

The Equality and Diversity Forum

Taking equal opportunities seriously the extension of positive duties to promote equality

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Produced by the Equality and Diversity Forum
with the support of the Nuffield Foundation



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.



The Equality and Diversity Forum is a network of national organisations committed to progress on age, disability, gender, race, religion and belief, sexual orientation and broader equality issues.

The Forum was established in January 2002 to promote dialogue and understanding across the separate equality 'strands', and to ensure that policy debate on proposals for discrimination legislation and a single equality body recognises the cross-cutting nature of equality issues. It has played a key role in building consensus and co-operation between organisations that had not worked together before. The Forum contributed a joint response to the Government's consultation on establishing a single equality body.



The Nuffield Foundation is a charitable trust established by Lord Nuffield. Its widest charitable object is "the advancement of social well-being". The Foundation has long had an interest in social welfare and has supported this project to stimulate public discussion and policy development. The views expressed are however those of the authors and not necessarily those of the Foundation.

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Foreword

by the Equality and Diversity Forum

The Equality and Diversity Forum is the network of national equality organisations, which exists to promote dialogue and understanding across the equality “strands”. It also commissions research on issues that are central to the forward policy agenda. We are pleased to be publishing this study which addresses an issue of importance across the equality spectrum: whether employers and service providers should have a statutory duty, not only to avoid discrimination, but to promote equality?

To be specific, should the responsibility on public bodies to promote equality which the Government has already introduced across the range of equality issues in Northern Ireland (1998), but in relation to race equality only in Britain (2000), be extended, in some form, to gender, disability, age, sexual orientation and religion or belief? In addressing that question for the public and private sectors, this paper makes an important contribution to the debate on the strategic direction of equality policy.

Existing discrimination legislation has helped redress many inequalities in our society. Nevertheless, after a quarter of a century of race and gender legislation, and despite recent legislation on disability, we are well short of the results that we would all like to see. It is for that reason that the Government has, over the past five years, given public bodies in Northern Ireland and the devolved assemblies in Britain the responsibility to promote equality; and given 43,000 public bodies in Britain a duty to promote race equality and good race relations.

The Government has a commitment to extend that duty to disability and gender. Meanwhile, a European Directive has led to new measures outlawing discrimination in employment on grounds of sexual orientation and religion and belief, to be followed by regulations on age in 2006. There is no commitment to extend the duty to promote equality to those strands. The result, for employers

and service providers, is a variable geometry of responsibilities and approach.

Early results from the equality duties which already exist are encouraging. In a recent evaluation of the race duty, almost 70 per cent of respondents said this work had produced positive benefits. A diverse range of organizations was making progress, including “some very good schemes and policies in rural areas and smaller organisations”. Nevertheless, a proposal to extend the duty across the full range of equality issues raises many questions that this paper sets out to answer.

In contrast to the retrospective, complaints-driven approach of the 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? Is the precise model already in operation on race immediately transferable to the other strands – is monitoring of religion or sexual orientation feasible and desirable for instance? Could we learn from the early experience of implementing the existing duties to devise a model that is even more effective in delivering the outcomes – in employment and services – that we need? Does the duty to promote good race relations have any relevance to the other strands – to religion or gender for instance – and, if so, how might this be translated into a duty on public bodies that in many cases are already working to promote social cohesion? Would an extension of these duties across all equality strands be a welcome move for organisations confused by the array of differing requirements, or would it be feared as an additional bureaucratic burden? Finally, given that the majority of people work in the private sector, what relevance might this approach have for them?

We now know that there will be a Commission on Equality and Human Rights, taking over the roles of the three existing Commissions (on gender, race and disability) and providing support for and enforcement of the age, sexual orientation and religion/belief regulations. This begs the question of whether the new body will have to work with the existing array of laws or whether

we can move towards a single equality act with a consistent approach across equality and diversity as a whole. It makes sense therefore, at this stage, to examine the pros and cons of extending the equality duty across the board, as the eventual standard throughout the UK. Colm O’Cinneide’s paper does this, setting out the limitations of the current legislation, explaining the nature of an equality duty and the steps that have already been taken to mainstream it in the public sector.

While our members are committed to parity of protection across the equality strands, we recognise that the discussion on next steps needs to engage with those who are sceptical – in the public and private sectors. The majority of the paper is written in the context of the former, but Part 8 addresses the potential of an equality duty in the private sector. While employers’ representatives have not encouraged any extension of an equality duty to private firms, it is notable that many of the companies that lead the way in implementing good practice are voluntarily doing precisely what such a duty would require.

Our job now is to take forward the discussion with a wide range of organisations, both the enthusiastic and the less so. The Forum will be using “Taking Equal Opportunities Seriously” to demonstrate that an equality duty would be an opportunity for individuals, organisations and employers, not a threat.

The Equality and Diversity Forum would like to thank the Nuffield Foundation for supporting the commissioning and publication of this paper.

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 proving 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.

Introduction

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.

The existing model of anti-discrimination law has generated considerable cultural change in society. It is, however, limited in impact for several reasons. There is too much reliance upon individual enforcement and complex adversarial litigation. There is a lack of active participation by disadvantaged groups in framing anti-discrimination policies. It also encourages a culture of passive compliance with legislation, rather than the adoption by public, private and voluntary sector bodies of proactive equality strategies that should aim to break down discriminatory structures and attitudes.

“Mainstreaming” and equal opportunities initiatives in both the public and private sectors are designed to encourage such proactive approaches. These initiatives are, however, often limited, under-resourced and toothless in effect. The argument is made here that the imposition of positive statutory duties upon the public and private sectors has the potential to give legal backbone to these initiatives, generating real change in behaviour and attitudes.

To be effective, positive duties need to be designed in such a way as to avoid certain pitfalls. They must be proactive, sustainable, effective and outcome-orientated. Duties need to be imposed 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, an overemphasis on process as distinct from outcomes, the lack of an effective enforcement mechanism and the creation of a “hierarchy of inequalities” are all potential traps that need to be avoided. If the necessary ingredients are present, and these traps avoided, then positive duties can deliver better outcomes in the public, private and voluntary sectors. If extended across the full range of equality grounds, they also have the potential for benefiting society at large, improving service delivery, enhancing decision-making and ensuring a more diverse workforce.

In the public sector, the impact of the existing positive race equality duty, the Northern Ireland s. 75 duty and the Welsh and Scottish duties demonstrate the potential of positive duties across all the equality strands. These existing duties also offer lessons that can help shape a British-wide coherent and effective scheme of cross-strand equality duties. The costs and benefits for service providers and public authorities of extending existing duties have to be considered, as well as what elements of the existing duties, in particular those of the positive race duty, should be retained or modified. Great attention will have to be given to the question of how a duty to promote good relations would apply across the different grounds. It is also important to ensure that compliance with the duties is focused on achieving real change in the form of actual outcomes.

Similar attention has to be given to how positive duties can be applied across the equality grounds in the private and voluntary sectors. Employment equity and public procurement schemes are already being implemented in Canada, Australia, Norway, the United States and Northern Ireland. Developing similar schemes for the UK private and voluntary sectors offer real and tangible benefits, if designed with a suitably light regulatory touch, making due allowances for the size of particular private sector firms, and the need for effective and credible promotion and enforcement,

This paper is intended to explore the options for implementing such duties, and to focus attention upon the key points of the issues involved. In particular, it concentrates upon the necessary ingredients for a successful cross-strand approach that addresses the needs of each of the different equality grounds while still moving the overall equality agenda forward. The emphasis here is on considering how equality duties can be designed to maximise their benefit for society at large.

Part 1 examines the limitations of existing anti-discrimination law, and why new measures focused on encouraging proactive action to eliminate inequalities are necessary. Part 2 looks at the existing mainstreaming and equal opportunities policies that have been introduced to attempt to encourage such proactive action, and outlines their limitations. Part 3 sets out the case for positive duties in the public sector, while Part 4 examines the experience of such duties thus far in the UK. Part 5 analyses how positive duties could apply across the different

equality grounds, while Part 6 sets out the necessary ingredients for a cross-strand equality duty. Parts 7 and 8 examine the potential of positive duties in the private and voluntary sectors, respectively.

All of the opinions set out in the following pages are the author's own, except, of course, where noted otherwise!

Part 1

The limits of existing anti-discrimination law

This Part examines the limitations of existing anti-discrimination legislation, in particular its inability to target adequately structural forms of discrimination, and argues that a shift from a formal equality approach to a substantive approach based upon proactive action is necessary.

1.1 The limitations of the law

Legal responses to discriminatory practices and attitudes try to alter social attitudes and behaviour by using a particular regulatory model that has its roots in employment law. Legislation is used to a) set out and require compliance with a fixed legal standard of conduct which is b) enforced by individuals (often supported by equality commissions) bringing legal proceedings when that standard of conduct is violated, which c) can result in the award of damages when evidence of a clear act of direct or indirect discrimination has been established. These three elements are common to almost all existing and forthcoming anti-discrimination legislation across the equality strands, including the Race Relations Act (RRA), the Sex Discrimination Act (SDA), the Disability Discrimination Act (DDA) and the employment equality regulations implementing the EU Framework Equality Directive.

This approach has had considerable success in combating overt forms of discrimination. "The Independent Review of the Enforcement of UK Anti-Discrimination Law" ("the Hepple Report") describes its effect as having "broken down barriers for individuals in their search for jobs, housing or services" and "driven underground... overt expressions of discrimination", as well as "providing an unequivocal declaration of public policy" and having an important "educative or persuasive function".¹

Nevertheless, the existing legislation often proves less than adequate in dealing with more complex and deeply rooted patterns of exclusion and inequality. It creates difficulties for employers, service providers and complainants alike, and is ultimately limited in effect in particular due to several specific factors:

a) Excessive reliance on individual enforcement

The burden of enforcement of anti-discrimination legislation is left to individual complainants, or to the equality commissions if they elect to use their limited funds to support an individual's case.² Therefore, anti-discrimination law relies

for its implementation on the willingness and ability of individuals to bring actions, or at the very least to approach the enforcement commissions where they exist.³

Even when an individual has the ability, courage and willingness to initiate an action, the focus is on remedying individual acts of discrimination after the event, not on the elimination of structures and patterns of behaviour that perpetuate discriminatory practices. The individual enforcement model sets up a two-party winner-takes-all contest, which is confined in effect to the two parties concerned, leaving no room for best practice group settlements or the input of third parties.⁴ Remedies are limited to redressing retrospectively the immediate wrong, rather than removing discriminatory practice across an organisation.⁵

In addition, the confrontational element inherent in anti-discrimination cases means that an environment is created that ensures that the individual cannot easily return to that workplace or service provider in question, and may generate new hostility towards the equality agenda on the part of the offending party. What is suitable for enforcing a contract does not translate well into securing meaningful equality. This approach often resembles sending a fire engine to fight a fire rather than preventing that fire in the first place.

b) The complexity and cost of litigation

The fractured, incoherent and unclear structure of anti-discrimination legislation makes it difficult for individuals, employers and public authorities to identify their legal rights and obligations.⁶ This can and should be largely cured by the introduction of a comprehensive single equality act making existing legislation accessible and coherent. However, applying anti-discrimination legislation will always generate its own complexities and difficulties of proof, especially where discrimination does not take an overt form.

In particular, anti-discrimination law generates costs and complexities due to the perennial interpretation difficulties relating to the need to show the existence of a "requirement" or "practice", the usual requirement to identify a suitable comparator, as well as the uncertain and shifting extent of the justification defence in indirect discrimination.⁷ The applicant success rate in Employment Tribunal cases involving race discrimination issues has been described by the UK Cabinet Office Strategy Unit as "notably low"⁸, with only 3 per cent per cent of complaints resulting in positive findings of race discrimination in 2002–3.⁹ Added to this is the cost and time factors related to litigation, which both deter many complainants even when cases are brought before the employment tribunals, and hurt employers. It is possible that the cases that are submitted to tribunals are only a "token measure" of the scale of the discrimination problem.¹⁰

c) Isolated deterrence

The anti-discrimination model produces isolated findings of discrimination with

remedies that are only designed to compensate the individual involved. This ensures that underlying patterns of discrimination frequently remain unidentified and unchallenged. Significant areas of the workforce have seen little or no challenge to discriminatory practices, exemplified by the treatment of women within some financial sectors of the City of London. To take another example, the complexity of future age discrimination legislation may ensure multiple test cases which, however, may only generate progress over decades, leaving patterns of ageist treatment untouched for many years: such has been the experience in both the US and Canada.¹¹

d) The encouragement of a culture of “passive compliance”

The emphasis on the anti-discrimination model as the dominant tool for securing equality of treatment has the effect of ensuring that being a “good employer” or a “progressive public authority” is perceived as just taking the minimum steps to avoid liability. This results in organisations taking defensive steps to meet the requirements of the legislation, rather than taking proactive steps to encourage a culture of real diversity and to identify and eliminate practices that may have discriminatory impact even if not clearly caught by the legislation. Equality is marginalised and viewed as a matter of compliance with external regulation, rather than an active commitment to real diversity requiring real proactive action.

This makes existing anti-discrimination law of limited use in combating institutional discrimination in both public authorities and private organisations, as defined in the context of race by “the Macpherson Report”.¹² Anti-discrimination legislation is often capable only of targeting discriminatory acts that generate detectable consequences that negatively impact on specific individuals. This means that many forms of institutional discrimination will slip beneath its radar. This has the additional consequence that practices that amount to institutional discrimination are often made to appear acceptable, as they are outside the legally established definition of discrimination.¹³ Deeply rooted discriminatory practices benefit therefore from this cloak of acceptability.

e) Lack of active participation by disadvantaged individuals and groups in decision-making

Much of the prejudicial treatment faced by disadvantaged groups arises out of patterns of institutional discrimination involving the neglect or lack of understanding of the specific needs of these groups. This neglect is often due to the limited participation of these disadvantaged groups in decision-making processes, and inadequate consultation with these groups both by public authorities and private employers and service providers. Current anti-discrimination legislation imposes no requirement to consult with disadvantaged groups in developing strategies to eliminate discrimination, or in improving performance, service delivery and employee satisfaction in general. Again, anti-

discrimination legislation treats discriminatory acts as isolated individual events, rather than arising from structural patterns: identifying the persistence of these patterns requires consultation with affected groups.

f) Artificial categories of discriminatory behaviour

“Abnormal” discriminatory behaviour as targeted by the legislation is classified into discrete types of discrimination, such as gender, age, race and so on. The emphasis on specific and separate types of discrimination serves to gloss over the existence of factors and practices that often impose substantial disadvantages on many groups at the same time. Good practice is often not carried over from one category to another, and offensive behaviour that is addressed in one context often persists in another. For example, casual assumptions and prejudices about racial groups are often singled out for extensive condemnation, but the same approach is often not taken in respect of assumptions about religious groups.

Conceptualising discrimination in terms of rigid discrete categories also results in inevitable anomalies, gaps in protection, and confusing distinctions.¹⁴ These distinctions do not usually flow from any coherent policy rationale, but result from the separation of the various grounds of discrimination and the ensuing inertia that slows any attempt to formulate coherent policy across all the equality grounds.

The lack of coherence this produces affects potential victims, public authorities and private sector bodies alike. Different resources have to be allocated across the different strands, shifts in a legal position may not be duplicated for other equality grounds, and developing anti-discrimination policies becomes unnecessarily fragmented and complex. Anti-discrimination legislation has been framed in a piecemeal and ad hoc manner as different problems and pressures have arisen across the different grounds. It has not been designed to promote a common commitment to equality of treatment.

g) Lack of emphasis on social cohesion

The individualistic focus of the anti-discrimination model has tended to obscure the importance of securing social cohesion and good relations between different groups. By being primarily concerned with individual acts of discrimination, the anti-discrimination model glosses over the role of public authorities in particular in dealing with patterns of neglect, poor communication and social tensions between different ethnic, religious and social groups in the UK. These issues of social cohesion are “equality” issues as well, as their resolution requires a commitment to equality of concern for all social groups, as well as due attention to the problem of resolving tensions and reconciling different groups. Again, systemic and structural questions are obscured by the focus on individual, discrete acts of discrimination.

1.2 Closed horizons – the consequences of the limited scope of anti-discrimination law

Public sector consequences

In the public sector, eliminating discrimination is often treated by public authorities as just involving passive compliance with the legislative requirements, and combating inequality and promoting good relations are viewed as a reactive process that is often marginalised within the concerns of public authorities. Policy is often constructed on the basis of assumptions about the needs of disadvantaged groups that often do not mirror their own perceptions and needs. Equality is not given its necessary place within the central objectives of public sector organisations, nor is it treated as being of crucial importance to other central objectives, such as the delivery of services to the public and strengthening social cohesion.

The lack of a successful focus on equality issues can be illustrated by reference to some indicative statistics. Schools are up to four times more likely to permanently exclude African Caribbean pupils, while black and South Asian groups also suffer from poor health, and inadequate access to health services.¹⁵ They also experience inadequate access to adequate housing¹⁶, and certain groups also suffer from poor educational outcomes and disproportionately high levels of school exclusion.¹⁷ Perceptions that discriminatory police practices unfairly target Black and South Asian groups remain strong,¹⁸ and ethnic minorities remain subject to high levels of racially motivated assaults¹⁹, as well as being over-represented in UK prisons.²⁰

Private sector consequences

Similar consequences also arise in the private sector, where equality is again often marginalised as an externally imposed regulatory burden. Again, statistics illustrate the problem. The unemployment rate of Bangladeshi, Pakistani and Black Caribbean men was 10–15 percentage points higher than that of their White counterparts.²¹ All ethnic minorities remain disadvantaged in terms of employment and occupational attainment.²² 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 often confrontational approach. The relevance of good practice to enhanced business performance, more effective recruitment and improved employee job satisfaction is too often obscured by the emphasis on passive compliance. Even employers with good equality policies have inevitable difficulties: the lack of a clear legal standard of appropriate equality practice, combined with the ever-shifting and incremental development of case law in the courts and employment tribunals, makes it difficult for employers to take the necessary steps to bring themselves within the required standard of compliance.

1.3 Moving from formal to substantive equality

Formal equality

The limitations of the individual enforcement model are rooted in the conviction that the optimum approach to combating equality is to ensure that all individuals be treated in a formally equal manner. Fredman describes this concept of equality as “formal equality” or “equality as consistency”, which requires that “fairness requires consistent treatment”.²³ This concept of equality, while attractive, runs the risk of ignoring the specific contexts in which real individuals are situated. Combating discrimination becomes a matter of proving formal guarantees of equal treatment instead of tailoring specific measures to assist and empower disadvantaged groups and individuals.²⁴

Substantive equality

The “one-size fits all” formal equality approach of the individual enforcement model has become the template for addressing inequalities. As a result, equality law has for too long been confined by closed horizons stemming from a failure to develop beyond its roots in employment law as the tool to prevent acts of overt discrimination. Much of the prejudicial treatment faced by disadvantaged groups arises out of patterns of institutional discrimination or neglect of the specific needs of these groups. Anti-discrimination legislation is of limited use in breaking down these deep-rooted structural obstacles to equality, being designed to combat isolated and easily identifiable acts of discrimination, rather than requiring a shift in emphasis towards the proactive advancement of equality and the elimination of underlying extensive patterns of discrimination.²⁵

A “substantial equality” approach in contrast would aim to remove obstacles faced by the differing disadvantaged groups and to empower these groups in a meaningful way.²⁶ Extra policy responses are required to supplement the formal guarantees of equality that most of anti-discrimination law is designed to offer. Work on social exclusion, anti-poverty initiatives and community cohesion projects adopt a substantive equality approach by targeting obstacles faced by particular groups: new equality strategies must be developed on the same basis to complement and enhance these initiatives.

The persistence of structural patterns of inequality across all the equality grounds imposes considerable costs on society at large by impeding effective service delivery, damaging the labour market prospects of disadvantaged groups and contributing to patterns of social exclusion and ethnic tensions. Addressing these problems requires that anti-discrimination legislation be supplemented with new equality strategies that are also linked to other initiatives designed to combat social exclusion and enhance community cohesion. For example, existing race relations legislation has had limited effect in ending structural inequalities in the labour market for ethnic minorities: the Cabinet Office Strategy Unit’s

report on the labour market performance of ethnic minorities identified the inadequacy of the existing law and set out policy options designed to go beyond its limits by promoting positive equality measures, which are designed to work in tandem with community cohesion and social exclusion measures.²⁷

Conclusions – the limits of the anti-discrimination model

- Existing anti-discrimination legislation has been very effective at 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.
- Anti-discrimination law is complex, excessively dependent on willing individuals being able to make complaints, relies upon artificial legal distinctions, lacks any emphasis on social cohesion and frequently suffers from the participation and input of disadvantaged groups.
- It also creates a culture of “passive compliance” by only requiring passive steps to meet the bare minimum required to escape a finding of discrimination rather than encouraging a culture of proactive action to eliminate discriminatory behaviour and attitudes. As a result, anti-discrimination law often creates difficulties for employers, service providers and complainants alike.
- Equality is not given its necessary place within the central objectives of public sector organisations, nor is it treated as being of crucial importance to other central objectives, such as the delivery of services to the public and strengthening social cohesion.
- In the private sector, equality is again marginalised as an externally imposed regulatory burden, and 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 often confrontational approach.
- The lack of a clear legal standard of appropriate equality practice combined with the ever-shifting and incremental development of case law in the courts and employment tribunals makes it difficult for employers to take the necessary steps to bring themselves within the required standard of compliance.
- The persistence of structural patterns of inequality across all the equality grounds imposes considerable costs on society at large by impeding effective service delivery, damaging the labour market prospects of disadvantaged groups and contributing to patterns of social exclusion and ethnic tensions.

- Equality law has for too long been confined by closed horizons. Addressing these problems requires that existing anti-discrimination legislation be supplemented with new equality strategies, based upon a “substantial equality” approach.

Part 2

The parameters of a new approach

This section outlines how proactive equality strategies would be designed and how they would operate so as to compensate for the deficiencies of existing anti-discrimination legislation.

2.1 New equality strategies

Given the limitations of the existing structure of anti-discrimination law, there is a need to develop strategies for “going beyond” this model by supplementing it with effective mechanisms designed to bring about substantial equality and recognition of the needs of disadvantaged groups (described as “fourth generation” strategies in the UK context²⁸). From the analysis above, it is apparent that individual-orientated reactive complaint procedures need to be reinforced (not replaced!) by proactive methods of removing group disadvantages and of breaking down institutional discrimination.²⁹ Any attempt to achieve this has to encourage a culture of diversity rather than defensive compliance.³⁰ Action against discrimination needs to be proactive rather than reactive. Rees has suggested that action needs to be both “internal” – within the organisation in question as an employer – and “external”, in the “business” of each organisation, especially in service delivery: achieving equality involves considering the equality dimension of a project or policy “systematically, from inception to design, implementation and review... it is a new way of doing things, rather than an add-on or extra”.³¹

Flexibility, efficiency and good relations

Such proactive action also needs to be capable of benefiting public authorities, the private sector and the public at large in addition to the disadvantaged groups. Any new strategies in encouraging proactive and effective equality policies should also aim to ensure that compliance with equality law in general is made simpler and regulatory burdens are minimised. Similarly, the promotion of substantive equality of treatment should be linked in the public sector to the promotion of social cohesion, good relations and community harmony. The proactive promotion of equality should both be achieved and be seen to achieve benefits in terms of social cohesion, improved community relations and the elimination of festering inter-group sores.

