PPP) initiatives to require private employers to implement “equality audits” in their workforce. Such mechanisms have been used to great effect in the US, but would require the amendment and clarification of existing law. They are easy to design and could constitute the first step in extending duties to the private sector. This could involve, depending upon the circumstances, the carrying-out of pay audits to identify and eliminate unjustified patterns of pay differentials, suitable assessment and monitoring of training, promotion and recruitment strategies, as well as the introduction of suitable human resources policies as regards work hours and time off. Failure to take the appropriate steps could result in loss of contract. The failure to introduce such duties in PFI contracts thus far has been a significant lost chance, which should not be

repeated.

Comparative experience from Northern Ireland, other EU countries, the US and Canada can be drawn upon to design similar duties for the private sector in general, and pay audit and workforce monitoring requirements in particular. As with public sector duties, bureaucratic load and excessive cost imposition need to be avoided to ensure the credibility of the introduction of any positive duties. Scandinavian corporate reporting mechanisms could be used as an initial step, and due caution should be exercised in developing schemes to avoid excessive load.

Streamlined equality duties requiring companies of a suitable size and scale to take effective steps to implement equality audits may be appropriate. They would also permit employers to design and apply their own policies, subject to a minimal yet effective degree of regulation. They would have the advantage of providing a clear regulatory framework that can guide employers in making sure that they come within the legal requirements of equality law. Positive duties therefore, if appropriately designed, link well with private self-interest, business efficiency and good human resources practice.

Conclusion

Positive equality duties are not a panacea or a substitute for culture change, or for strong and committed leadership. To be effective, they need to be structured in a way that recognizes the link between human rights, community cohesion, integration, poverty, socio-economic rights and equality. They do, however, have great potential as tools for generating change. They can contribute, not just to the well being of disadvantaged groups, but to that of the community at large by enhancing service delivery and employment diversity. Positive duties are regulatory tools that can be applied with a light touch to improve private and public sector performance while enhancing citizens' rights. Serious consideration needs to be made as to their effective and prompt implementation.

In contrast to the retrospective, complaints-driven approach of the existing anti-discrimination legislation, the proactive, problem-solving approach fostered by a responsibility to promote equality has obvious appeal. But what in practice does it require from employers and service providers and what can it really deliver?

Colm O’Cinneide’s study, commissioned by the Equality and Diversity Forum, addresses the question of whether employers and service providers in Britain should have a statutory duty, not only to avoid discrimination, but to promote equality on the basis of gender, disability, age, sexual orientation and religion or belief. In addressing that question for the public and private sectors, this paper demonstrates that an equality duty represents an opportunity for individuals, organisations and employers, not a threat, and makes an important contribution to the debate on the strategic direction of equality policy.

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Equality and Diversity Forum

A network of national organisations committed to progress on age, disability, gender, race, religion and belief, sexual orientation, and broader equality issues.

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