Consultation, monitoring and auditing

Participation by disadvantaged groups and individuals in developing policies has to be recognised as a key value, guarding against paternalism and complacency

towards the real effectiveness of existing practices and policies.³² However, in taking this participative group-based approach, it is necessary to recognise that disadvantaged groups may have different perspectives and values, and that the groups themselves are not monolithic blocks. Consultation with groups will also need to be supplemented with a constant process of assessing and monitoring the impact of service delivery, human resources policy and equality strategies.

As part of this process, the impact of private and public sector policies on disadvantaged groups has to be regularly reviewed and assessed by adequate monitoring, evaluation and auditing. This should include the use of disaggregated statistics across the various equality grounds, and the perspectives of the members of the groups themselves need to be integrated into this process.³³ The impact of any equality initiatives can only be assessed via such monitoring. As Rees has argued, the data obtained by such monitoring and evaluation will also serve as a “management tool for targeting service delivery” in both the public and private sectors, linking directly in the public sector with the necessary collation of data that is essential to enhance performance in service delivery.³⁴

Outcomes and sustainability

A final crucial requirement of any new strategy is that the outcomes of equality strategies are what ultimately matter. Good procedural practice in consultation and monitoring is only a stage in achieving real and substantive equality, albeit an important and necessary one. Excessive emphasis on procedural gains can create the illusion of real change. A recent assessment of UK local authority and health care equality mainstreaming initiatives concluded that too much emphasis had been placed on “the production policies and protocols rather than service outcomes”.³⁵ If proactive equality strategies are to tackle structural patterns of discrimination, then they have to be outcome-orientated. In both the private and public sector, any such outcomes-orientated approach will also have to be sustainable over time, as distinct from serving as a short-term initiative that delivers limited gains before being dropped off the list of priorities by shifting political, financial or organisational winds. The problems created by structural patterns of inequality require concerted effort over time, and due sensitivity to the development of new patterns of discriminatory behaviour.

“Something for everyone” – the benefits of proactive equality strategies

a) Public sector

In the public sector, new proactive equality strategies have the potential benefit of linking well with initiatives to enhance community cohesion, combat social exclusion and improve the delivery of services, both to improve their effectiveness and to develop a comprehensive strategy to address patterns of

exclusion, neglect and poor performance. The delivery of health services, for example, is undermined by patterns of inequality that affect older persons, ethnic minorities and disabled persons. In the absence of a set of comprehensive strategies that also include new strategies to target these patterns of inequality, NHS service delivery reforms will lack the tools to deal with the structural problems of inequality that generate much of the performance difficulties they are designed to eliminate. Problems of social exclusion, community tension and poor service delivery affect all of society: new equality strategies have the potential to benefit everyone by making an effective response to these problems.

The Audit Commission has identified critical factors that can positively enhance equality and diversity in the public sector both in terms of service delivery and employment

- commitment
- involving users
- mainstreaming equality and diversity
- monitoring performance data and
- sustainability.³⁶

The Commission emphasises that these factors not alone are valuable in enhancing equality, but also play a role in enhancing service delivery and effective employment procedures across the board. It also emphasises that approaches to equality and diversity need to be developed with the involvement of the community as a whole as part of a “shared vision”, and places great importance on the link between equality measures, good relations and good interaction across the community at large.³⁷ It also states that achieving equality needs to be “part of the day job” for public sector authorities.³⁸ Its conclusions neatly summarise both the key ingredients of what is necessary in developing new equality strategies as well as the potential impact of this approach upon the performance of public sector bodies in general. Similarly, if proactive strategies can ensure that public service personnel become more diverse and representative, the service itself may become more responsive to the needs of all of society.³⁹

b) Private sector

Similar benefits can arise in the private sector. The “business case for diversity” has been repeatedly emphasised in recent years: enhancing diversity within both the workforce as well as in the processes whereby decisions are made can generate considerable business benefits.⁴⁰ These can take the form of human resources gains, such as enhancing workforce satisfaction, lowered costs and greater job satisfaction. It can also impact positively upon knowledge flow and

innovation, by broadening perspectives, as well as enhancing the capacity of private sector bodies to do business internationally and across cultures.⁴¹ To generate these benefits, it is necessary to utilise proactive action to eliminate obstacles to equality of opportunity and to ensure active encouragement of diversity at all levels of an organisation. Taking these active steps is an essential element of maximising the “diversity dividend”.

What tools are necessary to put these strategies into practice?

Having identified above the essential ingredients of the strategies that are needed to supplement the existing anti-discrimination legislation, it becomes necessary to identify the mechanisms that will best put these strategies into practice. A variety of different initiatives have been introduced in a piecemeal manner across the different equality grounds and in different areas of the public and private sector that aim to give effect to a proactive approach as set out here. Some have had markedly more success than others. Learning from the experience of what was worked and what has not is essential in attempting to design a comprehensive approach to implementing new equality strategies.

Conclusions – the parameters of a new approach

- Individual-orientated complaint procedures and remedies need to be reinforced by methods of proactively removing group disadvantages and of breaking down institutional discrimination. New strategies in encouraging proactive and effective equality policies in the public and private sectors should also aim to ensure that compliance with equality law in general is made simpler and regulatory burdens are minimised. Similarly, the promotion of substantive equality of treatment should be linked to the promotion of social cohesion, good relations and community harmony.
- In the public sector, the new strategies will also have to link effectively with initiatives to enhance community cohesion, combat social exclusion and improve the delivery of services. In the private sector, such proactive action is essential to maximise the “diversity dividend” from a diverse workforce.

Part 3

Existing strategies: mainstreaming and diversity

This part examines the strategies that have been thus far largely used to implement the proactive approach set out in the previous part in both the public and private sectors, whether in the form of mainstreaming initiatives or equal opportunities policies. The strengths and gains of these approaches will be examined: however, they also have certain weaknesses, which in the absence of strong leadership support may ensure that these strategies ultimately lack impact. The fallibility and limitations of these strategies are why the positive duties outlined in the rest of this paper are necessary, to act as statutory support for the implementation of effective and sustained proactive equality strategies.

3.1 Mainstreaming in the public sector: comparative lessons

Moves towards responding to the limits of existing anti-discrimination legislation and developing new approaches based upon substantive equality have generally in the EU and elsewhere taken the form of the piecemeal adoption by the public sector of various forms of diversity strategies or “mainstreaming” policies, defined by the Council of Europe in the gender context as the incorporation of a gender equality perspective in all policies at all levels and at all stages by the actors normally involved in policy making.⁴² These policies are designed to provide for participation by disadvantaged groups and to ensure proactive policy-making that is intended to identify and if possible to eliminate discriminatory impact.

Considerable divergence exists as to what “mainstreaming” in the context of equality actually entails: the word is prone to a variety of interpretation.⁴³ McCrudden has identified two main components of effective mainstreaming: impact assessment, concentrating on the impact of policies on disadvantaged groups, and the participation of these groups in decision-making processes.⁴⁴ Rees also emphasises the importance of due regard for the individual, representative structures and adequate institutional and financial support structures.⁴⁵ By providing for participation by disadvantaged groups, and for proactive policy-making designed to identify and if possible to eliminate discriminatory impact, mainstreaming as a strategy incorporates many of the key elements outlined above of a meaningful substantive equality strategy.⁴⁶

Mainstreaming as a strategy has attracted support from the United Nations, the

European Union, the Commonwealth Secretariat, the International Labour Organisation and the Organisation for Economic Cooperation and Development in recent years, and has been presented as the solution to the problems identified here with the existing anti-discrimination model.⁴⁷ Mainstreaming also offers great potential for enhancing service delivery and policy design in general: the Australian Local Government Association has emphasised in its guidance to local authorities in implementing “access and equity” mainstreaming measures for all groups in Australian society that proactive mainstreaming initiatives benefit all sectors of society by improving policy formation and service delivery.⁴⁸

Gender mainstreaming

Mainstreaming initiatives can be applied across the range of equality grounds, but in the EU their use has so far tended to centre upon gender, due to the greater political profile of gender equality concerns in many countries. Almost all of the EU states, including the UK, as well as Canada, Australia and New Zealand have implemented gender mainstreaming programmes of varying degrees of effectiveness and ambition.⁴⁹ In these countries, gender mainstreaming is usually based around what Nott has described as the “expert-bureaucratic” model, where specialist units with gender expertise within the government structure push internally for the incorporation of gender perspectives all at levels of public sector decision-making.⁵⁰ Some, in particular local initiatives in the Nordic countries and Italy, also emphasise consultation with local populations.⁵¹ The European Commission has introduced policy guidelines specifying that equality concerns be taken into account at every level of policy formation, impact assessment and decision-making, and not just treated as a supplemental add-on.⁵² Mainstreaming has similarly been made a legal requirement in respect of the allocation of European Structural Funds⁵³ and has been adopted as part of the EU Guidelines for Member States Employment Practices.⁵⁴

Many of these gender mainstreaming initiatives have generated substantial changes in public sector data collection, service delivery and policy formulation, with the Nordic countries in the vanguard, in particular in the development of regional development, health and public transport policies.⁵⁵ The EU requirements have been effective in supporting and encouraging good practice, in particular in those areas where the Structural Funding requirements are relevant.⁵⁶ Other initiatives have had more varied results.⁵⁷ Rees suggests that many such initiatives have been under-resourced, and insufficient support and training has been made available to those entrusted with implementing these measures: an emphasis on procedure and “tick-boxing” at the expense of outcomes has also been prevalent, and sustaining attention and support for mainstreaming has proved difficult.⁵⁸ In Australia, for example, large divergences in the substance and style of gender mainstreaming has been identified, and strong criticisms have been made that the mainstreaming process has often had the effect of diluting existing gender initiatives.⁵⁹

A persistent problem has been the issue of sustainability and encouraging compliance. As mainstreaming initiatives are not legally enforceable duties, compliance is usually voluntary or backed by very limited auditing requirements, with the result that the implementation of effective mainstreaming is usually dependant upon political good-will, organisational capacity, sustained leadership and expert advice.⁶⁰ In the absence of this, initiatives tend to be at the best procedure-orientated, and at the worst lapse completely.⁶¹

Other forms of equality mainstreaming

Mainstreaming initiatives in other areas apart from gender remain comparatively underdeveloped. "Equality proofing" initiatives designed to implement a form of mainstreaming across all the equality grounds have been introduced to a limited extent in Ireland, Canada and elsewhere: other countries, such as New Zealand, have introduced initiatives designed to factor in human rights considerations at every policy-making stage.⁶² Both federal and state jurisdictions in Australia have adopted in 1996 the Charter of Public Service for a Culturally Diverse Society, designed to set out the responsibilities and obligations of public authorities in ensuring access and equity in service delivery in Australia's multicultural society. The Charter is a broad restatement of the goals of the Access and Equity programme which was originally introduced in 1985 to enhance the integration of new migrants, and has been supplemented by a performance management framework backed by general reporting requirements.⁶³

However, many of these national initiatives remain tentative, and also tend to focus upon ensuring compliance with legislation or human rights standards rather than proactive mainstreaming. In the main, the political impetus that has driven the introduction of comprehensive gender mainstreaming has not been present in respect of many of the other grounds, and throughout the EU the mainstreaming of ethnic or minority perspectives in particular has been implemented only via very ad hoc procedures involving consultation with NGOs. Disability is to an extent the exception to this. Comprehensive disability action plans have been adopted in many EU and Commonwealth countries⁶⁴, but remain subject to similar difficulties as apply in the gender context.

In general, even well-established equality mainstreaming initiatives suffer from lack of effective enforcement, inadequate support and uncertainty as to the extent and strength of the duties imposed upon the various public authorities affected.⁶⁵ These policies are usually not given detailed shape by means of legislation, leaving it very much open to the discretion of various state bodies as to how they should consult and carry out impact assessments. Lack of clarity as to the appropriate monitoring and evaluation tools is a recurring problem.⁶⁶ The nature and extent of participation by disadvantaged groups in policy-making and the key issue of who should be consulted often also receive a vague response. Nott has contrasted the "expert-bureaucratic" model outlined above

with a “democratic-participative” model, that emphasises consultation with civic and community groups, rather than reliance upon elite specialist units within the civil service hierarchy.⁶⁷ “Democratic-participative” mechanisms have remained comparatively underused.⁶⁸

Compliance in the absence of comprehensive enforcement usually depends again upon political good-will. In Canada, federal equality legislation imposes a “duty to accommodate” upon public and private bodies across all the equality strands: this ensures that satisfactory compliance with the legislation requires a degree of proactive action, and equality strategies in the public sector serve to complement and flesh out this requirement, generating some good results in a generally favourable political climate. This demonstrates how legislative requirements are necessary to give any real bite to mainstreaming initiatives, but even in Canada, political will plays an important role, and where political will, organisational capacity or resources are lacking, especially at the local or provincial level, then initiatives can stall.⁶⁹

3.2 Public sector diversity strategies in the UK

PAET

The UK has similarly introduced a variety of equality and diversity mainstreaming strategies at central, regional and local levels, and the same problems of adequate support, sustainability and dependence upon organisational or political good will have arisen. The former Conservative government first issued guidance on policy appraisal for different social groups in 1992, which was revised, after consultation with various government departments, into the “Policy Appraisal for Equal Treatment guidelines” (“PAET”) in 1996. It was largely through “PAET” that the UK government carried forward its post-Beijing commitment to mainstreaming equal opportunities in the gender context. In 1998 the incoming Labour government issued new “PAET” guidelines to all departments. They covered equal treatment for race, sex, and disability, and were issued by the Women’s Unit to all departments in November 1998, with guidance on preparing gender impact assessments later supplementing the initial guidelines, which were also linked to the Modernising Government objectives for policy making and service delivery. The “PAET” guidelines were essentially voluntary in nature, and in the absence of political or organisational will, frequently lacked impact. Central government bodies and regulators (including the Audit Commission and the other inspectorate bodies) are encouraged by means of the 1998 guidelines to ensure that equality and diversity are integrated into their policymaking, audit and inspection functions. However, compliance varies considerably.⁷⁰

PAFT – Northern Ireland

Similarly, the “Policy Appraisal and Fair Treatment” (“PAFT”) guidelines were

introduced in Northern Ireland in January 1994, and were designed to promote fair treatment by ensuring that policies and programmes being developed or reviewed did not discriminate unjustifiably against a broad range of social groups, including persons of different gender, religious belief or political opinion, married or unmarried people, people with or without dependents, people with or without disability, and people of different ethnic groups, ages or sexual orientation. The "PAFT" guidelines applied to Northern Ireland government departments and the Northern Irish Office, and departments were expected to use all appropriate means to ensure that Non Departmental Public Bodies also complied with the guidelines, as well as considering practical steps to promote compliance by operators of contracted out services.

The guidelines suffered from problems of interpretation and implementation by public authorities, with little detailed guidance being given to departments or other public bodies.⁷¹ Compliance was yet again voluntary and patchy. A report by the Standing Advisory Commission on Human Rights in 1996 were highly critical of the operation of "PAFT", and suggested the guidelines appeared to be largely ignored by substantial elements of the relevant public sector bodies.⁷²

Local government

Local authorities, having introduced various mainstreaming initiatives of their own on a voluntary basis from the early 1990s on, are responsible for working with their partner organisations via Local Strategic Partnerships (LSPs) to draw up a long-term community strategy that aims to improve the social, economic and environmental well-being of their local community, with equality and diversity a component part of this strategy. Under the Best Value Initiative, authorities are expected to consult their local communities in order to identify their needs, and to redesign their services in accordance with those needs, thereby incorporating elements of equality mainstreaming into policy design and service delivery. The recent "Cattle Report" into the disturbances in towns and cities in the spring/summer of 2001 stressed the importance of local authorities' leadership role in relation to the diverse, and potentially conflicting, needs of different local communities.⁷³ The Office of the Deputy Prime Minister (ODPM), the Home Office and the Local Government Association have recently issued guidance to local authorities on community cohesion, an important step in linking mainstreaming with good relations and social cohesion.

The Audit Commission and other inspectorates have begun to undertake some tentative initial work with local government and other partners to ensure that equality and diversity are integrated into core functions of audit, inspection and research, and into important new initiatives, such as the Comprehensive Performance Assessment (CPA) in England. Equality indicators are included within the CPA model and as part of the Corporate Governance inspections. Guidance for local authorities is provided by the Equality Standard for Local Government prepared by the Employer's Organisation for Local Government and

the Commission for Racial Equality, compliance with which is included as a Best Value performance indicator.⁷⁴

However, the results of these various initiatives have been mixed. The extent of the obligations imposed on local authorities is not clear, and effective mainstreaming is yet again usually dependent on the enthusiasm and willingness of individual units. Residual uncertainty as to the meaning and scope of mainstreaming seems prevalent in both central and local public authorities.⁷⁵ "Equality and Diversity: Learning from Audit, Inspection and Research", a report issued by the Audit Commission in May 2002, showed that the performance of local authorities on equality and diversity in 2000/01 was poor in some key areas, with the following examples taken as illustrations:

- forty per cent of councils had not even reached the first of five levels of the Commission for Racial Equality's good practice standard – this level requires that they have a comprehensive race equality policy agreed by members across the council
- the average council in England still had less than one quarter of its buildings accessible to disabled people, although the proportion has risen in recent years
- in English councils, on average, only 22 per cent of senior managers were women, compared to around half of the working age population being women
- the Report did identify areas of progress, and does predate the coming into effect of the race duty (see below). Nevertheless, it demonstrates that existing equality initiatives across the various strands are not generating real progress in key areas.

3.3 The limits of mainstreaming

A major problem that is apparent from comparative and domestic UK experience of mainstreaming policies is that they are "soft law" initiatives that are not framed as statutory duties: a recurring experience in discrimination law is that equality initiatives have little or no real impact without strong enforcement provisions.⁷⁶ Institutional support and resource allocation in the absence of any legal duty to implement equality mainstreaming is inevitably dependant upon fluctuating political will and competition from other priorities. Putting it simply, in the absence of a clear statutory duty to implement mainstreaming, guidelines will often not be taken seriously. A strong and rigorous enforcement mechanism is also required, to ensure compliance with this duty: the failure to secure compliance with "PAFT" in Northern Ireland demonstrates vividly the importance of this.⁷⁷

Also, in the absence of clear legislative requirements, there is no clarity as to what forms of monitoring, consultation or policy assessment are required. This results

in a mish-mash of limited monitoring initiatives. Equally, there is little clarity as to how the community cohesion guidelines link up with mainstreaming initiatives. In addition, many of the mainstreaming initiatives discussed here are process-based, rather than directed at achieving outcomes: the Equality Standard for Local Government, for example, essentially provides for a particular set of processes rather than requiring any concrete focus on outcomes. This means that compliance when it happens usually takes the form of procedural steps rather than any real outcome-orientated process.

Mainstreaming in the absence of statutory duties therefore generally lacks the key ingredients of genuine commitment and sustainability that are necessary to make proactive equality strategies work. Also, the variety of different and overlapping equality initiatives to which local authorities are required to adhere often generates bureaucratic load, duplication of resources and the loss of focus on achieving tangible outcomes.⁷⁸ There is a serious lack of a cohesive set of public sector statutory duties that give legal force and clarity to what public authorities are expected to do.

3.4 Private sector diversity management and equal opportunities policies

Private sector employers both in the UK and elsewhere have been showing an ever-increasing interest in implementing proactive equality policies as part of “diversity management” strategies. These strategies are intended to mainstream good equality practice into business decision-making and practices, and in particular into human resources policy.⁷⁹ The emphasis is on encouraging an environment of cultural diversity and making practical allowances in recruitment, promotion and training for disadvantages that may be faced by particular groups or individuals.⁸⁰ Various initiatives can be classified under this general heading, including training employees and managers, undertaking voluntary pay audits and taking positive action initiatives in encouraging underrepresented groups to apply for both recruitment and promotion.⁸¹ In the UK, networks like the Employers Forum on Disability, Age Positive, Employers Forum on Age, Opportunity Now and Race for Opportunity, as well as the Equality Commissions, have encouraged the dissemination of best practice and have been very effective in altering attitudes and behaviour in the private sector. Equal opportunities policies have become increasingly common in the UK. These initiatives, as examples of proactive equality strategies designed to eliminate disadvantage, are to be warmly welcomed.

Nevertheless, there are limitations to what can be achieved through the voluntary adoption of equal opportunities and diversity management strategies in the private sector. Wrench has pointed out that what is required by best practice in this area is very uncertain, and diversity management as a term can apply to a huge variety of practices, some of more utility and effectiveness than

others.⁸² The existence of equal opportunities policies within companies, if given insufficient focus and attention, can generate complacency and dilute real action to combat disadvantage. Diversity management in particular has been characterised as a “soft option” in contrast to the imposition of tougher legislative requirements.⁸³

There is also a real danger that if equal opportunities policies do not generate short-term results, or if management fashion or market conditions change, then many equal opportunities policies will be allowed to subside. Sustainability, dependence on organisational good-will, a lack of clarity and the lack of any enforcement mechanisms again are issues of concern in the private sector in the context of equality strategies as they are in the public sector. In addition, many businesses have simply not adopted any equal opportunities policies beyond those required to secure compliance with anti-discrimination law. As of 1998, one-third of workplaces surveyed by the “Workplace Employee Relations Survey” (“WERS”) had no formal equal opportunities policy.⁸⁴ A recent survey conducted by the Confederation of British Industry found that the overwhelming 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).⁸⁵

What is apparent is that despite the spread of equal opportunities best practice in the private sector, certain structural patterns of disadvantage remain deeply rooted and are not breaking down at any appreciable rate.⁸⁶ For example, disabled persons remain twice as unlikely to be unemployed in the UK⁸⁷, and only 50 per cent of unqualified men over the age of fifty are in employment, with 55 per cent of managers saying they use age as a criterion in recruitment.⁸⁸ Women graduates can expect to be earning on average less than their male counterparts by the age of 24, while the gap between women’s part-time earnings and men’s full-time rates increased in 2001 to a staggering 41 per cent from 40 per cent in 2000.⁸⁹ A recent survey conducted by the Runnymede Trust indicated that ethnic minorities only constituted 1 per cent of senior management, despite the common use of equal opportunities policies.⁹⁰

While the reasons for the persistence of these structural inequalities in employment, recruitment, pay and promotion are due to a mixture of factors, it is clear that voluntary diversity strategies in the private sector are not generating the necessary large-scale changes that are required to combat discrimination. There is a need to establish a legal, economic and social environment where employers are more likely to make use of affirmative action to redress inequality. There is also a need to ensure that internal diversity initiatives within corporations are supported and encouraged by a supportive external environment. Fitzpatrick et al have stated that there is a need to develop an “equality ethos focus” which facilitates the perception of equality rights as being fundamental, allows for sensitive consideration of multi-faceted aspects of discrimination and encourages employers to adopt comprehensive policies which

embrace all aspects of the employment relationship”.⁹¹ Private sector positive duties may be the tool to create this environment.

Such duties may vary in format from public sector duties (although there will be considerable overlap in how monitoring and remedying patterns of inequality in employment-related decisions is handled.) As such, this paper will consider public sector positive duties first, before moving on to examine the potential of positive duties in the private sector. This distinction is somewhat artificial. In areas such as employment policy and public procurement, no clear dividing line can be established between the public and private sectors in terms of how equality duties may operate. This is demonstrated by the Norwegian Gender Equality Act’s imposition of duties equally upon the public and private sector. However, to allow a concentrated focus on the issues particular to each sector, this division between public and private sectors will be used, albeit with some reservations!

Conclusions – existing strategies: mainstreaming and diversity

- Existing public and private sector equality strategies lack clarity, strong enforcement mechanisms or legal backing. Where the organisational will to support such initiatives is lacking, experience has repeatedly shown that these strategies lack impact.
- In both the private and public sectors, it is increasingly apparent that additional strategies need to be taken to ensure sustainable, enforceable and effective equality mainstreaming. In both sectors, positive duties provide a mechanism for achieving this.
- This paper will set out what positive duties are designed to achieve, and then in turn describe how they could be implemented in the public and private sectors respectively.

Part 4

Positive duties and the public sector

This part analyses the necessary ingredients to enable positive duties to have an impact in the public sector, and how they can reinforce, unify in a coherent and cost-effective manner and add considerably to existing mainstreaming and diversity initiatives

4.1 The necessary ingredients of public sector positive duties

Positive duties are increasingly being used in the public sector to provide the statutory requirement to promote equality and the definite set of obligations necessary to give effect to this requirement. As such, they are designed to improve the performance of public authorities in monitoring, employment, service delivery and policy formation. A race equality duty has already been introduced under the Race Relations (Amendment) Act 2000 for Great Britain (which replaced a previously ineffective duty on local authorities), a combined equality duty has been introduced in Northern Ireland extending across all the equality grounds, and general duties (if lacking an enforcement dimension) have been imposed upon the Welsh Assembly and the Greater London Authority. An “enabling” power has been introduced in Scotland, allowing the Scottish parliament to impose duties on authorities performing devolved functions.

McCrudden has identified six core principles underpinning the Northern Irish duty that the “Hepple Report” adopted as suitable for forming the basis for any UK-wide positive duties:

- a clear positive statutory duty to promote equality of opportunity by public authorities across all areas of government policy and activities
- the participation of affected groups in determining how this should be achieved
- the assessment of impact of existing and future government policies on affected groups
- consideration of the alternatives which have less of an adverse impact
- the consideration of how to mitigate impacts which cannot be avoided
- transparency and openness in the process of assessment.⁹²

The objective of positive duties is therefore to change how public authorities

perform their functions by making equality a central goal of their day-to-day activities, and to prevent the side-lining of equality concerns by imposing a statutory requirement to take proactive action.⁹³ Duties aim to transform reactive approaches into proactive, integrated approaches, informed by the perspectives of disadvantaged groups.⁹⁴ This can involve alterations in service delivery, employment practices, access policies, and policy formation in general. Positive duties can also extend across the full gamut of public authorities, including education authorities, central and local government, the police, health authorities and transport bodies, as demonstrated by the UK race relations duty.

Legal requirements – elimination of unlawful discrimination and the promotion of equality of opportunity and good relations

The crucial contrast between positive duties and the mainstreaming initiatives outlined above is that positive duties are intended to be legally binding, and therefore can potentially have real bite, in particular in circumstances when political will to drive forward the equality agenda is lacking, or when conflicting priorities might otherwise relegate equality to a subsidiary concern. Where a positive duty applies, promoting equality is legally established as a core responsibility of public bodies, and a requirement is clearly imposed to take steps to promote equality. The binding nature of the obligation ensures a certain degree of sustainability and commitment.

In imposing this legal obligation to take proactive steps, positive duties have to be formulated to make clear that the duty is not satisfied just by compliance with existing legislation. The appropriate steps to assess, monitor, consult and take remedial action that are the necessary ingredients of the proactive approach have to be independent from and in addition to a public body's obligation under anti-discrimination legislation. Positive duties therefore usually impose a legally enforceable duty on public authorities to both eliminate discrimination (the "negative" obligation) and to promote equality (the "positive" obligation.) Both elements are crucial parts of the duty, and must be implemented in a proactive manner. In this way, positive duties are designed to supplement the provisions of anti-discrimination law, by complementing the negative requirements of the anti-discrimination model with positive statutory requirements.

Positive duties to promote good relations are also often imposed on public authorities, usually in respect of particular equality grounds such as race. This leg of the duty scheme plays a vital role in linking the proactive obligations of public authorities with a role in promoting social cohesion and community relations. It has so far primarily served as an "enabling function", giving authorities the legal power to factor in the promotion of good community relations into their policymaking and in particular into their funding allocation strategies (see below).

Relevance and proportionality

Positive duties can also improve on existing initiatives by legally requiring appropriate weight to be given to equality issues. Two key concepts that are central to both the negative and positive obligations are relevance and proportionality. Where relevant, public authorities subject to positive duties are required to take action to assess and monitor the impact of policies and practices upon disadvantaged groups, as well as consulting with these groups as part of this impact assessment.

The time and resources to be spent on this assessment process, and the steps that should be taken to eliminate or remedy practices or policies that have a discriminatory impact, should be proportionate to the importance of promoting equality and eliminating disadvantage, taking into account the other key functions and responsibilities of the bodies in question. Policy impact assessment, the remedying or alteration of discriminatory policies, consultation with relevant groups, training initiatives, the development of access initiatives, and the monitoring of educational attainment, user satisfaction of particular public services and employee numbers from disadvantaged groups are all instances of initiatives that will be utilised to satisfy the requirements of the duty.

Potential implementation issues

As the content of the duties imposed will vary with the activities of the body in question, the specific requirements imposed by the duties can be tailored to suit differing types of public authority. Duties have to be flexible and adjustable, to prevent the persistence of outmoded or inappropriate approaches, while maintaining as far as possible consistency of approach, especially insofar as they are applied across the different equality grounds. The perspectives of the bodies subject to the duties need also to be taken on board in designing the extent of the specific duties: to a large extent, the effectiveness of equality strategies can depend on convincing those implementing equality measures of their usefulness, purpose and value. Duties need therefore to refrain from imposing excessive bureaucratic load.

It is also important to ensure that duties are not imposed so as to create a hierarchy of equalities, with certain grounds having greater status and attention because they are the subject of more rigorous duties than other grounds. This danger is of course already a prospect in Britain, with the failure of the government to introduce duties for the other equality grounds paralleling the race duty, or else a single equality duty.

In addition, introducing duties in particular geographical regions and not in others creates differential legal rights for citizens that vary from region. Residents in Northern Ireland, Wales, London and Scotland benefit from enhanced legal obligations on certain public authorities in their regions to promote equality that residents elsewhere do not. This raises one of the central

concerns of this paper: should positive duties be extended across all of the equality grounds, and if so how should a set of such duties be designed and established?

How positive duties are enforced is also crucial. If positive duties are introduced that lack any meaningful enforcement mechanism, then there is a real danger that the difficulties of sustainability, excessive emphasis on procedure, dependence upon political will, inadequate organisational capacity and lack of priority that have plagued mainstreaming will also apply to positive duties. Although positive duties that lack such an enforcement mechanism may help in providing momentum to equality initiatives in the short-term, they need to be backed by suitable enforcement schemes as an effective precondition for their long-term effectiveness.

Positive duties also again run the risk of becoming a matter solely of procedural compliance, with all the emphasis being placed upon meeting the monitoring, consultation and impact assessment requirements and not upon the achieving real change and incorporating equality considerations at every level of the decision-making and service delivery. There is a role for senior management, central government, inspectorates and the Equality Commissions to work with authorities to guide practice and performance towards an outcome-orientated focus. Appropriate use of the enforcement options may be necessary if procedure is visibly not translating into action. The "Hepple Report" suggested that this "stick" could be provided by a set of "interlocking" enforcement mechanisms, consisting of internal self-scrutiny by the bodies subject to the duty, external pressure from involved interest groups and support and, if necessary, compulsion via legal remedies, provided by the equality commissions.⁹⁵

In designing a framework for equality duties applying across the various equality grounds that will maximise the potential of the duties while minimising the potential defects, the various positive duties that are already in place in the UK offer invaluable lessons in how to design such a framework. Comparative experience outside the UK is on the other hand limited. Therefore the structure and impact of the existing UK duties need to be examined in some detail.

Conclusions – positive duties and the public sector

- Positive duties in the public sector can play a role in remedying the inadequacies of mainstreaming by imposing clear legal obligations to take proportionate and necessary steps to monitor, consult, and assess on equality issues, and to take remedial action if necessary. They provide a natural focus point for the variety of public sector equality strategies 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

imposed 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, an overemphasis on process as distinct from outcomes, the lack of an effective enforcement mechanism and the creation of a “hierarchy of inequalities” are all potential traps that need to be avoided in designing and implementing duties.

- If the necessary ingredients are present, and the traps avoided, then positive duties can deliver better outcomes in service delivery, policy impact assessments and the employment policies of public authorities.

Part 5

Public sector positive duties in practice

This Part examines the experience of existing statutory public sector equality duties in the UK and identifies lessons to be learnt from this experience.

5.1 The race relations duty

The original S. 71 duty

A comprehensive positive duty has only been imposed so far across Great Britain in respect of race equality, even though the UK Government has committed itself to introducing positive duties in the future in respect of gender and disability.⁹⁶ S. 71 of the Race Relations Act 1976 had imposed a duty on local authorities to make “appropriate arrangements” to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups. This duty played a useful role in empowering local authorities to develop racial equality initiatives, including the network of Race Equality Councils co-funded with the Commission for Racial Equality (CRE), but in the absence of any real enforcement mechanism the duty was very limited in impact. The fatal flaw in the s. 71 duty was however the limitation of the duty to making “appropriate arrangements”. This proved to be so vague as to deprive the duty of any meaningful content for enforcement purposes.

The general duty

The Race Relations (Amendment) Act 2000 in contrast imposes a general positive duty on an extensive list of specific public authorities listed in Schedule 1A of the Act to pay “due regard” to a) the need to eliminate racial discrimination and the complementary positive obligations to b) promote equality of opportunity and c) good relations between people of different ethnic groups.⁹⁷ The CRE in its code of practice defines “due regard” as meaning that “the weight given to race equality should be proportionate to its relevance to a particular function”, incorporating the requirements of relevance and proportionality discussed above.⁹⁸

The CRE code of practice states that public authorities should “consider” meeting the duty by identifying which of their functions are relevant to the duty, setting priorities for these functions based on their relevance for race relations, assessing how the implementation of these functions and related policies affect race equality, and considering how the policies and practices might be changed, where necessary, to meet the duty.⁹⁹ Where a listed authority has made arrangements for a private or voluntary body to carry out some of its functions,

then it is required to make the necessary arrangements (by inserting appropriate contractual terms for monitoring and enforcement if necessary) to ensure that its obligations under the duty are fulfilled: authorities cannot evade their obligations under the duty by “contracting-out” or by entering into public-private partnerships.

The specific duty

The general duty is supplemented by specific duties imposed by the Home Secretary on specific types of public authorities. Listed central government departments, local authorities, police, other criminal justice authorities, health authorities, educational authorities and regulatory bodies are required prepare and publish a Race Equality Scheme, setting out how they intend to fulfil the requirements of the duty. The scheme should explain how they will meet both their general and specific duties.

Under the Race Equality Scheme, the listed public authorities to which this requirement applies will have to:

- assess whether their functions and policies are relevant to race equality
- monitor their policies to see how they affect race equality
- assess and consult on policies they are proposing to introduce
- publish the results of their consultations, monitoring and assessments
- make sure that the public have access to the information and services they provide
- train their staff on the new duties.

The Race Equality Scheme – itself one of the specific duties – essentially packages the other duties into a coherent strategy and action plan. The Scheme must also set out its arrangements for publishing the results and for making sure the public has access to public services and information, as well as the authority’s training arrangements in respect of race equality.

In addition, listed public authorities are under various specific duties to monitor on ethnic lines the composition of their staff and the ethnic make-up of the pool of applicants for posts, promotion and training. In addition, if these listed authorities have more than 150 full-time staff, they are required to monitor the composition of those involved in grievance, disciplinary procedures and performance appraisals, training and those who are dismissed. A similar duty is imposed on educational bodies in respect of the ethnic composition and performance of their staff and pupils. Schools must prepare and publish a race equality policy, as well as monitoring and assessing how their policies affect ethnic minority pupils, staff and parents. Higher and further education

institutions must prepare a race equality policy, assess how their policies affect ethnic minority students and staff and arrange to publish their policy, and the results of assessments and monitoring.

Enforcement

Given that the lack of an enforcement mechanism ensured the redundancy of the s. 71 duty, the success of the race duty may depend upon the effectiveness of its enforcement mechanism. Concerns however do exist that the enforcement options available under the RRAA are not adequate. The UK duty does not require race equality schemes to be referred to the CRE for formal approval (unlike the case in Northern Ireland) on account of the potentially ungovernable workload, but the CRE does have a crucial enforcement responsibility for the duty. It can issue a compliance notice to any public authority that is failing to comply with one of the specific duties, requiring the authority to take steps to meet the duty and to provide evidence of compliance. If after three months the CRE considers the authority is still in violation of the duty in question, an order from a county court or the sheriff's court ordering compliance can be sought. As the specific duties impose clear and specific procedural requirements, failure to comply or inadequate compliance with these procedural requirements may be straightforward to challenge. A failure by a public authority to prepare a race equality scheme or to monitor its workforce could therefore be challenged under this procedure. The CRE has issued one compliance notice thus far to the Conwy County Borough Council.¹⁰⁰

The specific duties imposed on the listed authorities in respect of educational authorities and public sector employers require those authorities to make the necessary arrangements to fulfil these duties, so a failure to implement these specific duties (as distinct from a failure to draw up the required schemes) will be challengeable. However, it may not be possible to challenge failure to implement adequately other commitments made by public authorities in race equality schemes under this procedure, as there is no specific duty to fulfil these commitments.

A failure to actually implement an equality scheme or crucially to comply with the general duty itself can only be challenged by judicial review (by individuals with the necessary legal standing or the CRE) or by the CRE launching a formal investigation under its powers conferred by sections 48–52 and 58–62 of the Race Relations Act. Both are legally high-risk strategies, as demonstrating a failure to give “due regard” to the duty will be difficult, and involve substantial costs. This means that it may be very difficult to enforce the implementation of equality schemes or compliance with the general duty, which may prove to be a substantial impediment. The CRE also lacks the powers to require authorities to produce evidence of the steps they are taking to comply with the duty. The enforcement mechanisms for the race duty are therefore lacking.

Compliance with both the general and specific duties will also be monitored by the audit inspectorates. If sufficient emphasis and resources are put into this process, this may compensate to a degree for the deficiencies in the enforcement mechanisms. It remains to be seen if this will prove to be the case.

Interim progress

The introduction of the positive race duty has been warmly welcomed, despite reservations that the legislation imposed insufficient specific requirements to make the duty effective.¹⁰¹ The “CRE Code of Practice” and the ministerial orders have, to an extent, remedied this lack of legislative detail. Early indications identified lack of applicable data as a particular problem in formulating impact assessments.¹⁰² Concern has also been expressed as to the lack of a clear position under the duty as to the necessary and appropriate action to be taken when a policy is found to have an adverse impact. Both remain problematic issues. However, the CRE has identified seven high-level strategic outcomes that should be focused on in implementing the duty. Some focus on service delivery and shifting inequalities or disparities in key service outcomes (e.g. educational attainment) and service user satisfaction levels. Others are specifically concerned with employment, and achieving progress in workforce representation at all levels, as well as employee experiences across the employment cycle. The overall aim is ultimately to achieve measurable improvements in race relations, such as ensuring no significant disparity in public confidence levels by ethnicity.

The CRE has commissioned an independent review of responses to the duty in the first year and has found broadly three sorts of responses by public authorities.¹⁰³ Just over a third of the respondents were responding well to both the spirit and letter of the law, with thirty-nine per cent of the random sample of schemes and policies analysed assessed as “fully” or “mainly” developed. There is a further significant group who have put the building blocks in place, but have some way to go. Lastly, there is a group where the response is weak and, in some cases, does not yet comply with the legislation. Certain areas of necessary improvement were noted, including a clear desire for more guidance and support, lags between sectors (in particular in the education field) and a need for organisations to articulate more clearly what they are aiming to achieve within a concrete timetable, including how better to link assessment impact and monitoring. Authorities often also were giving less attention to the employment duties, addressing good relations or partnership and procurement strategies in their assessments of functions and policies.

However, this independent study also found that public authorities strongly value the ways in which the duty has improved policy-making and service delivery design. Overall, around two-thirds of authorities and over 70 per cent of educational institutions felt that their work to date had produced positive benefits, rising to 89 per cent in central government and 83 per cent in higher education. The positive result most often cited was increased awareness of race

equality in policy making and service delivery. Between 58 per cent and 74 per cent of public authorities had identified service user satisfaction outcomes, with the criminal justice sector among those prominent in setting time-related outcome targets, including those relating to public confidence (72 per cent) and community relations (78 per cent), possibly due to the impact of the Lawrence Inquiry. Examples of good practice are being developed, and the report concluded that the general approach of the race duty is sound, and the emphasis now needs to move on from preparing the “infrastructure” to a focus on outcomes, action plans and public accountability. The importance of senior managerial level commitment was also emphasised, as was the potential for similar duties to be rolled out across all the other equality strands.

5.2 Northern Ireland – the S. 75 positive duty

The single most extensive positive duty imposed in the UK is that provided for by s. 75 of the Northern Ireland Act 1998, which imposes a duty on specified public authorities to have “due regard to the need to promote equality of opportunity” across all the equality grounds, including disability, age, sexual orientation and also political belief, in carrying out their public functions.¹⁰⁴ A duty to promote good relations is imposed in respect of race, religion and political belief. The duty was imposed following the failure of the “PAFT” initiative (see above) and fulfilled commitments made in the Good Friday agreement.¹⁰⁵

A wide range of Northern Irish authorities is subject to the legislation, with some important exceptions, including many of the UK Ministries. Schedule 9 of the Act specifies the measures required to comply with the duty, in particular the requirement that all authorities to which the duty applies are required to prepare an Equality Scheme. This Scheme is required to set out the impact assessment, monitoring, consultation, training and information access arrangements, including the preparation of Equality Impact Assessments (EQIAs), that the authority intends to take to implement the duty. The Northern Ireland Equality Commission has set out detailed guidelines for drafting Equality Schemes and carrying out Equality Impact Assessments. The results of policy assessment, consultation and monitoring carried out under the scheme are required to be taken into account in formulating policy.

Enforcement

The s. 75 duty requires all equality schemes to be submitted for approval to the Northern Ireland Equality Commission, which, if dissatisfied with a scheme, can refer the authority in question to the Secretary of State for Northern Ireland, who can impose an alternative scheme if necessary. The Commission can also investigate the extent of compliance with the duty or with a specific scheme, as well as investigate complaints about non-compliance from individuals. If the authority fails to respond to action recommended by the Commission following such an investigation, the Commission can refer the matter to the Secretary for

State. There may be some ambiguity in the legislation as to what the Commission can actually investigate. Paragraphs 10 and 11 that provide for this enforcement mechanism refer to a “failure by a public authority to comply with a scheme”: does this permit a complaint about individual acts, and/or a failure to promote in general? Thus far, the Commission has investigated complaints about the reduction of accessible health care services and the use of particular symbolism in municipal buildings, which indicates that it considers that specific behaviour may be challengeable.¹⁰⁶ Enforcement via judicial review and auditing mechanisms is also possible, which however is subject to the same reservations as expressed in the context of the race duty.

Interim Progress

The s. 75 duty differs from the race duty in applying across all the equality strands, requiring that every authority to which the duty applies prepare a scheme, and having a stronger enforcement mechanism, requiring that the Commission approve all schemes and granting it a wide investigative role. The Commission has so far adopted 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. The Commission and representative groups from across the equality grounds have played an active role in the framing of the equality schemes.

The Commission has recently prepared a progress report on the implementation of the duty up to March 2002. Its conclusions were generally positive, finding good levels of procedural compliance with the requirements set out in Schedule 9, despite extensive slippages in timetables.¹⁰⁷ Public authorities are integrating the requirements of the s. 75 duty into corporate and business planning processes, but lack of resources were preventing authorities delivering many of the requirements of equality schemes.¹⁰⁸ In particular, the process of undertaking EQIAs and developing monitoring systems has proved challenging for public authorities, and little consideration had been given to linking monitoring and compliance with the s. 75 duty with meeting Best Value and other performance measurement indicators.¹⁰⁹

There was evidence of good practice in consultation, particularly in using joined-up approaches to consult across the different strands, but there was also evidence that the practice of some authorities of using mass mailing of consultation documents was producing consultation fatigue.¹¹⁰ Some smaller authorities cited the lack of clarity and guidance on good relations as a major impediment to the strategic implementation of this duty. Unsurprisingly, positive engagement with good relations issues prior to the introduction of the statutory duty was a factor in making progress.¹¹¹

The progress report also identified examples of good practice and outcomes. Compliance with the duty had resulted in general in the provision of extensive

training for public authority employees in equality issues, new complaint procedures, the collection of hitherto unavailable data on the groups affected by policy decisions, the creation of special units within public authority structures (including several Good Relations Units, set up by Belfast Council amongst others), greater public accessibility to information and public services, especially for ethnic minorities and the disabled, and enhanced use of outreach initiatives. The incorporation of equality impact assessment within policy-making had also produced tangible outcomes across the various grounds. Examples among many include the following:

- the Northern Irish Housing Executive in fulfilling its requirements under the duty identified provision for disabled persons as a problem, resulting in the provision of a phone-based interpretation service, staff training in sign language, hearing loops and portable systems in all outlets, and a centrally based textphone. The Housing Executive also established consultative forums across the strands, and reviewed accessibility requirements in general¹¹²
- proposed tariffs under the Criminal Injuries Compensation Scheme would pay dependants £10,000 to spouse and £5,000 to each other dependent up to a maximum of £50,000. Screening showed this would adversely impact on larger families and these were more likely to be from the Roman Catholic community. In light of this impact the maximum was removed¹¹³
- the Northern Ireland Prison Service provided qualifying prisoners over 25 year of age with a grant of £50.05 per week and £43.00 to prisoners under 25 years of age. As a result of screening, an adverse impact on persons of different ages was identified and the weekly allowance was harmonised¹¹⁴

The Commission has had political support in making sure the s. 75 duty is well implemented, and thus far the duty has begun to generate real shifts in consultation, monitoring and policy assessment procedures. Openness to a greater range of perspectives from a wider diversity of different groups in Northern Irish society has been the most immediate tangible impact, even if the lack of well-organised representative groups in respect of particular groups has been a problem. A potential problem is that Schedule 9 does not give specific requirements for each individual equality strand, or necessarily require the specific targeting of each of the particular grounds within equality schemes or EQIAs, although the code of practice prepared by the Commission does place emphasis on this. While the lack of such specific requirements may ease the bureaucratic burden, it poses the danger that certain strands may be neglected by particular authorities in favour of higher-profile strands, or strands where progress may be easily demonstrated. So far the duty may have actually focused attention on hitherto neglected groups such as ethnic minorities, but preventing a hierarchy of concern may pose challenges in the future.

The ultimate impact of the s. 75 duty will depend on whether the generally adequate compliance with the Schedule 9 requirements is translated into real

outcomes. The s. 75 duty relies heavily upon formal procedural requirements set out in Schedule 9 to ensure a sufficient and sustainable focus on equality, all the more important given the particular circumstances in Northern Ireland. This operates very well to secure procedural compliance, but may result if inadequately monitored in excessive emphasis on procedure: the Equality Commission is, however, stressing in its guidance that the emphasis in applying the equality schemes has to be on the achievement of outcomes. The utility of the duty in securing these outcomes remains to be tested in the long-term. Compliance with procedure must be treated as a building block to real change. What is clear, however, even in the first few years of its application is that the existence of the s. 75 duty has brought equality issues to the forefront of public authority concerns in Northern Ireland.

5.3 Devolution – the Welsh, London and Scottish duties

Wales

Cross-strand equality duties have also been imposed on many of the new UK devolved and regional authorities, without however being backed up by strong enforcement mechanisms. Under the Government of Wales Act 1998, the National Assembly for Wales may exercise the powers of making delegated legislation where these are transferred to it by ministerial order, but cannot alter parliamentary legislation. Section 120 of the Government of Wales Act 1998 imposes a duty on the Assembly to ensure that its business and functions are conducted with due regard to the principle of equality of opportunity for all people. Unlike in Scotland, there is no definition of equal opportunities.

The duty requires that the Assembly ensures that the public authorities subject to its remit promote equal opportunities in the performance of their functions. This duty in tandem with a favourable political climate has contributed to the emergence of a proactive equality agenda in Wales and to improving the output of existing initiatives.¹¹⁵

The initiatives used to give effect to the duty have usually involved the use of general equality strategies, with strand-specific initiatives generally only used to supplement the implementation of the general equality approach. The emphasis under this general approach has been on gender, race and disability so far, supplemented by the development of new consultative mechanisms and policy impact assessments with regard to sexual orientation. The Assembly has carried out a pay audit of its staff, and similar audits on these grounds are also being encouraged in higher educational establishments and across the public sector. Recruitment and promotion within the civil service have been opened up, and equality audits across all the strands in employment, service delivery and policy assessment are now conducted annually across the Welsh public sector. Equality

has been mainstreamed in the preparation of the Welsh Budget and in policy impact assessments. A voluntary code of compliance has been introduced for private contractors, and equality of opportunity has been mainstreamed within public procurement.

The Assembly has also mainstreamed equality within its own procedures and consultation processes (in particular those of its committees). A standing committee on equality has been established within the Assembly, and the Welsh Assembly Government has established a Public Sector Round Table on Equalities and an Equalities Unit within the Welsh Local Government Association, both of which complement the Welsh Equalities Standard that has been developed to assist Welsh public authorities to implementing the duty. Four consultative networks have been established with Assembly funding for groups concerned respectively with disability, race, gender and sexual orientation issues.

A political climate favourable to equality initiatives exists in Wales, but the duty has nevertheless also played an important role in driving forward the equality agenda in Wales, acting to provide impetus, break down resistance and to generate a proactive approach that aims to demonstrate concrete instances of compliance with the duty. The duty has therefore contributed to achieving positive outcomes in the fields of equal pay, appointment procedures, consultation and the reinforcing of mainstreaming initiatives. The impact of the duty on achieving outcomes in employment patterns, public procurement and policy impact assessments will, however, only be ascertainable in the longer term. In addition, awareness of the existence of the duty outside public authorities remains very low. However, the duty has been given credit by senior Welsh public servants and Assembly members for ensuring that equality initiatives are given suitable priority.¹¹⁶ The duty has acted as a focal point for Welsh equality initiatives, acting as a “hook” on which to hang a variety of equality strategies.

The deficiency in the Welsh duty remains the lack of an enforcement mechanism to secure progress even if the current political impetus is lost. The Welsh Assembly duty is very similar to the old unenforceable s. 71 duty on local authorities, and the Welsh duty is only enforceable via judicial review. Under Schedule 9 of the Government of Wales Act, the Welsh Administration Ombudsman may challenge the Assembly for maladministration, which may also provide an enforcement route for the duty. The audit inspectorates can monitor Welsh public bodies for compliance with the duty. Nevertheless, the lack of an enforcement mechanism makes its successful implementation largely dependant on political will. Where that will is present, it serves as a very useful tool: however, it may not be suitable for other political contexts where sustainability may be more of a challenge. Nevertheless, the duty does illustrate the efficacy of positive duties in driving forward change.

The Greater London Authority

Section 33 of the Greater London Authority Act 1999 imposes a similar set of duties upon the Greater London Assembly, and has had similar results in providing a foundation for the development of a proactive equal opportunities agenda by the Mayor and Assembly. Section 33 requires that the Mayor and Assembly, as well as other specified London authorities, to make appropriate arrangements with regard to the principle that there should be equality of opportunity for all. This general duty is supplemented by a more specific equality duty to also 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. S. 33 also imposes an annual reporting requirement upon the Greater London Authority (GLA). The GLA duty therefore combines the general equal opportunities duty model utilised in Wales with a more specific duty that is similar in scope to the Northern Irish s. 75 duty, but which has no equivalent of the specific requirements imposed by Schedule 9.

As in Wales, the existence of this duty has provided the impetus and a focal point for the development of a proactive equalities agenda for London. As part of the Mayor's consultation and policy development initiative, a cross-strand equalities policy commission was established to report on the shape and content of the equality strategies required to give effect to the duty. The report of the commission in November 2000 recommended a set of principles to be reflected in the GLA Equalities Statement, including the adoption of a "rights-based" approach.¹¹⁷ The report also recommended the adoption of a formal equalities toolkit, an equality action plan, standard format performance indicators to demonstrate equality outcomes across all the equality grounds, clear monitoring and evaluation standards and comprehensive consultation mechanisms as part of an Equalities Framework.

The commission's conclusions have shaped the GLA Equalities Framework 2002–04, designed to structure the work of the GLA in complying with the s. 33 duty. A GLA Equalities Toolkit has been developed and equality is built into best value performance indicators.¹¹⁸ Annual "Mayoral Equality Reports" assess compliance with the duty, and extensive consultation networks have begun to be established, including the London Older People's Assembly. Equality considerations have been built into the framework of the GLA compact with the voluntary sector, and extensive monitoring and target mechanisms have been introduced in the GLA's employment, service delivery and policy structures.

The GLA Equality Statement is comprehensive and well-developed, and contains specific commitments that are being rolled out into practice, including the opening up of job advertising, re-assessment of the core requirements for particular posts, a commitment to flexible working hours, the use of positive

action (including guaranteed interviews for disabled persons who meet the relevant essential job requirements) and the mainstreaming of equality concerns within public procurement. The accompanying GLA Equality Strategy introduced employment targets for gender, race and disability, as well as age monitoring: scoping work on best practice in monitoring treatment on the grounds of sexual orientation is being finalised. An equal pay review is being completed, and equality concerns are being built into policy assessment at every level.

As in Wales, the GLA duty has served in a favourite political climate to provide the impetus to a range of equality measures across all the equality grounds. The combined equality strategy introduced to comply with the duty have unified and given a degree of coherence to the various initiatives that had been introduced by the London local authorities over the last twenty years. The extension of the duty across all the equality grounds has also resulted in the development of innovative monitoring, consultation, positive action and policy assessment techniques for the new grounds, such as the scoping exercise for developing sexual orientation monitoring and the Older Persons Assembly. The specific reference in the GLA duty to all of the equality grounds has contributed to ensuring that the GLA, while making use where possible of general equality indicators and frameworks, is conscious of the need to achieve demonstrable outcomes across all the grounds. Where appropriate, ground-specific initiatives have been introduced, which are used to a greater degree than in Wales and Scotland, especially in the context of sexual orientation and age.

The GLA approach also makes considerable use of targets across all the grounds, to assess progress towards clear outcomes. There is strong support for this approach, which is seen as particularly appropriate in the context of London with its population diversity. There is some concern that meeting these extensive targets may be difficult, possibly resulting in internal and external discontent with the use of such mechanisms. Nevertheless, annual equality "milestones" have been set for the different directorates of the GLA as part of the emphasis on outcomes, and a particular emphasis on consultation and inclusion is also seen as an integral part of compliance with the duty.

The GLA duty like the Welsh and Scottish duties has no enforcement mechanism outside of auditing assessment, so compliance with the duty largely depends upon political will, which at present is strong. If political circumstances change, the strength of the duty may be open to question.

Scotland

Under the Scotland Act the Scottish Parliament cannot legislate on designated "reserved matters," including anti-discrimination legislation. However, there is an exception allowing "the encouragement (other than by prohibition or regulation) of equal opportunities" and for imposing duties on any office-holder in the Scottish Administration or any Scottish public authority subject to the

control of the Scottish Parliament to make arrangements to ensure that their functions are carried out with due regard to the need to meet the equal opportunity requirements.¹¹⁹ Equal opportunities are defined as “the prevention, elimination or regulation of discrimination between persons” on a series of grounds that include race, nationality and ethnicity, but which also includes religious beliefs, unlike the duty under the RRAA. The significance of this “enabling power” is that it allows the Scottish Executive to develop a specifically Scottish approach to equality, and to impose specific equality duties upon public bodies whose functions come within the umbrella of reserved powers.

This ability to promote equality of opportunity has again produced concrete results. Equal opportunity duties have been imposed on relevant local authorities in the recent Housing Act and in a current Local Government bill going through the Parliament. Similar duties have been introduced in the education sector. The Scottish Parliament has also established an Equal Opportunities Committee to oversee equal opportunities policy, develop mainstreaming policy across the Executive and to oversee implementation of these duties.¹²⁰ The Executive has introduced extensive equality mainstreaming in its policy impact assessments, as well as in its budgetary process, and has conducted pay audits of its staff.

The Scottish power obviously differs from the Welsh, GLA and Northern Irish duties in not being a positive duty. It remains therefore unenforceable. As an enabling tool, however, it has allowed the devolved authorities to develop cross-ground equality strategies.

Conclusions – public sector positive duties in practice

- Various models of cross-strand equality positive duties are being implemented in the public sector, in addition to the race relations duty that applies to public authorities throughout Britain: in Northern Ireland, Wales, London and Scotland, these cross-strand duties have all demonstrated their utility in improving decision-making and service delivery.
- However, experience of working with such duties has shown the possible importance of an adequate enforcement mechanism, in circumstances where political support may be less forthcoming. It also shows up the need for an emphasis of each of the different equality strands, adequate support and guidance for authorities implementing the duties, strong managerial commitment and an emphasis upon outcomes. The lessons learnt from where duties have been implemented should be used to assist in designing a cross-strand set of duties for all of Britain.

Part 6

Cross-strand equality duties for the public sector

This Part examines the extent to which positive duties could be effective across the entire range of equality grounds, and argues for the introduction of an effective cross-strand set of equality duties.

6.1 The impact of duties on the different equality grounds

The Northern Irish duty, as well as the Welsh, Scottish and Greater London Authorities duties, extends across all the grounds of discrimination recognised in the EU Framework Equality Directive (the s. 75 duty goes further, extending to political beliefs). All these duties show that public sector duties to promote equality can be implemented and deliver good results across the various strands. This indicates that the current restriction of positive duties to racial equality is an unnecessary and self-defeating restriction. There is no reason why positive duties can only generate change in respect of race issues.

The conclusions of the Schneider Ross survey into the implementation of the race duty support this conclusion: "The basic principles of the public duty, and the practical steps required in order to meet these, apply equally to other equality and diversity areas. It is our belief that the progress shown among many authorities and institutions, through the survey, 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".¹²¹

By giving "teeth", clarity and enforceability to proactive mainstreaming strategies, positive duties require structural patterns of discrimination and neglect to be addressed. In so doing, they can also contribute to improving service delivery and policy formulation, benefiting disadvantaged groups and even the full range of "consumers" of public services. Therefore, positive duties have a role to play across all the equality grounds. This can be demonstrated across the different equality grounds. Disability is analysed first, due to the likelihood of a disability duty being introduced in the immediate future.

6.2 Disability

In 2003, Bridget Prentice MP introduced a Disabled People (Duties of Public Authorities) Bill into the House of Commons, providing for the amendment of the Disability Discrimination Act to include a positive duty to promote the equalisation of opportunity for disabled persons and the elimination of unlawful disability discrimination. The explanatory notes accompanying the bill state that “the Bill seeks to mirror (where appropriate) the approach taken in section 71 of the 1976 (Race Relations Act), and the intention is that the general duty will apply to the same bodies which are currently subject to duties in or under that section”. While the Bill did not become law, the UK government has recently confirmed that a public sector disability duty will be introduced by legislation in the current parliamentary year.

If this legislation is similar in form to the Bill, it will therefore provide for a general positive duty equivalent to that imposed by the race duty to be placed upon public authorities. The Disability Rights Commission (DRC) will be given similar enforcement powers as the Commission for Racial Equality has under the race duty, and auditing mechanisms will also assist in making it work. Such a duty would put flesh on the current government’s commitment to introduce a disability duty similar to the race duty.¹²² It would also implement one of the key recommendations of the UK Disability Rights Task Force, which in their final report “From Exclusion to Inclusion” recommended the introduction of a public sector positive disability duty¹²³, a proposal which the government appeared to accept in its response to the Task Force.¹²⁴

Such a positive disability duty would require that the concerns, needs and perspectives of disabled groups are incorporated into assessments of how public sector policies, practices and service delivery impact upon disabled persons.¹²⁵ Examples of outcomes that could potentially arise from a positive duty could include the following:

- a re-orientation of how certain health services such as cancer screening, mental health and dental care are delivered, with greater emphasis, for example, on outreach to persons having particular disabilities that may contribute to a lesser take-up rate of such services under existing delivery mechanisms (as happens with cancer screening¹²⁶) or on providing appropriate services for disabled persons (such as ensuring that mental health specialists and dentistry practices have the training and tools to provide an effective service for all disabled persons)
- better access to educational material, with a greater emphasis on provision of this material in accessible formats and a re-orientation of focus to include the needs of the full range of disabled groups in education policy and provision¹²⁷
- considerably enhanced consultation and outreach to the full spectrum of disabled groups by all public authorities subject to the duty, as demonstrated

by some of the outreach initiatives that have been already been implemented in Northern Ireland to comply with the s.75 duty discussed above

- better design of facilities and internal work practices, with the duty requiring appropriate consideration to be given to disability and access considerations in funding allocation
- a re-examination of community, arts, sports and other forms of funding to ensure that equality of consideration and opportunity is given to different groups of disabled persons and to individuals with disabilities
- By requiring public authorities to monitor the impact of policies upon the disabled community and the composition of their workforces, a positive duty will give a legal impetus to the collection of up-to-date data on the numbers and characteristics of disabled persons, which is currently greatly lacking.¹²⁸

Given that disabled persons have traditionally been neglected in policy design and service delivery, a disability duty has immense potential for generating real change. Such a duty will also constitute a powerful tool for disability groups to put pressure on public authorities to take their concerns seriously. It will also constitute a considerable advance on existing disability initiatives, by imposing a definite legal framework that requires appropriate weight to be placed on meeting the needs of disabled persons. It will also provide a “pressure point” for disability non-government organisations and activists to push for greater and faster change. The mish-mash of existing public sector disability initiatives lacks the enforceability, weight and focus that a positive duty would provide.

There are certain reservations, however, about the introduction of a separate disability duty. The wording of the Prentice Bill gave rise to some concerns, which may be duplicated in the legislation: see below. There is also a question as to whether the DRC will receive the necessary resources to enable it to play an active enforcement role. In addition, there may be real advantages in imposing disability duties as part of a general equality positive duty, and disadvantages in enhancing the piecemeal and lop-sided nature of discrimination law by introducing a disability duty while not doing so for the other grounds. This is not an argument for not welcoming the introduction of the duty: it is an argument for rolling similar duties out across all the equality grounds, or for the introduction of a comprehensive set of equality duties (see below).

6.3 Age

Similar considerations apply in the context of age. A positive duty that incorporated age equality would require due monitoring, assessment and consultation to determine the impact of public sector policies and practice upon the different age groups. Given the paternalism and neglect that has traditionally characterised the design and implementation of service delivery directed at older and younger persons¹²⁹, the comparatively recent recognition

of age as an equality ground, the lack at present of age discrimination legislation and the very limited nature of most age equality mainstreaming measures, a positive age duty could have a considerable impact.¹³⁰ It again could provide a pressure point for representative groups to influence the conduct and procedures of public authorities.

Given the lack of age discrimination legislation, and the casual acceptance of age inequality that has hitherto been common, an age duty could have a significant impact. Compliance with the duty could require for example the following:

- greater consultation with older and younger persons on public transport provision
- appropriate monitoring as to the age composition of particular grades, training courses and posts of responsibility
- positive action to encourage greater age diversity in particular posts and types of employment¹³¹
- greater consideration of how health care service delivery and the accessibility of premises can be designed to meet the needs of persons of various age groups, in particular older persons
- greater examination of the assumptions underlying certain health care resource allocation decisions, in particular explicit or implicit rationing of services such as the denial of access to breast cancer screening programmes for those over 70¹³², or the lack of inadequate facilities for long-term or chronic care, inadequate community based care training and a lack of supervision of care facilities¹³³
- a re-consideration of artificial age cut-off points in access to education, work training, New Deal initiatives and welfare support¹³⁴
- specific targeting of adult and community educational provision towards the needs of particular age groups: eight in ten people aged under 40 have participated in learning, compared to only to six in ten of those aged over 50¹³⁵
- a re-examination of policing policy towards younger and older persons
- greater focus on the neglected problem of abuse directed towards older persons, with between 5 per cent and 655 of elderly persons at risk of verbal, physical abuse or neglect¹³⁶: two leading commentators have suggested that “the public is probably insufficiently aware of the extent of intrafamilial abuse of the elderly: the degree of ignorance... is comparable to that which applied to child abuse 30 years ago”¹³⁷
- the development of new methods of providing information on services to persons across the entire age spectrum
- a re-consideration of compulsory retirement policies.

An age positive duty would require a fundamental reconsideration of existing practices and policies. It would also generate key benefits for society at large, by contributing to the identification and rooting-out of patterns of structural age discrimination that impose huge costs on society. The Employers' Forum on Age have argued that ageism in employment costs the UK £31 billion every year in lost production, and that "as the population and dependency ratio increases, improving labour market participation rates, particularly among the over 50s, is key to maintaining the UK's productivity, wealth and standard of living."¹³⁸ The Economic and Social Research Council Research Programme on Extending Quality of Life suggests that "the cost to the UK of the falling rate of economic activity in those aged 50 or above is vast".¹³⁹

6.4 Religion

A positive duty to promote equality on the grounds of religious belief or the lack thereof again offers considerable opportunities. The focus of the Race Relations Act and the positive race duty on ethnic origin has had the effect of making race the prism through which issues relating to ethnic minorities are perceived, even where religion and belief may be the root cause of discrimination.¹⁴⁰ This lack of focus on religious issues is reflected in the lack of data on the disadvantages suffered by Muslim groups: as one Muslim group described the situation, "the effect of the Race Relations Act 1976 has been to make race the most powerful and all pervasive keyhole through which to perceive society".¹⁴¹ The Commission on British Muslims and Islamophobia has called for the duty to be extended to the promotion of equality between persons of different religious groups, in line with the equal opportunities policy of the Police Service.¹⁴² A positive duty that extended to religious belief would achieve this, by requiring monitoring, consultation, policy assessment and remedial action to take into account the religious dimension to equality issues.

Such a duty would add another dimension to the existing race duty, and have the particular advantage of improving service delivery, employment policies and data availability by requiring greater focus on the perspectives and needs of the different religious or non-religious communities.¹⁴³ There has clearly been neglect of the importance of religion in equality policies, both as an essential component of self-identity, and as a common root cause of discriminatory treatment. A positive duty would be the tool to combat this neglect, having again the potential to generate practical results, including for example:

- improved access to health and other public services by enhancing responsiveness to religious sensitivities and practices, such as greater consideration of the impact of Ramadan observance in the context of providing health care, support for students and even in terms of adjusting scheduled timetables

- a greater focus in criminal justice on crimes and hate speech linked to religious hatred¹⁴⁴
- improving police practice and attitudes across the public sector towards particular religious groups
- altering public sector employment practices to reflect religious festivities and practices (e.g. allowance for special leave for Hajj or Diwali)
- greater outreach to particular communities via the use of community religious institutions
- greater knowledge of the diversity of religious belief in the public sector
- the inclusion of a greater focus on religious equality in programmes concerned with race equality
- a new focus on ensuring that employment practices do not result in the exclusion of particular religious communities from particular areas of employment, training or promotion.

This duty would not entail the promotion of religious beliefs or the giving of priority to religious beliefs over other convictions in policy design. The duty, as with the race duty, would be framed in terms of eliminating unlawful discrimination and promoting equality of opportunity. This would require equality of treatment of different religious groups in employment and service delivery, but would not require that religious beliefs would be reflected in policy. It would also equally extend equality of opportunity to those who had no religious beliefs, requiring that the perspectives of secularists or humanists would have to be also taken into account in service delivery, employment practice and policy assessment.

6.5 Sexual orientation

The inclusion of sexual orientation within a set of positive duties has again the potential to generate real shifts in public sector practice. The Welsh duty has already ensured that a Lesbian, Gay, Bisexual and Transgender (LGBT) consultative network has been established, whose perspectives are fed into policy design and the work of the Welsh Assembly. As in the age and religion contexts, the absence thus far of adequate legislation, the lack of any comprehensive mainstreaming initiatives and the general neglect of an equality perspective in respect of sexual orientation makes a positive duty of great potential use. Examples of the impact such a duty may have would include:

- a greater focus on homophobic bullying and abuse in education and other public sector activities
- an enhanced focus upon outreach to LGBT communities

- greater provision of specific services in health service delivery, geared towards the needs of the LGBT communities
- improved police liaison, and greater attention to policing practices and attitudes towards members of the LGBT communities
- a re-consideration of policy and practices towards same-sex partner employment benefits, adjustment to reflect a new sexual identity and other issues
- greater data collection on the impact of public sector delivery upon the LGBT communities
- a new focus on ensuring that employment practices do not result in the exclusion of members of the LGBT communities from particular areas of employment, training or promotion.

The absence of adequate procedural remedies for homophobic bullying, such as that highlighted in recent litigation ¹⁴⁵, would constitute a classic example of failure to comply with the requirements of a positive duty.

6.6 Gender

Gender is the equality ground which has seen the greatest degree of mainstreaming initiatives in the UK outside of race, but nevertheless the current government have also committed themselves to introducing a positive gender duty.¹⁴⁶ The fragmented nature of existing mainstreaming initiatives, and the extent to which political priorities have not backed up these initiatives with much substantive action, demonstrates clearly how mainstreaming without the backbone of positive duties is a limited tool. A positive duty in the gender context will require adequate consultation with both sexes in the design of service delivery, policy and employment practices, and the rigorous implementation of the mainstreaming initiatives, policy impact assessment requirements and monitoring that effective compliance with existing initiatives should entail.¹⁴⁷ The existence of various isolated islands of good practice should not blind us to the potential of a positive duty in the gender context. Among the many examples of the impact of such a duty are the following:

- the re-examination of existing health care policies and resource allocation, and in the treatment of patients
- greater awareness of gender issues in the design and delivery of social welfare support
- greater consultation and responsiveness to the perspectives of women in the provision of public transport facilities, in particular with respect to improved security, facility design and timetabling

- enhanced police responses and awareness to female victims of crime, including in particular sex offences, and also greater attention to gender perspectives in patrolling patterns, resource allocation, focus on domestic violence and other areas
- greater gender awareness in the design of crime policy by police, prosecutors and civil servants (in particular in the identification of areas of priority and sentencing); for example, while the Home Office's targets under their Public Service Agreement with the Treasury include a reduction in vehicle theft, there is no mention of violence against women in general, or domestic violence and rape specifically¹⁴⁸
- the provision of enhanced gender-sensitive support structures in education, including the encouragement of female students to study traditionally male-dominated subjects and continued challenging of sex stereotypes
- the introduction of appropriate monitoring and assessment practices in employment, including the introduction across the entire public sector of pay audits and remedial positive action designed to remedy under-representation; women who work full-time still earn 18 per cent less per hour than men, and if they work part-time that gap widens to 41 per cent¹⁴⁹
- greater consideration of employment policy in respect of part-time employees, time-off, flexible working, pension policy and paid paternal leave, given the impact of policy in these areas upon overall patterns of gender inequality
- greater identification of low-paid areas of work traditionally associated with women, enhanced consultation with members of these segments of the workforce, and action on improving pay and overall remuneration levels
- the inclusion of gender perspectives in the design of policy at central and local levels across the board.

In all cases, the duty would reinforce existing formal mainstreaming commitments that at present lack teeth. Public sector employment practices are a particular area where a gender duty could make a particular impact, but the scope of a gender positive duty would extend across the entire spectrum of public sector activity.

6.7 The impact of positive duties across the equality strands

It is apparent from the discussion of the potential impact of positive duties across the different strands that there is a pressing need for such duties to be applied across all the equality grounds. Many similar patterns of public sector institutional discrimination and neglect recur across the different strands, even if the specific forms this takes may vary. Positive duties, by requiring due

consideration to be given to equality concerns in employment policy, service delivery and policy design, can impact upon all these patterns of structural discrimination.

While not a panacea for each separate set of equality issues, positive duties are an invaluable tool for advancing the equality agenda and improving public service performance across the full range of equality grounds. There is no reason why they should be confined to race, or disability. In fact, as they are a statutory obligation, they can unify under a common umbrella all the different diversity initiatives that public authorities are currently undertaking. The central objective of such duties in each area would again be to change how public authorities perform their functions, by making equality a central goal of their day-to-day activities, and to prevent the side-lining of equality concerns.

In contrast, there exists real potential for existing “hierarchies of inequality” to be maintained and reinforced if certain grounds are excluded or subjected to limited duties. The announced establishment of a single equalities and human rights commission adds a new dimension to this problem. If duties exist for specific strands and not for others, this may ensure that the resources of such a combined commission will have to be largely directed towards assisting public authorities to comply with these duties, which could result in considerable internal discontent and inter-strand tension.¹⁵⁰

Conclusions – cross-strand equality duties for the public sector

- Equality duties, if extended throughout Britain across all the equality strands, have the definite potential to bring about greater equality and efficiency in service delivery, policy formation and employment across the public sector in respect of all six of the equality strands. The case for introducing such duties across these strands is overwhelming, not least because they can act as a focus point for the diversity of equality initiatives that currently public authorities are engaged in implementing.
- The objective of such duties would be to change how public authorities perform their functions by making equality a central goal of their day-to-day activities, and to prevent the side-lining of equality concerns. Duties aim to transform reactive approaches into proactive, integrated approaches, informed by the perspectives of disadvantaged groups. This can involve proportionate and relevant alterations in service delivery, employment practices, access policies, and policy formation in general for each strand.
- If duties are not introduced for particular equality grounds, this may create or add to existing “hierarchies of “inequality”.

Part 7

The design of an equality duties framework

This Part considers what should be the appropriate design for a set of equality duties applying across all the equality grounds to the entire public sector, and how these duties should interact to enhance their impact and reduce bureaucratic load.

7.1 Architecture

If such duties are to be introduced across the different strands, then issues of architecture – how these duties should be designed and how they should interlink – arise. In addressing these issues, certain considerations are very important. The implications for service providers and public authorities in general in extending the existing duties have to be considered, as well as what elements of the existing duties, in particular those of the positive race duty, should be retained or modified as part of this extension. Monitoring as practised under the race duty may, for example, be considered in certain circumstances to be inappropriate in the context of sexual orientation, and may give rise to objections if extended to religious affiliation. Great attention will have to be given to the question of how a duty to promote good relations would apply across the different grounds.

Avoiding bureaucratic load

The cumulative workload that the imposition of new duties across all the equality grounds needs similarly to be borne in mind in designing any new model. Imposing excessive bureaucratic load has to be a key consideration. The credibility of any new duties will be severely damaged if they are perceived as an extended exercise in form-filling.

Equality and diversity as guiding principles

In resolving these issues, certain key guiding principles can be identified. The recognition of a common principle of equality underpinning all of the equality grounds is very important. Any positive duty model should aim to reinforce the application of this principle in its design and operation.¹⁵¹ This is particularly important to ensure an adequate focus on overlapping forms of discrimination.¹⁵² Duties should encourage public authorities to take into account the full range and spectrum of UK society in the performance of their functions. The greater the emphasis on equality as a common good, the greater

will be the ability of public bodies to take difference and variety into account. The greater, therefore, in turn will be the benefits in the form of improving service delivery, both to historically disadvantaged groups, and to the public in general.¹⁵³ However, a central element of this common principle of equality is the recognition of diversity and the differences between the different grounds. This requires that the specific considerations relevant to each equality ground be factored into anti-discrimination initiatives.¹⁵⁴

7.2 A single general duty?

A model structured with reference to these twin goals of equality and diversity should therefore provide for a general focus on equality outcomes (see page 73). If a general equality duty was introduced, this would require a cross-strand approach. This approach would emphasise the diversity and inter-connectedness of the equality grounds: it can also focus attention on the common principle of equality that underlies them all.¹⁵⁵ A general duty can also ensure that differences in focus and treatment across the grounds are minimised, and encourage the cross-transfer of good practice across the different grounds. For example, a unified equality duty would encourage the use of existing good practice, such as training and pay audits, that may be being applied in the race field to be extended to the other equality grounds, and vice versa.

A single duty would also mean that much of the work that is currently duplicated across the different strands could be handled simultaneously across all strands, and thereby contain the bureaucratic burden and even reduce costs. Equally, however, some supplementary specific duties will have to be introduced to cover the specific, diverse requirements of each of the different strands, to ensure that equality is balanced with diversity

The alternative to this model is to provide for six different strand-specific duties. This would have the advantage of creating a formal duty for each equality strand. However, the disadvantage of this approach is that it may ensure duplication of work. It could also mean that six different duties with six different compliance frameworks will enhance an emphasis on procedure rather than on achieving outcomes.

A general duty framework supplemented with strand-specific duties appears therefore to be more suitable. Such a general duty will also avoid the current fragmentation of equality initiatives across the different grounds by providing a central point of focus, which can pull work across the different grounds within a common framework. The strand-specific duties can then ensure that progress is achieved across all the different grounds.

Overlapping grounds

A duty orientated towards a general concept of equality would also ensure that

consultation, monitoring and impact assessment would be expected to take into account “intersectional” forms of discrimination. The deficiencies in service delivery identified by recent research on the Muslim lesbian, bisexual and transgender community demonstrates vividly where current mechanisms are going wrong, with services being orientated either towards ethnic minorities as discrete units or to the LGBT community with consequent negative results for those who are members of both.¹⁵⁶ Similar concerns exist with black and ethnic minority women¹⁵⁷, disabled members of ethnic minority groups, women with particular disabilities and other areas of overlap. Proactive engagement with the needs of intersectional groups may only be achieved with the prodding of a positive equality duty designed to avoid a “silo” approach to equality issues. Overlapping forms of discrimination will remain a constant thorn without the introduction of a general duty, which will contribute to eliminating unhelpful pigeonholing of the different equality issues. Care needs to be taken in implementing cross-strand equality duties that individuals, groups and sub-groups are suitably demarcated, bearing in mind the importance of self-identity as well as patterns of cumulative disadvantage, and group demarcations are not set in stone.¹⁵⁸

7.3 Design and structure

The general duty

Serious consideration should therefore be given to introducing a general positive duty across the full range of equality grounds. Such a general duty would require the elimination of unlawful discrimination and the promotion of equality and possibly good relations (see below). A code of practice would be essential to clarify what is required by a general duty and to emphasise that complying with such a duty will require action to be taken across the range of equality grounds. The general duty should be imposed with a relatively light touch in terms of specific requirements, given its breadth and scope. It should therefore emphasise end product and enforcement, rather than specific methods. Code of practices could in turn be used to indicate best practices and minimum expectations.

The general duty should be framed in similar terms to the Northern Irish s. 75 duty, and applied to all listed public authorities. Supplementary requirements, like those contained in Schedule 9 of the Northern Ireland Act or the race duty, could also be imposed upon particular lists of authorities. The general duty should be couched in general terms, similar to the wording used by the “Hepple Report” in recommending a requirement to produce such general equality schemes.¹⁵⁹ More specific requirements, such as the race duty’s requirements for employment monitoring, should be left to the strand-specific supplementary duties.

There are some grounds for suggesting that any such general equality duty should require all public authorities to which it applies to prepare an equality

scheme, as the Northern Irish duty does.¹⁶⁰ This would require specified authorities to draw up schemes setting out their arrangements for monitoring, consultation and policy impact assessment requirements. The race duty in contrast only requires certain listed authorities to do so, and such a requirement may impose some burdens on small-sized public authorities. However, imposing an explicit requirement to produce an equality scheme on all authorities would have the advantage of ensuring that a definite set of arrangements is in place. The contents of the scheme could also be required to be produced in enforcement actions, and would serve as a basis to assess the adequacy of compliance with the general duty.

The strand-specific duties

This general duty would be supplemented with specific positive duties and codes of practice for each of the specific individual grounds as appropriate. This would ensure due recognition of the specific contexts relevant to each strand.¹⁶¹ Specific statutory monitoring requirements concerning matters such as employment and educational attainment would be appropriately introduced as strand-specific duties. These specific duties would resemble the duties imposed on educational establishments and public sector employers by the race duty.

A strand-specific disability duty could, for example, require public authorities to include in their general equality scheme specific provision for data monitoring, policy impact assessment and consultation initiatives that are particularly relevant to disabled persons. The strand-specific duties could also make provision for appropriate strand-specific consultation, and specific forms of outcome-directed practices (in particular for disability, where duties to make reasonable accommodation could be introduced as appropriate). The specific duties need not be identical for each equality ground: the content of these duties may vary considerably depending on which grounds are at issue. Monitoring of numbers in employment and education will be appropriate in gender, disability and race: religion and sexual orientation on the other hand give rise to more difficult issues, and may require different approaches.¹⁶²

These strand-specific duties would ensure an adequate focus on the needs of each strand within a common framework. It would also ensure that measures in respect of each strand would have to be clearly designed and implemented. The general duty should be seen as the basic framework of the duty, added to and fleshed out where appropriate by the strand-specific duties. Legislation should require the relevant minister to make provision for these strand-specific duties by statutory instruments, to ensure responsiveness and flexibility.

Retaining the separate race, devolved and Northern Irish duties

Retaining the current race equality duty in its existing form may be appropriate, at least in the short to medium term. Particular issues and expectations arise in this context, and gains already made may be lost if this duty is subsumed within

Model of proposed framework of public sector equality duties

General duty

Applies to all public authorities subject to the RRAA duty, including devolved authorities

- a) eliminate unlawful discrimination
- b) promote equality of opportunity between/on the grounds of... across all the equality grounds
- c) promote community relations?

Sexual orientation specific duties

e.g. consultation requirements with LGBT groups

Religious belief specific duties

e.g. due regard to religious sensitivities in health service delivery assessment

Age specific duties

e.g. monitoring numbers dismissed

Disability specific duties

e.g. due regard to access provision

Gender specific duties

e.g. employment monitoring

Supplemented by

Duty to prepare an equality scheme

Applies to some/all of the authorities subject to the RRAA duty

Duty to prepare an equality scheme and give due consideration to the arrangements set out therein. The scheme is to include arrangements for:

- a) monitoring
- b) policy impact assessment
- c) consultation
- d) policy adjustment if proportionate

Race relations duty

Retain in existing form in transition period, then merge into the new framework if/when appropriate

Northern Ireland S. 75 duty

Retain the NI duty as a separate duty, given different legislative base in Northern Ireland, different institutional arrangements and the need to cover 'political belief'

Devolution duty framework

Retain, to reflect devolution framework

the general duty too soon. Rather, existing racial equality schemes could be upgraded to full equality schemes, and a gradual merging of the duties in practice would be appropriate. However, it would be appropriate for the existing arrangements for Wales, Scotland and the GLA to be retained, to allow appropriate leeway for the devolution arrangements and the right of devolved authorities to set their own policies. If devolved authorities are subject to both devolved and the new general duties, then they should use a common scheme. Different considerations also apply in respect of the Northern Irish duty. Given the existence of separate equality legislation and institutional arrangements in Northern Ireland, and the complexity of the s. 75 duty's link with the Good Friday Agreement, it would be appropriate to keep Northern Irish arrangements separate from those made for the rest of the UK.

This paper therefore proposes:

- the introduction of a general cross-strand equality duty
- a requirement for listed authorities to prepare an equality scheme
- supplementary strand-specific duties to flesh out specific requirements in respect of each strand
- an eventual merging of the race duty within this overall framework, with due caution given to ensuring that the gains brought about by the separate race duty are not wasted. The Northern Irish and other devolution duties should be kept separate.

On not re-inventing the wheel: the advantages of a cross-strand general approach to compliance

The general duty should act where appropriate as a focus for equality work. This should ensure that compliance effort is directed, as far as possible, towards satisfying the general duty, to make sure that effort, attention and resources are not fractured across the different strand-specific duties. The Report of the GLA Equalities Policy Commission in November 2000 recommended a common approach to measuring equality outcomes across the equality grounds and emphasised the need to build on and incorporate existing practice in order to “avoid reinventing the wheel”.¹⁶³ This is a sound approach. As Mirza and Sheridan have recently argued, specific group-orientated monitoring and targeting may negatively impact upon those who fall into overlapping or distinctive categories that do not neatly fall within specific equality grounds: “black and ethnic minority women slip through the cracks of a crude equalities accounting system which... focuses on either ethnic minorities or women at any one time, but rarely both at the same time”.¹⁶⁴ An excessive strand-specific focus at the expense of the thrust of the general duty can lock responses to discrimination into silo patterns that may prove counter-productive.

This does not mean that progress in respect of each of the individual equality grounds would not be required to be demonstrated. Compliance with the general duty should require the demonstration that appropriate steps have been taken to ensure progress towards outcomes across all the different equality grounds, as opposed to just progress towards an ill-defined vague concept of “equality”.

A pay audit, for example, may be introduced to implement the general duty, and be based upon a common model, while the separate lens of each equality ground will be used to identify any potential inequalities within the overall framework of the audit. Similarly, general equality training may be appropriate for all staff in particular authorities, but supplementary strand-specific extra training might also be given as appropriate as part of effectively fulfilling the general duty.

Wording of the duties

Some complex issues arise when considering the wording of any new duties. The general duty should, as with the existing duties, provide for the elimination of unlawful discrimination. This will be of limited impact, given the limitations of existing anti-discrimination legislation in its scope and its application to the public sector.¹⁶⁵ This makes it all the more important to ensure a strong commitment to promoting equality of opportunity in how the general duty is worded.

Various different wording is used to provide for the promotion of equality. The Welsh duty refers only to equality of opportunity “for all people”: the GLA duty ensures greater focus on the different grounds by requiring the promotion of equality “for all persons irrespective of their race, sex, disability, age, sexual orientation and religion”. The “Hepple Report” has criticised this wording, preferring that of the Northern Irish duty, which refers to the promotion of equality “between a) persons of different religious belief... racial group, age, marital status and sexual orientation b) between men and women generally c) between persons with a disability and persons without...”. In the view of the Report’s authors, this wording is more satisfactory as the duty to promote equality between different groups is more specific and easier to assess and measure than a duty to promote equality “for all persons”.¹⁶⁶ The Northern Irish approach should therefore be adopted, with appropriate re-modelling of some of the phraseology. The only possible disadvantage with this wording is that it may focus attention only on closing identifiable differences between groups, rather than ensuring substantive equality for all: the accompanying codes of practice need to make the substantive equality dimension of the duty clear.

The “Hepple Report” also drew attention to the weaker obligation in the GLA duty to have “regard” to promoting equality, rather than the stronger version in the Welsh, Northern Irish and race duty to have “due regard”. The Report suggested that “due regard” meant that public authorities had to give

proportionate weight to equality rather than merely take it into account, and that the use of “regard” alone would weaken this requirement.¹⁶⁷ This issue also arose with respect to Bridget Prentice MP’s private members bill providing for a positive disability duty. The Bill provides for the amendment of the DDA to include a positive duty on authorities specified by the Secretary of State who “must have regard to the following principles – (a) unlawful discrimination against and unlawful harassment of disabled persons must be eliminated (b) equalisation of opportunity for disabled persons is to be pursued.”

The use of “regard” here is again problematic. “Due regard” implies that the necessary degree of proportionate attention to the equality issues must be taken into account: just referring to “regard” may mean that a public authority may only have to take disability issues into account, as distinct from treating these issues with due concern. Even if this is not the case, judges, public authorities and civil servants will inevitably note the difference between the race and Northern Irish duties and any duty that merely refers to “regard”, and assume that “due regard” was not inserted to lessen the strength of that other duty. This may create a hierarchy of grounds.

“Equality of opportunity” as a phrase is however not without its drawbacks, with its connotations of levelling starting conditions rather than achieving substantive equality. It also fits the employment context better than it does service delivery. What, for example, does the provision of “equality of opportunity” mean in the context of health care provision, where promoting substantive equality may actually require providing certain groups with enhanced services? However, there are considerable advantages in retaining the current wording. Its interpretation and application in the race context has been fleshed out by the specific race duties and the CRE code of practice and is now generally understood by policy-makers. “Equality of opportunity” in the context of statutory duties may therefore have graduated to the status of a term of art. Any temptation to dilute this wording to a phrase such as “equalisation of opportunity” should be resisted. In the context of a positive duty, “pursuing equalisation of opportunity” is considerably weaker than promoting equality of opportunity, and arguably removes any requirement to work towards outcomes. Positive duties require proportionate action, not absolute delivery of outcomes irrespective of other considerations, so need not be reduced in scope. Any watering down of the commitment to substantive equality of opportunity will be damaging and unnecessary.¹⁶⁸

7.4 Good relations

Interesting issues surround whether a general duty should incorporate a third leg in the form of a duty to promote “good relations” or a similar concept. A subsequent Equality and Diversity Forum paper will examine this issue in greater detail, complementing the discussion in this paper. A few key issues will, however, be set out here, for the sake of completeness.

Existing duties to promote good relations

The race duty includes an obligation to promote good relations between persons of different ethnic, racial and national groups. A similar duty had been imposed as part of the s. 71 local government duty under the Race Relations Act. This element of the duty has required public authorities subject to the duty to give consideration to how they could improve race relations. In addition, the CRE, unlike the other statutory equality bodies, has the promotion of good relations as one of its core functions, allowing it amongst other initiatives to develop with success the network of Racial Equality Councils (RECs).¹⁶⁹ The s. 75 Northern Irish duty also has a good relations element, but this does not extend across all the equality grounds to which the duty applies. It only requires public authorities to promote good relations between persons of different racial origin, religious and political belief. The GLA duty to promote good relations applies only to race, religion and sexual orientation.

The justification for not extending the GLA and Northern Irish good relations duties across all the equality grounds is not clear, but appears to be based on the perception that the approach to “good relations” that had been developed in the race context (and in the context of religious and political belief in Northern Ireland) is not transferable to the context of gender, disability or age. These grounds are apparently not seen as giving rise to inter-group tensions. The inclusion of sexual orientation in the GLA duty on the other hand was apparently due to a belief that the race relations model of promoting good relations was transferable to the sexual orientation context.

What is noticeable, however, is the lack of clear analysis as to what the concept of “good relations” entails, and what type of action does it require outside the race context. There also appears to be a lack of focus on the social exclusion, hatred and violence that persons in particular age categories, women and disabled persons suffer. While this may not take the same form as race violence, issues of community relations and the promotion of understanding on the part of public authorities would seem to arise across the equality strands. This raises the question of whether the restriction of the scope of the good relations duty in the GLA and s. 75 duties is justified, and whether this concept can be extended and developed as part of a general equality duty.

Extending good relations

The duty to promote good relations has been very useful in requiring public authorities subject to the race and the s. 75 duties to implement strategies to bring community groups together. Many of the new initiatives being gradually introduced by local authorities as part of the community cohesion initiative can also be linked to the good relations duty. This demonstrates its potential usefulness in improving public sector performance in general. However, the concept of promoting good race relations can be difficult to define, and tangible

outcomes are very difficult to identify. Both the progress reports prepared in respect of the s. 75 duty and the race duty indicate that public authorities consider that the good relations duty lacks definite content. In Northern Ireland, the lack of clarity as to the “good relations” requirement has resulted in “the build-up of an ad hoc structure with a poorly defined core and little systematic commitment from government, political leadership or business.”¹⁷⁰

The good relations duty therefore appears to be uncertain in ambit. It does, however, appear also to have a valuable role to play as a tool for enabling public authorities to take progressive steps to improve community relations. Further research is necessary to identify ways in which this duty could generate measurable outcomes, and there is a need to disseminate best practice and co-ordinate approaches where the duty applies. However, the utility of the duty in the race, religion and sexual orientation field appears to be well established. Therefore, the strand-specific duties for these grounds should include this as part of the duty. But should similar provisions be introduced in the context of the sex, disability and age specific duties? Should a duty to promote good relations or something similar be also included in the general duty?

There is a danger that imposing a duty to promote good relations in respect of these grounds as part of a general duty will involve subjecting authorities to a non-applicable duty devoid of substantive content. However, public authorities should presumably have a general role in promoting a culture of tolerance, diversity and equality, and in combating structural patterns of ignorance and victimisation that can impact severely upon vulnerable groups in society.

It may be possible to frame a general requirement on authorities to take appropriate steps to counter prejudice and victimisation in the community at large.¹⁷¹ While the phrase “good relations” itself is a little awkward as a tool to encapsulate this duty, an alternative wording may be found such as a duty to promote “good community relations”. This could encompass initiatives to reduce domestic violence, abuse of the elderly or disabled, and the victimisation of younger persons. This duty could also ensure a link between the equality duty and groups not traditionally involved or benefiting from equality legislation. This would tie in well with the current government’s community cohesion initiative, and provide a platform for community relations initiatives. Specific duties to promote good relations or “community relations” as appropriate in respect of the different strands could also be included, which would retain the existing race relations duty.

Compliance with this general duty, if introduced, could require the use of very different approaches than those adopted for race. Promoting understanding and awareness of disability issues, for example, will mean emphasising education, understanding and adjustment in a very different way from the initiatives utilised in the race/religion context. Certain problems could arise in respect of the different strands. There may be circumstances where a public body, by reason of

its functions, might have little or no role in promoting understanding and/or good relations. A hospital may not have any role in this respect vis-à-vis disability, but a school would: so a specific duty to promote understanding might be appropriate in the disability context for educational institutions.

Therefore, specific duties may be imposed upon particular authorities where appropriate for particular strands, while the general duty could include a duty to promote good “community relations”. As part of implementing this duty, the existing race equality councils could have their remit expanded to include religious groups. Suitable bodies might be established to provide advice, liaison capacity and a point of contact in respect of the other grounds, to disseminate good practice. It is beyond the scope of this paper to explore how this could work in detail, or to explore ways in which the ad hoc and open-ended nature of a duty to promote good relations or community relations might be fleshed out. What is clear is that considerable thought needs to be given to the possibilities that may exist in this context.¹⁷²

7.5 Scope of application

The range of application of any general duty with its accompanying supplemental duties is an important issue, especially given the limited scope of the proposed new anti-discrimination regulations in respect of age, sexual orientation and religion. Ensuring that positive duties apply to all significant areas of public authority activity would appear to be an imperative: confining the scope of such duties to specific areas such as employment would considerably undermine their potential impact.

Service delivery and policy formation are exempt from legislative control for the three “new” grounds, even though they are areas of considerable concern. Subjecting public bodies to a general duty that covers these grounds would ensure that the needs and perspectives of disadvantaged groups under these strands would be taken into account in policy and service delivery. The same considerations apply in the disability field, given the limited scope of the DDA and the extent to which discrimination and failure to make reasonable adjustment can be justified. In these areas, the obligation to eliminate unlawful discrimination would obviously be restricted in effect, but the positive obligation to promote equality of opportunity would be the main active “arm” of the duty. Legally, this should not give rise to fears that this would extend anti-discrimination law by the back-door: discriminatory practices could still be legally secure from challenge, if a public authority could show that it had paid “due regard” to whether eliminating these practices was proportionate and practical under the duty.

As with the race and Northern Irish duty, the public authorities to which the general duty applies should be explicitly listed, as should those to whom the various supplemental duties apply. This prevents the need for costly litigation to

establish who constitutes a public authority.¹⁷³ The general duty should apply at a minimum to those authorities currently subject to the race duty. A provision should also be included in the legislation similar to that in the race duty that public authorities remain responsible for the performance of their obligations under the general and supplementary duties, even if they have “contracted-out” operational performance of relevant functions to private sector organisations. This will ensure that public authorities will be expected to make the appropriate arrangements by contractual arrangements to ensure that compliance with the duty will be guaranteed even if they are not actually performing the relevant functions themselves.

7.6 Process v outcomes

In implementing such new positive duties, lessons learnt from the existing duties, in particular the race duty, should be applied. As discussed previously, a perennial concern with positive duties is that compliance with duties may just take the form of “process compliance”, rather than focusing on achieving effective outcomes. Process is important to ensure participation of disadvantaged groups, but procedure is not enough in itself. A combined equality duty should not just become a mechanism that results in multiple forms of consultation and monitoring, but which does not produce any real change. The emphasis in framing the duty and guiding public authorities as to how to comply with it should be placed on securing effective outcomes that bring about real and meaningful equal treatment. Clear and committed central leadership and co-ordination, the adoption of “best practice” models, pressure by NGOs and disability groups, extensive training and the efficient exchange of information are all necessary to make sure that this proposed set of equality duties do not fall into the “process” trap.¹⁷⁴ Effective consultation and enforcement will have to again as discussed above be part and parcel of this.

7.7 Consultation

To ensure genuine participation by disadvantaged groups in the implementation of equality duties, Nott’s “democratic-participative” model, that emphasises consultation with civic and community groups, as well as individuals, should be adopted as the framework for consultation.¹⁷⁵ However, in both Northern Ireland and the rest of the UK, the ability of civic and community groups to engage in consultative processes is very mixed. In the context of the race duty, Muslim and Afro-Caribbean groups in particular have argued that inadequate resources and support make it very difficult for representative groups within their communities to participate. The lack of financial and logistical support for interested groups has been cited as a problem with the Northern Ireland duty.¹⁷⁶ Similar concerns are inevitable in the disability, religion, sexual orientation and age contexts, especially in respect of groups or individuals that may lack a link with representative organisations.

If active support for participation in the duty processes is absent, then there is a real danger that “consultation” will be limited and ineffective in incorporating the full diversity of equality perspectives. As seen above, the Welsh Assembly has established and funded consultative networks for race, gender, disabled and LGBT groups: the same commitment to proactive consultation procedures needs to be seen as an integral part of complying with the duty. Authorities also need to be careful to recognise that ethnic or religious groups in particular are not monolithic blocks, and to avoid limiting their consultation procedures to particular representative organisations and individuals that may not represent the totality of views within particular groups.¹⁷⁷ The same equally applies across all disadvantaged groups covered by the equality legislation: consultation should not be confined to particular NGOs or organisations.

Active effort needs to be put into developing targeted schemes for particular consultative exercises, which have real outreach to potentially affected groups. The results of consultation should also be genuinely incorporated into policy assessment. It is of course difficult for any duty to specify the extent of consideration to be given to the results of a consultation exercise. As a result, a set of cross-strand equality duties may not be able to implement Nott’s model in its entirety. However, it is imperative that the consultative aspect of the duty is not neglected. Equally, it is also important that consultation is not seen as the be-all and end-all of the exercise, leading once again to an excessive concentration upon procedure: nor should the duty be seen solely as a vehicle for implementing group perspectives into policy, but as a mechanism for balancing different perspectives within a strong statutory commitment to achieving substantive equality.

7.8 Enforcement

The Welsh, London and Scottish duties have generated real and identifiable change. However, as noted above, no enforcement mechanism aside from auditing assessment and judicial review is provided for in respect of the Welsh, Scottish and GLA duties, in contrast to the stronger race equality and Northern Irish duties, where the CRE and Northern Irish Equality Commission (NIEC) have enforcement roles where non-compliance with the duties are alleged. The absence of enforcement mechanisms makes progress very dependant on political and organisational good-will. The “Hepple Report”, in disagreeing with the Better Regulation Task Force¹⁷⁸ that a statutory enforcement framework was not needed, cited the experience of the Northern Irish “PAFT” and s. 71 of the Race Relations Act experiences and concluded that an enforcement framework similar to that in the s. 75 duty was necessary.¹⁷⁹ A strong enforcement mechanism is indeed necessary, to prevent positive duties becoming the next useful equality policy to flounder on the rocks of lack of implementation. It is particularly necessary to ensure that adherence to procedure also results in good outcomes, and that sufficiently serious steps are taken to alter policies and practices to

eliminate inequalities that are identified via monitoring and consultation.

However, in developing an adequate enforcement framework for equality duties, it should be noted that the existing enforcement mechanisms, even where they exist, are very limited. Admittedly, the nature of positive duties does not lend themselves easily to individual enforcement, due to the emphasis on relevance and proportionality in applying the duties. If a council, for example, identifies inadequacies in service delivery to particular minorities, but decides that remedying the imbalance will cost too much, or conflicts with other priorities, it will be rare that this decision will be capable of being treated as being obviously wrong. It is relatively easy to enforce the procedural obligations imposed by a positive duty, such as an obligation to produce an equality scheme. It is much more difficult to challenge a failure to achieve a particular outcome. Nevertheless, it is important that enforcement mechanisms do exist both to ensure procedural and substantive compliance, as the "Hepple Report" emphasised.

Individual and group enforcement action

Ideally, individuals and interest groups such as trade unions and community groups should be able to bring enforcement actions. However, individuals and groups under the race and s. 75 duties at present only have the option of referring non-compliance to the CRE ¹⁸⁰ or Northern Irish Equality Commission ¹⁸¹, or of seeking judicial review, which the Commissions can at present also seek.¹⁸² Judicial review, while potentially an invaluable enforcement tool, is both expensive and risky, as the courts will give a considerable degree of leeway to public authorities in balancing different priorities in this context: only an authority that acted in a clearly unreasonable manner in failing to give "due regard" to the equality duty would be vulnerable to review.¹⁸³ Judicial review will only play a role in ensuring that appropriate weight is given to the positive duty if pressure groups or the Equality Commissions are able to deploy the necessary resources in suitable cases to ensure that good judicial precedent is created.

This limitation could be circumvented if a system of specialist tribunals or independent review bodies were established to review and assess the application of the duty and to hear complaints from individuals. Internal review boards could, for example, be established within local authorities or central government departments. Alternatively, an external review mechanism similar to an ombudsman system could be established, with a specific focus on the implementation of the equality duties. Such review bodies could apply a less restricted test than that used in judicial review, or at the least they should be more accessible than the judicial review mechanism in terms of costs, time-limits and exclusionary rules. If appropriate, their findings could be made binding: if not, as where democratically-elected local councillors made the initial decision, then their opinion should only be overridden by a positive decision supported by

reasons. At present, no such bodies exist: serious consideration should be given to their establishment, but this at present may be seen as a dangerously radical step. (However, complaints of non-compliance can be made at present to the Parliamentary Commissioner for Administration, and this route should be utilised where other remedies are lacking.)

Evidence of compliance with the general duty could in addition be explicitly made capable of being introduced in discrimination cases brought by individuals, with courts and tribunals given the power to make appropriate inferences from this evidence. This could substantially reinforce the impact of the duty by linking compliance with public authorities' vulnerability to suit under anti-discrimination law. At the least, it would concentrate minds internally on compliance with the duty, and provide some external legal incentive to implement the duty.

Auditing mechanisms

Enforcement need not only be the concern of individuals and interest groups. Auditing mechanisms for reviewing compliance with equality duties are being developed, and have considerable potential for acting as the main motor for public authority reform. At present, however, auditing practice in the equality context remains geared towards assessing compliance with procedural goals and self-imposed public authority targets, and remains underdeveloped. The CRE is working with the Audit Commission and other inspectorates to develop more sophisticated methods of auditing outcomes in the context of the race duty.¹⁸⁴ The "Hepple Report" recommended the design of a "basket of indicators" which could show progress towards fair participation and fair access across all the equality grounds over a specific time period.¹⁸⁵ These indicators could include the monitoring of employment, service delivery and studies of the comparative perception of public services. The Report suggested that the use of these indicators to measure progress should be built into the general performance management frameworks and audited by the general inspection and audit bodies.¹⁸⁶

Equality Commission powers

While reinforcing and extending the role of the inspectorates in this manner is important, giving the equality commissions or the proposed equalities and human rights commission a strong enforcement role would appear to be crucial. Audit mechanisms may lack the "bite" and transparency of an enforcement system involving the Equality Commission(s), and may also find it difficult to bring enough expertise and commitment to equality issues. Having a strong enforcement role will also enable the Commission(s) to have the authority and status to work closely with authorities in giving effect to the duty, which otherwise they may lack.

Any such commission role in enforcing the duty should be structured in a manner

broadly similar to that provided for under the race duty. The Commission(s) should therefore be able to issue non-compliance notices if it considers that an authority is not complying with the duties, as the CRE can at present¹⁸⁷, and ultimately have the ability to seek court orders from county courts or sheriffs' courts requiring compliance.¹⁸⁸ The Commission(s) should also, as with the CRE at present, have the power to require information from authorities as to what they are doing to comply with the duty framework before a decision is taken to issue a non-compliance notice, with this power to gather evidence being enforceable by court order. Giving this set of powers to the Commission(s) will increase the ability to ensure that non-compliance is challenged. Adequate resources will have however to be provided to ensure that they can carry out this role.

However, the powers of any such Commission(s) also need to go beyond the powers of the existing Commissions at present. The CRE currently can only issue non-compliance notices where the specific duties imposed by the race duty upon public authorities are not complied with.¹⁸⁹ It can therefore apparently bring a compliance action for failure by educational authorities to draw up or give effect to race equality policies or a similar failure to draw up or to implement the specific employment duties.¹⁹⁰ It can also do the same for a failure to produce an adequate race equality scheme where required, although the wording of the duty to produce such a scheme does not appear to allow the CRE to challenge a failure to implement the scheme.¹⁹¹ However, the CRE cannot enforce a failure to implement the general duty, except through judicial review or through its power of formal investigation, which are both very limited mechanisms.¹⁹² The Commission(s) should therefore be able to trigger the enforcement mechanism for alleged non-compliance with the requirements of both the general duty and the strand-specific duties and this should be not confined to ensuring process compliance. This needs to be made explicit in the legislation that will be required to introduce the duty.

Similarly, the Commission(s) needs to be able to bring enforcement action in response to claims by individuals of failure to comply with the duties, as can be done in Northern Ireland. (This power is not limited to non-compliance with procedural requirements.) However, unlike the case with the s. 75 duty, the legislation should also make it explicit that the enforcement mechanism can be triggered for both a general failure to comply with the duty and for individual acts or policies that may be in breach of the duty. It should also make it clear that the Commission(s) should be able to act on its own volition, without having to wait for an individual complaint. S. 75 also provides that all equality schemes have to be initially approved by the NIEC¹⁹³: this is a power that would appear to be unworkable in the British context, given the amount and size of the public authorities involved.

This extension of enforcement powers proposed here for any future duties need not result in a confrontational approach. The co-operative approach taken by the CRE and NIEC to the implementation of the current duties appears to be effective

thus far: using the enforcement mechanisms should be retained as a last resort, after advice, conciliation and “naming and shaming” have proved unsuccessful. However, 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.

Conclusions – the design of an equality duties framework

- The imposition of a general duty to promote equality on public authorities, backed by supplementary strand-specific duties, would appear to be the best model for designing an effective scheme of public sector duties. This would be based upon the recognition of a common principle of equality underpinning all of the equality grounds, as well as the need to ensure that the specific considerations relevant to each equality ground be factored into anti-discrimination initiatives.
- The scope of the general and specific duties should extend to employment, service delivery and policy formation across all the different equality strands, as this will mean that the duties will apply where they are potentially of most use. An emphasis on outcomes must be central to any such scheme, as well as adequate consultation. Duties should be appropriately worded, and the general duty should be the main focus of compliance.
- 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 that are failing to fulfil the duty. This must include the ability to make a complaint without having to embark upon the torturous route of judicial review. Without such effective enforcement measures, the impact of the duties may be limited.
- Complex considerations apply in designing a duty to promote good relations. Forthcoming research will clarify these complexities, but there are arguments to support the imposition of specific “good relations” duties upon particular authorities where appropriate for particular strands, while the general equality duty could include a duty to promote good “community relations” or an equivalent phrase.
- The existing race duty should gradually be merged within this broader set of duties. The Northern Irish and devolved authority duties should however be kept separate, and extended if necessary by the devolved bodies themselves.

Part 8

Positive duties and the private sector

This Part returns to consider the potential use of positive duties in the private sector context, and argues for the introduction of duties to take specific steps to ensure equality of opportunity in employment and in other areas, with an emphasis on minimising any regulatory burden.

8.1 Positive duties and the private sector

The potential of positive duties is by no means confined to the public sector. Positive duties can also be applied to the private sector, in the form of legislative duties requiring proactive action on the part of private employers to eliminate discrimination. These duties have similar potential for generating change across all the equality grounds as do public sector duties, in particular by facilitating the identification of obstacles to equality of opportunity in promotion, recruitment, pay and training and the taking of appropriate action to remove these obstacles.

Different considerations do apply in designing positive duties for the private sector in comparison to the public sector. It is difficult to impose consultation requirements on the private sector, as many smaller-sized businesses will not have sufficient resources or access to consultative forums. Any positive duties will also usually focus primarily upon employment. It is also difficult to require many private service providers to promote equality in how they deliver services to particular groups (unless providing those services for a public authority – see below). Once employers comply with the requirements of anti-discrimination legislation by the taking of appropriate steps to avoid direct or indirect discrimination in the provision of services, framing an enforceable requirement to promote equality in their day-to-day business poses considerable and potentially insurmountable problems. Can a bank be required for example to provide services to ethnic minority communities where they lack banking facilities? This would be highly intrusive regulation, and there is little or no comparative experience of such an approach being taken in capitalistic societies. Private bodies cannot be expected to shoulder all the burdens of public bodies.

Certain types of positive duty may be imposed in respect of access to services. The Disability Discrimination Act makes provision for a type of positive duty, requiring as it does that service providers make reasonable accommodation for disabled persons, and the Canadian legislation extends this requirement across all the equality grounds. In Norway and Sweden, general positive duties to eliminate discrimination and promote equality are imposed on all private sector bodies.¹⁹⁴ Large companies may be able to adopt voluntary practices: the CRE has recently called for FTSE 100 companies to voluntarily adopt the race equality duty

both in terms of their employment policies and service delivery.¹⁹⁵ In the main, however, positive duties where applied to the private sector concern employment practices, as any requirements in respect of service delivery will be largely rhetorical and unenforceable. Employment duties have, in contrast, been introduced with considerable success and a relatively light regulatory burden in North America, Northern Ireland, Europe and Australia, and the Norwegian and Swedish duties are in actuality concerned with a similar approach.

Such duties usually require employers of a particular size to monitor the composition of their workforce and pay levels, to identify patterns of unequal treatment or practices which could cause such treatment, and to take proactive measures where appropriate and necessary to remove these identified obstacles to equality. These obligations are very similar in nature to those imposed upon public sector bodies in respect of employment. They are also no different in principle than legislative prohibitions on workplace discrimination, except that such duties require some limited degree of positive action rather than simply passive compliance. By imposing positive requirements, these private sector duties circumvent the need to rely upon individual ad hoc enforcement and remedies. They are designed to be proactive, simple to implement, anticipatory and based upon the principle of ensuring substantive equality.

Such duties should not be seen as solely involving the imposition of a new regulatory burden. They mirror precisely in nature, form and content what is generally accepted to be best equal opportunities human resources practice as already developed across the private sector in North America and by bodies such as the Employer's Forum on Disability and the other employer's organisations in the UK (discussed above). Just as public sector duties impose a legal requirement to implement mainstreaming best practice, which public sector bodies are supposed to undertake in any case, so private sector positive duties impose a legislative requirement to implement what is accepted to be corporate best practice. They are not an alien carry-over from the public sector: in actuality, they arise out of private sector initiatives arising out of the recognition of the business case for diversity. In many cases, they permit employers to devise their own compliance steps, subject to meeting minimum standards.

Positive private sector duties require private sector employers to implement policies that are being implemented on a daily basis by many human resources departments in any case. They therefore level the playing field, by providing for a common level of equality practice that prevents firms who choose not to implement corporate best practice from gaining any short-term business advantage from doing so. They also impose a set, fixed standard of conduct, which if implemented properly will ensure that private employers will be meeting their obligations under anti-discrimination law and reduce the need to endlessly shift legal and personnel policies in response to new employment tribunal decisions.

Many of the practices required by positive duties, such as the introduction of transparent recruitment procedures, are in any case now necessary to satisfy the indirect discrimination provisions of equality legislation. Positive duties also permit employers to engage in recruitment drives aimed at diversifying their workforce, such as those employed by many City of London investment banks, which at present rest upon very shaky legal foundations.¹⁹⁶ Positive duties, if appropriately designed, link well with private self-interest, business efficiency and good human resources practice. As with public sector duties, bureaucratic load and excessive cost imposition need to be avoided to ensure the credibility of the imposition of any positive duties in this area.

8.2 Voluntarism v “enforced self-reliance”

Given the link between positive duties and the equal opportunities policies adopted by many private sector employers, why is there a need to make such duties compulsory via legal regulation? As discussed above in Part III, the adoption of diversity best practice is frequently patchy, often at the mercy of varying degrees of internal managerial and shareholder interest and lacks the backing of strong incentives to retain sufficient focus on sustaining it in the absence of backing by individual senior executives. As discussed, the merits of the “business case for diversity” are well established,¹⁹⁷ but lack the inducement of immediate benefits to compensate for these problems of maintaining a strong and sustainable focus on diversity policies. Good intentions are not translating into results.

The “Hepple Report” strongly argued that “voluntarism” has consistently failed to deliver large-scale and widespread results in the private sector. It suggested that voluntary approaches may result in the spread of best practice in some organisations but will have little or not impact where economic or social factors ensure that particular organisations are resistant to change.¹⁹⁸ The Report identified considerable scepticism among employers as to the utility of purely voluntary measures, as demonstrated by the failure of the code of practice on age discrimination. It suggested that voluntary initiatives will only be effective if reinforced by the backing of “enforced self-regulation”, i.e. by means of the statutory enforcement of proactive duties where private sector organisations have failed to take appropriate voluntary steps themselves.¹⁹⁹ It therefore recommends the introduction of a set of positive duties based upon this enforced self-reliance approach, where the duties will apply in the absence of an adequate internal set of policies and practices.

The approach recommended by Hepple is convincing, having the advantage of giving private firms a degree of leeway while providing for a basic standard of compulsory compliance and enforcement. It also makes use of latest regulatory theory by encouraging private methods of self-regulation (with statutory regulation as reinforcement) and linking the promotion of equality with the self-interest of employers.²⁰⁰

This approach also links with the analytical framework proposed by Ely and Thomas, who suggest that three different perspectives exist on the importance of achieving diversity in private sector workforces: "access-and-legitimacy", which emphasises achieving workplace diversity to reflect increasingly diverse and multicultural markets and customers; "integration-and-learning", which recognises the value of the new skills and knowledge made available as a result of workplace diversity; and "discrimination-and-fairness", which sees achieving equality as a moral imperative.²⁰¹ Jain, Sloane and Horwitz have argued that all three of these perspectives have to be incorporated into a common policy framework to achieve greater equality in employment. Legal regulation, a product of the "discrimination-and-fairness" perspective, needs to be supplemented with encouragement of the voluntary adoption of the other two perspectives: "the law may achieve compliance but it cannot guarantee leadership, motivation and commitment... it is for this reason that all three approaches are necessary for achieving sustainable employment equity."²⁰² "Enforced self-reliance" achieves this by providing the space for private sector employers to adopt their own diversity initiatives, while imposing a minimum set of enforceable standards.

8.3 Models of private sector positive duties

Different comparative examples of private sector duties exist, that can provide lessons in implementing the "enforced self-reliance" approach adopted by Hepple. In Northern Ireland, the Fair Employment Act 1989 imposes a positive duty on employers with ten employees or more to take measures to ensure a fair proportion of Catholics and Protestants in their workforce.²⁰³ The duty has been extended and modified by the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO). Employers are required to monitor annually the composition and pay scales of their workforce, and every three years to review their recruitment, promotion and training practices. If patterns of discriminatory treatment are identified in the monitoring process, employers after consultation with the Equality Commission are required to take appropriate positive action measures. These can include the setting of goals and timetables, implementing equal opportunities policies, reviewing employment policies, practices and procedures, and taking steps to attract applicants from the under-represented community.

Enforcement of this duty is ensured by the requirement that employers "file" their monitoring returns and equality plans with the Equality Commission for Northern Ireland for approval, which can seek court orders to bring recalcitrant employers into line. The Commission can also launch investigations into employment composition and practices and this "Article 55 review" continues to be the key mechanism to promote equality in this area.²⁰⁴ The Commission can also enter into enforceable affirmative action agreements with employers. At the end of March 2001, the Equality Commission had agreed 301 affirmative action

agreements with employers, 72 of which were legally enforceable. It also carried out formal reviews with 31 employers implementing such agreements during the year 2000–2001, and reported that “the majority of the concerns had made good faith efforts to implement the programme and that there were some encouraging improvements in workforce composition”.²⁰⁵ Non-compliance with the provisions of the duty can be penalised primarily by the denial of government grants and exclusion from state tendering processes, a serious penalty given the size of the public sector in Northern Ireland.²⁰⁶

There is a general perception that the Northern Irish duties have proved in the main largely successful, which is backed by statistical evidence.²⁰⁷ The House of Commons Northern Ireland Affairs Committee reported in 1999 that “the extent to which employers have complied with the regulatory requirements of the legislation appears to be impressive”²⁰⁸, a conclusion backed by the findings of the Independent Review.²⁰⁹ The FETO duty is an example of “enforced self-reliance”, with employers’ reviews backed by the investigatory powers of the Commission.

Similar duties have been introduced in Canada and Australia at federal and state level, with more mixed results. Particular reference can be made to the Canadian federal Employment Equity Act 1986, revised and extended in late 1995. The Act extends to certain private employers engaged in federal commerce in particular financial and industrial sectors (and therefore of relatively large size), as well as to federal government departments with 100 employees or more. It requires employers to conduct annual monitoring of their workforce, and to take positive action to remedy identified inequalities in the treatment of women and visible minorities as appropriate given the turnover, size, workforce composition and recruitment pools of the company. Monitoring returns are filed with the relevant regulatory body, including information on workforce consultation on implementing the duty with failure to file subject to stiff financial penalties. The Canadian Human Rights Commission can conduct audits into compliance with the duty, which can be enforced by equality tribunals. Moderate gains have been identified from the implementation of the duty, which has been seen as lacking adequate breath of application and a sufficiently rigorous set of enforcement mechanisms.²¹⁰

Less than strict enforcement provisions have also lessened the impact of the Ontario Pay Equity Act 1987, which imposed a statutory duty on employers with more than 10 employees to examine their pay structures for discriminatory pay patterns. If a discriminatory pattern is found, then the employer is required to take action to draw up an equity plan or to implement pay adjustments. There is no requirement imposed on employers to file their results with a public body, however, and the Ontario Pay Equity Commission depends on individual complainants bringing cases. This has proved to be a serious deficiency in the Act.²¹¹

Despite the problems of weak enforcement, the use of positive duties along the lines of the FETO and Canadian models is becoming increasingly accepted. Even the highly deregulatory Australian Equal Opportunity for Women in the Workplace Act 1999 contained a requirement that employers of a certain size had to maintain a workforce profile and implement gender equality schemes in consultation with their workforce, however requiring only “reasonably practicable outcomes”.²¹² The Norwegian Gender Equality Act 2002 covers both public and private enterprises, and imposes a general positive duty upon employers to promote gender equality within their enterprises. This is reinforced by a requirement to report on progress towards gender equality in annual corporate reports or budgets, which must include detailed information on planned and implemented measures to promote gender equality and prevent differential treatment. This is supervised and monitored by the gender ombudsman and the company law authorities.²¹³ Sweden has similar legislation.²¹⁴

Both these duties use a lighter touch than the Canadian and Northern Irish legislation, while again being based upon the “enforced self-reliance” model: both have had notable success.²¹⁵ The Canadian legislation has been the model for the Dutch employment equity legislation, which requires positive action to be taken by employers to recruit ethnic minorities, women and disabled persons and reporting on the steps taken. This had had more mixed results, with progress in gender and disability but less for political reasons in respect of ethnic minorities.²¹⁶

In considering these comparative models of private sector duties, it should be emphasised that these illustrate that there are very different varieties of private sector duties, involving varying degrees of regulation and sanction. There is no single fixed model, but it is apparent that strong enforcement combined with cultural support and a relatively light regulatory touch are all key factors.

The duty proposed by the “Hepple Report” is broadly similar to the FETO duty. It would require a three-year periodic review of employment procedures in consultation with interest groups, and a requirement to take reasonable remedial action by means of an employment equity plan when the review indicated the existence of significant under-representation. Such a plan would include provisions for reasonable adjustments to make progress towards a representative composition of the workforce at the appropriate level, and arrangements for appropriate consultation and publication of the plan. Employers would be specifically not required to take action that would involve undue hardship to the employer’s business or the selection or promotion of under-qualified persons.²¹⁷

The Report also suggests that employers with ten or more employees would also be required to carry out a similar three-yearly periodic pay audit, and take appropriate action via a pay equity scheme where discrepancies were

identified.²¹⁸ This would be enforceable by an equality commission, with similar powers to the Equality Commission of Northern Ireland under the fair employment legislation, and evidence of non-compliance could be introduced in anti-discrimination proceedings.²¹⁹ The single equality bill recently introduced by Lord Lester makes provision for such positive duties to be imposed upon employers.²²⁰

8.4 A private sector positive duty for Britain?

Given this range of duties, is there an appropriate model for the British context, and will such a model attract support? The “Hepple Report” found that “there was general support from our respondents for an inclusive, proactive non-adversarial approach to achieve employment equity” with mixed feelings from employer organisations as to whether that approach should be founded on an enforceable positive duty.²²¹ The review concluded that the costs of imposing such a duty would not be excessive when the business benefits of diversity were factored in, that comparative experience had shown the clear need for enforcement measures, and that the inadequacies of the existing individual enforcement model justified the imposition of a positive duty on employers with 10 or more employees.

The Report also argued that employers will welcome a comprehensive code that with a light regulatory touch that establishes a clear legal position.²²² The Report also suggests that positive duties, in reducing the ad hoc nature of individual enforcement of anti-discrimination law, will actually reduce compliance costs for employers.²²³ Both contentions are strongly argued, but at present strong private sector caution about excessive regulation is very strong.²²⁴

It is clear that any positive private sector duties will have to earn their spurs as cost-effective proactive requirements that deliver real results for the disadvantaged groups if both the private sector and disadvantaged groups are to be convinced of their utility. Despite the independent review’s optimism about the acceptability of such duties, the abolition of Ontario’s employment equity scheme in 1996 by the new state Conservative government shows that the benefits and advantages to business of equality and diversity (and how positive duties can contribute effectively to this) need to be actively sold as part of the introduction of any such duties.²²⁵

While the Hepple model may very well represent the most effective and appropriate model for Britain, this reluctance may mean that a more incremental approach is necessary to the development of private sector duties. Nevertheless, any such incremental steps cannot be so watered down as to amount to a tokenistic requirement. The Norwegian approach may represent an appropriate first step, if the requirements imposed by that legislation are extended across all the equality grounds. (As with the public sector duty, confining the scope of duties to particular grounds will cause fragmentation and excessive duplication.)

Such a scheme, or a variant, extended across all the equality grounds could constitute an introductory first step, which may both “ease in” employers into the process, spread good practice and begin to demonstrate the benefits of the enforced self-reliance approach.

However, company reporting mechanisms have traditionally lacked real bite, and the Ontario experience of equal pay duties demonstrates that strong enforcement is a prerequisite for the effectiveness of positive duties. An incremental tightening of regulation is possible, which can be “rolled out” as appropriate if initial regulatory initiatives are not delivering results. In this way, private sector organisations can be given an incentive to put their house in order to avoid extra layers of regulation. Ultimately, however, it is likely that a duty with a light regulatory touch but with strong and effective enforcement provisions will be required. Elements of the Hepple model should perhaps be adjusted and simplified to ease the perceived problem of regulatory burden (in particular the ten-employee threshold proposed in the Report could be raised). However, the Report’s recommendations as to the active enforcement role of the equality commission and the ability of tribunals to draw inferences from non-compliance are essential ingredients of any positive duty scheme: adequate enforcement mechanisms have to be in place.²²⁶

In addition, in considering the perceived burden of complying with such schemes, the cost of making constant adjustments in human resources practice arising from legal developments in the employment tribunals and elsewhere needs to be considered. An employment equity scheme as outlined here would have the immense advantage for the private sector of setting a clear floor of compulsory practice, compliance with which would not alone generate the advantages of business diversity and ease employee tensions, but also reduce the risks of being exposed to anti-discrimination litigation.

8.5 Contract compliance and public procurement

Pending the introduction of such positive duties, serious consideration needs to be given in the interim to ensuring that private bodies awarded public sector procurement contracts are expected to take proactive steps to promote equality and eliminate unlawful discrimination. This type of positive duty, known as “contract compliance”, requires private contractors bidding for government contractors to introduce and implement effective equal opportunity policies, including appropriate pay auditing, best equal opportunities practice and monitoring of their workforce.

If patterns of unequal treatment are uncovered by this process, private contractors would have to show that appropriate measures for eliminating discrimination across the various grounds were being implemented. Private contractors could also be required to factor equality concerns into how they deliver services, in appropriate cases. Failure to take the appropriate steps would

result in disbarment from the tender process and the cancellation of existing contracts. Continuing compliance with the duties even after the contract is awarded can also be written into the contracts in question as a fundamental term, demonstrable breach of which would terminate the contract.

Morris has identified five central justifications for contract compliance requirements: public purchasing policies should be open to adjustment to attempt to redress social problems; the beneficiaries of public money should not be implementing discriminatory policies; contract compliance can foster fair competition by removing short-term unfair advantages rooted in exploitative or unequal practices; it can improve corporate management by requiring the implementation of equal opportunities best practice; and it can serve as an effective tool to combat structural discrimination which traditional anti-discrimination law has not affected.²²⁷ A sixth rationale can now be added: compliance with the race duty requires that public authorities mainstream race equality in contracting processes, and the expansion of positive duties across all the equality grounds should ensure a similar mainstreaming across all the equality strands. These justifications are strong and convincing.

Nevertheless, attempts by local authorities to develop contract compliance policies in the 1980s were effectively reined in. Judicial review decisions limited the permissible scope of such initiatives by restricting the scope of applicable relevant considerations²²⁸, while Part II of the Local Government Act 1988 “virtually strangled at birth the use of contract compliance by local authorities”, under the guise of ensuring a best value contracting process.²²⁹ Local authorities retained limited scope for introducing contractual conditions prohibiting racially discriminatory practices under the duty imposed by s. 71 of the Race Relations Act 1976.²³⁰ No such scope was left open for action on other equality grounds, even gender.²³¹

The race duty has now replaced the old s. 71 duty, and greatly enlarged the scope for contract compliance initiatives in the race context. The CRE has issued guidance to public authorities on complying with the race duty and best practice in public procurement.²³² Outside of the race context, best practice guidance has been developed in Wales under the general duty, albeit voluntary in nature, and by local authorities as part of the “best value” initiative. The “Hepple Report” is, however, correct in identifying considerable degrees of vagueness in many of the best value schemes, and a lack of clear standards.²³³ The Report also draws attention to the uncertain impact of EU public procurement rules in this area. These may restrict the extent to which compliance with equality of opportunity best practice may be taken in to account as a consideration in awarding public procurement contracts over the threshold value required for EC law to apply.²³⁴

The comprehensive CRE guidance represents a step towards greater use of contract compliance, but the survey into the implementation of the positive duty identified that few public authorities were considering how the duty impacted

upon partnership and procurement strategies, commenting that “if this is a true reflection of what is actually happening, then this represents a significant lever for change that is currently under-exploited.”²³⁵ The position in respect of the other equality grounds remains very unclear.

In contrast to this hodgepodge, the US and Canada have developed extensive contract compliance mechanisms. The US experience clearly demonstrates that comprehensive contract compliance schemes are capable of being implemented with considerable success in an economic context similar to that of the UK. US Executive Order 11246 requires federal government contractors with fifty or more employees and contracts of more than \$50,000 to abstain from unlawful discrimination and to take positive action to increase the representation of racial minorities in their workforce, including the implementation of positive action plans. The Office of Federal Compliance Programs enforces these contract compliance requirements by audits, enforceable conciliation agreements and, ultimately, by seeking judicial sanctions that can debar contractors from government work. It also requires contractors to file annual reports and to monitor the composition of their workforce. These requirements have been very successful²³⁶, even if the enforcement mechanisms have been lacking in coherence and effectiveness, and considerable litigation has ensued as to the scope of permissible affirmative action.²³⁷ The “Hepple Report” concluded that these positive duties were the most significant influence on their organisations, and that there was widespread acceptance of contract compliance by US employers.²³⁸ Similarly, in Canada, the Federal Contractors Programme requires bidders with 100 or more employees bidding on contracts of \$200,000 or more to undertake employment equity programmes: again, this has generated some clear successes, although its impact has been less than in the US.²³⁹

Based upon this experience, the “Hepple Report” recommends the use of comprehensive contract compliance initiatives as an integral part of the “best value” process in governing public procurement.²⁴⁰ The exact requirements will obviously have to vary from industry to industry, but codes of practice can set out appropriate guidance. By linking public procurement with the implementation of a positive, anticipatory, proactive approach to equality issues across all the equality grounds, contract compliance can act as the first lever in encouraging the utilisation of a positive duty approach by private sector organisations. The final report of the Cabinet Office Strategy Unit on ethnic minority labour market performance has also emphasised the role of public procurement in this context.²⁴¹

It is however apparent that clear legislation is required to put this best practice upon a firm basis and to clarify what can be done to ensure contractors comply, especially outside the race context. Complementary action may have to be taken at EU level, to clarify and if necessary modify European public procurement rules to allow for contract compliance schemes to be utilised effectively.²⁴² It is noteworthy that wording that permits employment equity is contained in the

North American Free Trade Agreement (NAFTA) side agreement and the Canada-Chile Free Trade Agreement.²⁴³ However, the possible obstacles in EC law to implementing contract compliance programmes may in any case be more illusory than real. This is especially so following the insertion of Article 13 into the EC Treaty, with its conferring of competency upon the EC to introduce measures in respect of the major equality grounds, and the persuasive impact of the Charter of Fundamental Rights, especially the anti-discrimination guarantee in Article 21.

Hitherto, the development of private finance initiatives without due attention to the possibilities of incorporating an equality dimension into the process has been a wasted opportunity, which the equality community has been slow to identify and critique. Enabling legislation and comprehensive codes of practice are now required to allow contract compliance initiatives to ensure that the expenditure of public money reinforces equality of opportunity in the private sector.²⁴⁴ Again, this should be achieved with the lightest possible regulatory touch, and an emphasis on keeping compliance simple yet effective.

8.6 “No reason to fear”: implementing private sector duties

As public procurement involves state expenditure, it constitutes an acceptable starting point for the implementation of positive duties within the private sector. Given the scale of public sector contracting, it can have considerable scope and impact. However, extending positive duties across the entire private sector as part of implementing enforced self-regulation also has to be seriously contemplated, as argued here. If designed with a suitably light regulatory touch, and making due allowances for incremental progress, the size of particular private sector firms, and the need for effective and credible promotion and enforcement, developing similar schemes for the UK private sector would seem to offer real benefits, both for disadvantaged groups and ultimately for businesses also.

The lesson from the comparative experience in general is that private sector duties, including contract compliance requirements, are very effective if proactively enforced by enforcement agencies that can shape group remedies and require changes in practice. This demonstrates the possible utility of positive duties in circumventing the restrictions inherent to the individual enforcement model. Positive duties also mean that the enforcement agencies can act against patterns of institutional discrimination and discriminatory structures that would be impervious to attack under the existing enforcement model. By allowing for conciliation procedures and mutual agreements between the enforcement agencies and employers on methods to remedy discriminatory patterns, as well as employer self-regulation within the scope of the statutory requirements, the enforced self-regulation approach moves away from a simple adversarial model to one that allows for flexibility and conciliation.

The specific measures taken in respect of the different equality grounds as part of complying with any private sector duty will vary. Monitoring for race, gender and age will perhaps be an integral part of compliance, at least for larger firms, and as with the public sector, monitoring for sexual orientation and for religious belief raises considerable issues of privacy. Guidance by the Equality Commission(s) will play a crucial role in framing the appropriate compliance strategies, and necessary safeguards may have to be clearly set out in the legislation.

Guidance by the Commission(s) and more expansive legislation will also be important in spelling out clearly what positive action measures can be taken to redress discriminatory patterns. The law needs to indicate clearly the types of affirmative action which are legally permitted, giving private sector employers who wish to use it a degree of security, while also setting out the scope of positive action measures that may be required under the positive duties. The Race and Framework Directives both state that “the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to... the grounds...”²⁴⁵, and the forthcoming Gender Directive amending the Council Directive on the implementation of the principle of equal treatment for men and women will also allow this broadly permissive affirmative action approach.²⁴⁶ This gives leeway for such approaches: however, EC law continues to rein in the scope for US-style affirmative action²⁴⁷, and none of the positive duties discussed here are dependant for their success upon the use of such policies.

It should be emphasised again that such duties represent a legal requirement to introduce existing best practice: as such, they are far from being alien intruders from the public sector. Firms with good equal opportunities policies have nothing to fear from such duties, and potentially much to gain.

Conclusions – positive duties and the private sector

- Positive duties can also be imposed upon the private sector, even if some different considerations apply. “Diversity management” initiatives are not delivering the adequate results, and private employers are suffering from the lack of a legally delineated best practice standard.
- Contract compliance mechanisms as used in the context of public procurement and PFI/PPP initiatives to require private employers to implement “equality audits” in their workforce are easy to design and should 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 would result in disbarment from

the tender process.

- Comparative experience from other European Union countries, the US and Canada should be drawn upon to design duties for the private sector in general, pay audit and workforce monitoring requirements in particular. Scandinavian corporate reporting mechanisms could be used as an initial step, and due caution should be exercised in developing duty schemes in avoiding excessive load. Streamlined equality duties requiring companies of a suitable size and scale to take effective steps to implement equality audits may be necessary, and 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. Such positive duties essentially require the use of best practice in private sector employment policies.

Part 9

Positive duties and the voluntary sector

9.1 The voluntary sector

Positive duties may also be utilised in the voluntary sector. Certain difficulties arise in that many voluntary organisations are small in size or lack the funding required to comply with a strenuous framework of duties. In addition, particular organisations may specifically direct their services at particular groups or objectives, and requiring a cross-strand equality focus may be wholly inappropriate. (Requiring the Catholic Church to respect differences of sexual orientation raises completely insurmountable difficulties, for example.)

However, requiring voluntary organisations of a certain size to comply in their employment practices with the private sector duties raises no particular problems. Voluntary sector employers may be required to adhere to positive duties like any other private sector employer of appropriate size, as long as a conflict of ethos is not involved. The exceptions within the religious and sexual orientation discrimination regulations for genuine religious ethos, and the relevant exceptions in the Sex Discrimination Act, will ensure that no fundamental incompatibility exists between positive duties in the field of employment and the diverse nature of the voluntary sector.

Similarly, as with private sector bodies contracting for the performance of public service functions, voluntary bodies that perform certain public sector functions for public authorities should be required to comply with contract compliance requirements. They should also be required in delivering the public services in question to adhere to the general equality duty. This would apply for example to the provision of accommodation for older persons by the Leonard Cheshire Foundation.

Charities could, as part of their obligations under the charities legislation, be required to adhere to the general equality duty, provided however that their particular purpose and orientation was reflected in the nature of their obligations under the duty. A charity set up to provide support for asylum-seekers, for example, could adhere to the general duty but retain its emphasis on its particular purpose, target issues and goals.

Perhaps a more appropriate route to enhancing the promotion of equality within the voluntary sector is to build in equality commitments as part of public authority compacts with the voluntary sector, as the GLA has done. Various guidance in implementing proactive equality policies exists for charities, such as that offered by the Scottish Council of Voluntary Organisations.²⁴⁸ Public sector

compacts could reinforce take-up and adoption of this guidance via equality commitments, where interaction with the public sector was involved. This could lead in turn to the development of a model of the general duty that would be suitable for charities in particular.

Conclusions – equality duties and the voluntary sector

- Voluntary sector employers should also be subject to equality duties, again depending upon size and scale. Where a voluntary body is delivering services for a public authority, they should be subject to the general equality duty and to contract compliance requirements. Compacts with the public sector may represent the most appropriate way of mainstreaming equality throughout in the voluntary sector where voluntary organizations are not assuming public functions.

Conclusion

Positive duties are not be a panacea for all forms of inequality. They require particular types of proactive action to be taken: they do not require particular results. If the emphasis is placed on process rather than outcomes, then their impact will be considerably blunted and cosmetic change will substitute for real progress. However, maintaining a focus on outcomes will be difficult to enforce. If they cannot be adequately enforced, or if compliance and enforcement efforts are under-resourced, then there is a real risk that they will remain only rhetorical commitments. Their considerable potential for effecting change can only be implemented if the duties are given the support and priority they require to be effective.

A further precondition for their effectiveness exists: positive duties should also be designed and structured to recognise the link between human rights, community cohesion, integration, poverty, socio-economic rights and equality. The Greater London Authority Equalities Policy Commission in its November 2000 report emphasised that equality initiatives needed to be linked up with anti-poverty strategies. The overlapping causes of inequality and discrimination need to be recognised and dealt with by unified strategies. Duties should also be accompanied by full enforcement, reform and extension of existing anti-discrimination legislation: they are designed and intended to supplement anti-discrimination law, not to serve as a substitute or compensation. Equally, they cannot act as a substitute for culture change, or for strong and committed leadership.

Having entered these caveats, positive duties do have great potential as tools to create change within public and private sector institutions. By requiring proactive action, they give a legal backbone to mainstreaming and equal opportunities policies, both strengthening their "internal" development and ensuring an "external" compliance standard. By compelling the taking of adequately implemented procedural steps, they create a climate of openness to new diversity initiatives and ensure a greater focus upon the proactive promotion of equality. The experience of both public and private sector duties thus far has been that they are highly effective motors of change. Positive duties are tools to ensure that adequate priority is given to equality issues, and they can have an impact across the full range of equality grounds and across the public, private and voluntary sectors.

This paper has set out a framework structure for a set of public sector duties extending across all the equality grounds. It has also suggested the introduction of equality duties in the private and voluntary sectors, and in particular the speedy implementation of contract compliance initiatives. In all these sectors, positive duties must earn their spurs, by generating outcomes and escaping the

trap of excessive reliance upon bureaucratic procedure. However, if implemented effectively, they have immense potential for generating change. They can also serve to improve service delivery to all, contributing not just to the well-being of disadvantaged groups alone but to the community at large, by enhancing service delivery and employment diversity. Positive duties are, in essence, regulatory tools to apply with a light touch to improve private and public sector performance while enhancing citizens' rights. Serious consideration needs to be given to their effective and prompt implementation.

Notes

- 1 B. Hepple, M. Coussey, and T. Choudhury, **Equality: A New Framework**, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Oxford: Hart, 2000), para. 1.33.
- 2 There are compelling arguments to allow any future single equality body to bring litigation in its own name where appropriate, even in the absence of a named individual complainant: see C. O’Cinneide, **A Single Equality Body: Lessons From Aboard**, (Manchester: Equal Opportunities Commission, 2002).
- 3 See S. Fredman, **Discrimination Law**, p. 165. See also S. Fredman, and E. Szyszczak, “Interaction of Race and Gender”, in B. Hepple and E. Szyszczak, **Discrimination: The Limits of the Law**, (London: Mansell, 1992), p. 216.
- 4 See A. Chayes, “The Role of the Judge in Public Law Litigation” (1976) *Harvard Law Review* 1281.
- 5 *Ibid.* at pp 170–173.
- 6 S. Hannett, “**Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination** (2003) Vol. 23 (1) *Oxford Journal of Legal Studies* 65–86.
- 7 See C. McCrudden, “Anti-Discrimination Goals and the Legal Process” in N. Glazer and K. Young (eds.) **Ethnic Pluralism and Public Policy** (London: Treasury, 1983); B. Hepple, “Judging Legal Rights” [1983] C.L.P. 71. See also G. Bownes, **Snakes and Ladders: Advice and Support for Discrimination Cases in Wales** (Cardiff; EOC, 2003), available at [http://www.eoc.org.uk/cseng/abouteoc/snakes per cent20and per cent20ladders per cent20full per cent20report per cent2020.2.03.pdf](http://www.eoc.org.uk/cseng/abouteoc/snakes%20and%20per%20ladders%20full%20report%2020.2.03.pdf) (last accessed 22 November 2003).
- 8 UK Cabinet Office Strategy Unit, **Ethnic Minorities and the Labour Market**, (London: Cabinet Office, 2002), para. 4.56.1, at p. 119.
- 9 Employment Tribunals Service, Annual Report 2002–03, p. 23–24, available at <http://www.ets.gov.uk/annualreport2003.pdf> (last accessed 26 August 2003).
- 10 Cabinet Office Strategy Unit, *op cit.*, para. 4.59, at p. 123.
- 11 See Z. Hornstein (ed.) **Outlawing Age Discrimination: Foreign Lessons, UK Choices**, Transitions after 50 Series (The Joseph Rowntree Foundation: London, July 2001).
- 12 Macpherson et al., **The Stephen Lawrence Inquiry** (London: Stationery Office, 1999), available at <http://www.official-documents.co.uk/document/cm42/4262/4262.htm>
- 13 Prof. Nicola Lacey has argued that the structure of existing equality law defines the behaviour defined as “discriminatory” in legislation as abnormal, therefore establishing all other forms of behaviour, no matter how prejudicial in effect, as normal, or at least less problematic. See N. Lacey, “From Individual to Group”, in B. Hepple and E. Szyszczak, **Discrimination: The Limits of the Law**, (London: Mansell, 1992), pp 102–3.

- 14 See C. Bell, "The Employment Equality Review and Fair Employment in Northern Ireland" (1996) 2 *International Journal of Discrimination and the Law*, 53–84.
- 15 UK Cabinet Office Strategy Unit, **Ethnic Minorities and the Labour Market: Interim Report** (London: Cabinet Office, 2002) at 4.33, p. 89–90. Initial results from the 2001 Census have confirmed these findings: see **Ethnic Minorities: Census 2001** (London: Office of National Statistics, 2003). The rates of poor health among Pakistani, Bangladeshi and Other Asian people are all well above average when analysed by age group. The Irish, Black Caribbean and Other Black groups also report poorer health than the average. Bangladeshi groups have much lower employment rates and higher unemployment. The rates of poor health among Pakistani, Bangladeshi and Other Asian people are all well above average when analysed by age group. The Irish, Black Caribbean and Other Black groups also report poorer health than the average. For a discussion of the higher rates of diagnosed mental illnesses suffered by these groups, see V. Bahl, **Ethnicity: An Agenda for Mental Health**, (London: Gaskell, 1999).
- 16 See Joseph Rowntree Foundation, **Ethnic Diversity, Neighbourhoods and Housing** (York: Joseph Rowntree Foundation, 2000). See also UK Department of Transport, Local Government and the Regions, **Addressing the Housing Needs of Black and Minority Ethnic People** (London: HMSO, 2001); UK Social Exclusion Unit, **Minority Ethnic Issues in Social Exclusion and Neighbourhood Renewal, A Guide to the Work of the Social Exclusion Unit and the Policy Action Teams** (London: HMSO, 2000).
- 17 UK Cabinet Office Strategy Unit, **Ethnic Minorities and the Labour Market** (2002) *op cit.*, 4.13 – 4.26, pp. 70 – 81.
- 18 UK Home Office, **Crime, Policing and Justice: The Experience of Ethnic Minorities – Findings from the 2000 British Crime Survey** (London: Home Office, 2001) pp. 55–71, available at <http://www.homeoffice.gov.uk/rds/pdfs/hors223.pdf> (last accessed 3 August 2003).
- 19 *Ibid.*, pp. 21–41.
- 20 Ethnic minorities accounted for 18 per cent of the male population and 25 per cent of the female population. These proportions significantly exceed ethnic minority representation in the population as a whole and have remained relatively constant in recent years. See UK Home Office, **Statistics on Race and the Criminal Justice System: A Home Office Publication Under Section 95 of the Criminal Justice Act 1991** (London: Home Office, 2000).
- 21 Cabinet Office Strategy Unit, **Final Report: Ethnic Minorities and the Labour Market** (London: Cabinet Office, 2003), available at <http://www.cabinet-office.gov.uk/innovation/2003/ethnic/html/index.htm> (last accessed 10 June 2003), at p.19.
- 22 *Ibid.*, p. 111–128. See also M. Noon, "Racial Discrimination in Speculative Application: Evidence from the UK's Top 100 Firms", (1993) **Human Resource Management Journal**, Vol.3 No.4; Wrench and Modood, **The Effectiveness of Employment Policies in Relation to Immigrants and Ethnic Minorities in the UK** (Geneva: International Labour Organisation, 2001); Trade Union Congress, **Exposing Racism at Work** (London: TUC, 2000). This has been confirmed by the initial findings of the 2001 Census. Looking at ethnicity by economic, the Pakistani

and Bangladeshi groups have much lower employment rates and higher unemployment.

- 23 See S. Fredman, **Discrimination Law** (Oxford: OUP, 2002), p. 7 – 11.
- 24 See O. Fiss, "Groups and the Equal Protection Clause" in Cohen M, T. Nagel and T. Scanlon (eds.) **Equality and Preferential Treatment** (Princeton, NJ: Princeton University Press, 1977) p. 85.
- 25 See Fredman, **op cit.** See also C. Barnard, "Gender Equality in the EU: A Balance Sheet" in P. Alston (ed.) **The EU and Human Rights** (Oxford: Oxford University Press, 2000), 215; B. Hepple, "Have Twenty-Five Years of the Race Relations Acts in Britain Been a Failure?" in Hepple and Szyszczak, at n. 13 above.
- 26 See Fredman, **op cit.**, pp. 21–22.
- 27 Cabinet Office Strategy Unit, **Final Report: Ethnic Minorities and the Labour Market** (London: Cabinet Office, 2003), available at <http://www.cabinet-office.gov.uk/innovation/2003/ethnic/html/index.htm> (last accessed 10 June 2003).
- 28 See the Independent Review, above at n. 1. See also S. Fredman, "Equality: A New Generation?" (2001) 30 *Industrial L.J.* 163; B. Hepple and C. Barnard, "Substantive Equality" (2000) 59 *Cambridge L.J.* 566; M. Bell and L. Waddington, "Reflecting on Inequalities in European Equality Law" (2003) 28 *28 (3) European L. Rev.* 349, 357–8.
- 29 See Fitzpatrick, Hegarty and Maxwell, "A Comparative Review of Fair Employment and Equality of Opportunity Law" in D. Magill and S. Rose, **Fair Employment Law in Northern Ireland: Debates and Issues**, (Belfast: SACHR, 1997), p. 158.
- 30 For a general discussion of this from a gender perspective, see the essays in F. Beveridge, S. Nott, and K. Stephen (eds.) **Making Women Count: Integrating gender into law and policy-making** (Aldershot: Ashgate, 2000).
- 31 T. Rees, "Gender Mainstreaming: Misappropriated and Misunderstood?", paper presented to the Dept. of Sociology, University of Sweden, 21 February 2002, at p. 5, available at www.sociology.su.se/cgs/ReesPaper.doc (last accessed 10 June 2003).
- 32 See Fredman, above at n. 3, pp. 22–23. The Report of the UK Independent Review proposed as a basic principle of anti-discrimination law that "there must be opportunities for those directly affected to participate, through information, consultation and engagement in the process of change". See the Independent Review, above at n. 1, para. 2.19.
- 33 C. McCrudden, "Mainstreaming Equality in the Governance of Northern Ireland" (1999) *Fordham International Law Journal* 22.
- 34 See T. Rees, above at n. 31.
- 35 U. Khan, **Equality Standards in Health and Social Care**, Department of Health Equality Strategy Unit, 2001.
- 36 Audit Commission, **Equality and Diversity: Learning from Audit, Inspection and Research** (Audit Commission: London, May 2002), paras. 87–113.

- 37 *Ibid.*, at paras. 110–113.
- 38 *Ibid.*, at para. 126.
- 39 See the conclusions of S. Taggar, “A Comparative Look at the Impact on Human Resources Management of Employment Equity Legislation”, in H. C. Jain, P. J. Sloane and F. M. Horwitz, **Employment Equity and Affirmative Action: An International Comparison** (London: M.E. Sharpe, 2003), pp. 70–107, 107.
- 40 See S. Hardy, **Small Step or Giant Leap** (London: Work Foundation, 2001), **Equality and Excellence: the Business Case** (London: Opportunity Now, 2001), Cabinet Office Strategy Unit, **Final Report: Ethnic Minorities and the Labour Market** (London: Cabinet Office, 2003).
- 41 For a useful summary analysis of the potential gains arising from “diversity management”, see **The Business Case for Diversity Management: An Introduction** (Canberra: Department of Immigration and Multicultural Affairs in cooperation with the Australian Centre for International Business).
- 42 See **Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices**, Final Report of Activities of the Group of Specialists on Mainstreaming (EG-S-MS (98), (Strasbourg: Council of Europe 1998 May).
- 43 See T. Rees, **Mainstreaming Equality in the European Union** (London: Routledge, 1998).
- 44 C. McCrudden, “Mainstreaming Equality in the Governance of Northern Ireland” (1999) 22 (4) *Fordham International Law Journal* 22.
- 45 See Rees, *op cit.*, at n. 43.
- 46 See M. Pollack and E. Hafner-Burton, “Mainstreaming Gender in the European Union”, (2000) 7 *Journal of European Public Policy* 3, 432–457, and T. Rees, **Mainstreaming Equality in the European Union** (London: Routledge, 1998).
- 47 UN Fourth World Conference on Women (1995) **Global Platform for Action – Beijing**. New York; United Nations Publishing. See also S. Razavi and C. Miller, “Gender Mainstreaming: A Study of Efforts by the UNDP, the World Bank and the ILO to Institutionalise Gender Issues”, Occasional Paper No. 4, UN Fourth World Conference on Women, 1995. For a very comprehensive account of mainstreaming initiatives and best practice, see F. Mackay and K. Bilton, **Learning From Experience: Lessons in Mainstreaming Equal Opportunities** (Edinburgh: Scottish Executive Social Research, 2003), available at www.institute-of-governance.org/index.html (last accessed 15 October 2003).
- 48 See Australian Local Government Association, **Services for All: Promoting Access and Equity in Local Government** (Canberra: ALGA, 1998).
- 49 See EC Commission, **Progress Report from Commission on the Follow-Up of the Communication: “Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities”** COM (1998)122 Final, (Brussels: Commission, 1998). See also **Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices**, Final Report of Activities of the Group of Specialists

- on Mainstreaming (EG-S-MS (98), (Strasbourg: Council of Europe 1998 May), and the Nordic Council of Ministers, **Compendium of National Approaches: Country Responses to the Questionnaire on Gender Mainstreaming** prepared for the OECD conference "Gender Mainstreaming: Competitiveness and Growth, 23–24 November 2000 (Paris: OECD, 2000).
- 50 S. Nott, "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 T. Donaghy, "Mainstreaming: Northern Ireland's Participative-Democratic Approach", paper presented to the Jubilee Conference of the Australian Political Studies Association, October 2002, available at <http://arts.anu.edu.au/sss/apsa/Papers/donaghy.pdf>
- 51 See Rees, above at n. 31.
- 52 See **Incorporating Equal Opportunities for Women and Men Into All Community Policies and Decisions, Commission Communication**, COM (96) final. See also M. Pollack and E. Hafner-Burton, "Mainstreaming Gender in the European Union", (2000) 7 *Journal of European Public Policy* 3, 432–457.
- 53 See S. Mullally, **Gender Proofing in the Context of the European Structural Funds: Outline Guidelines** (Dublin: Government Stationery Office, 1999).
- 54 Council Decision of 19 January 2001 on Guidelines for Member States' Employment Policies for the Year 2001 (COM 2001/63/EC).
- 55 See Mackay and Bilton, at n. 47 above, 100–117.
- 56 See Mullally, at n. 53 above: see also P. Chaney and R. Fevre, **An Absolute Duty: Equal Opportunities and the National Assembly for Wales** (Cardiff: Equal Opportunities Commission, 2002). available at www.eoc.org.uk/cseng/abouteoc/an_absolute_duty.asp
- 57 **Ibid.**
- 58 **Ibid.**
- 59 See Donaghy, above at n. 50.
- 60 For a general survey of the outcomes and limitations of EU gender mainstreaming policies, see the European Expert Group on Gender and Employment Report to the Equal Opportunities Unit, DG Employment, <http://www2.umist.ac.uk/management/ewerc/egge/egge.html> (last accessed 23 November 2003).
- 61 See A. E. Woodward, **Gender Mainstreaming in European Policy: Innovation or Deception?** Discussion Paper, (Berlin: WZB Research Unit Organization and Employment, 2001).
- 62 See Mackay and Bilton, at n. 47 above, 28–30, 89–91.
- 63 See the website of the Australian Department of Immigration & Multicultural & Indigenous Affairs at http://www.immi.gov.au/multicultural/_inc/publications/charter/charter.htm (last accessed 22 November 2003).

- 64 See e.g. the Australian Commonwealth Disability Strategy, with the Disability Discrimination Act 1992 requiring public organisations to prepare disability action plans, with information available at <http://www.facs.gov.au/disability/cds/cds/action1.htm>; see also the Canadian In Unison framework strategy, <http://www.hrdc-drhc.gc.ca/sp-ps/socialp-psociale/reports/disability/sect5e.shtml> (both last accessed 22 November 2003); for an example of the integration of disability policy within a broader employment framework, see the German National Employment Plan 2000, http://www.logos-net.net/ilo/150_base/en/init/ger_1.htm (last accessed 10 November 2003).
- 65 See C. McCrudden, "Equality" in C.J. Harvey (ed.), **Human Rights, Equality and Democratic Renewal in Northern Ireland** (Oxford: Hart, 2001) for a comprehensive discussion of these limitations in the Northern Irish context.
- 66 See e.g. in the Australian context, the **Access and Equity: Annual Report 2002** (Canberra: Department of Immigration and Multicultural Affairs, 2003), at p. 42.
- 67 S. Nott, "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).
- 68 See T. Donaghy, "Mainstreaming: Northern Ireland's Participative-Democratic Approach", paper presented to the Jubilee Conference of the Australian Political Studies Association, October 2002, available at <http://arts.anu.edu.au/sss/apsa/Papers/donaghy.pdf>
- 69 See **Canadian Experience in Gender Mainstreaming**, Gender-based Analysis Directorate, Status of Women Canada, 2001, available at http://collection.nlc-bnc.ca/100/200/301/swc-cfc/cdn_experience_gender-e/020319-international-e.pdf (last accessed 10 June 2003).
- 70 Various public bodies have developed specific diversity strategies governing how they operate in respect of the various strands. For example, para. 2.2 of the Code for Prosecutors issued by the CPS requires that Crown Prosecutors "must not let any personal views about ethnic or national origin, sex, religious beliefs, political views or the sexual orientation of the suspect, victim or witness influence their decisions." Guidance supplements this in respect of various types of offences and victims.
- 71 A commitment was subsequently given that the Annual Report on PAFT implementation by the Central Community Relations Unit (CCRU) would be published, providing a degree of transparency to the process: this did little to assuage critics of the guidelines. See C. McCrudden, "Equality" in C. Harvey (ed.), **Human Rights, Equality and Democratic Renewal In Northern Ireland**, (Oxford: Hart, 2001).
- 72 See N. Hutson, **PAFT in Northern Ireland – A Contribution to the Debate on Mainstreaming Equality** (Belfast: SACHR, 1996), and R. Osborne, A. Gallagher, and R. Cormack, with S. Shortall, "The Implementation of the Policy Appraisal and Fair Treatment Guidelines in Northern Ireland", pp. 127–52 in E. McLaughlin and P. Quirk, (eds.), **Policy Aspects of Employment Equality in Northern Ireland** [Employment Equality in Northern Ireland Series], vol. 2, (Belfast: Standing Advisory Commission on Human Rights, 1996).

- 73 T. Cattle et al., **Community Cohesion**, (London: Home Office, 2001).
- 74 See <http://www.lg-employers.gov.uk/diversity/equality/index.html>
- 75 See C. Collins, **Race and the Public Service Reform Agenda: Policy Making in Whitehall** (London: 2002, Institute for Public Policy Research).
- 76 See C. McCrudden, "Mainstreaming Fairness? A Discussion Paper on Policy Appraisal and Fair Treatment" (Belfast: Committee for the Administration of Justice, 1996). See also S. Mullally, "Mainstreaming Equality in Ireland: A Fair and Inclusive Accommodation for all?" in **Legal Studies** (2001) Vol. 21, No.1, p. 99.
- 77 See C. McCrudden, "Equality" in C.J. Harvey (ed.), **Human Rights, Equality and Democratic Renewal in Northern Ireland** (Oxford: Hart, 2001), 75–131, 81–86.
- 78 **Ibid.**, 110.
- 79 See R. Thomas, "From Affirmative Action to Affirming Diversity", Harvard Business Review March/April 1990.
- 80 See R. Kandola and J. Fullerton, **Diversity in Action: Managing the Mosaic**, (Institute of Personnel and Development, 1998).
- 81 For examples in the context of race equality, see J. Wrench, **European Compendium of Good Practice for the Prevention of Racism at the Workplace** (Luxembourg: Office for Official Publications of the European Communities, 1997). See also M. Stewart and L. Lindburg, **Gaining From Diversity** (Brussels: European Business Network for Social Cohesion, 1997).
- 82 J. Wrench, "Managing Diversity, Fighting Racism or Combating Discrimination? A Critical Exploration", paper delivered at Council of Europe and European Commission Research Seminar **Re-situating Culture – Reflections on Diversity, Racism, Gender and Identity**, Budapest, June 2003.
- 83 D. Jones, J. Pringle and D. Shepherd, "'Managing Diversity' Meets Aotearoa/New Zealand" 29 **Personnel Review** 3 (2000).
- 84 See the Hepple Report, above at n. 1, para. 1.39, p. 16, citing data from the ESRC Data Archive at the University of Essex.
- 85 CBI, **Employment Trends Survey: 2003** (London: CBI/Pertemps, 2003)
- 86 Hepple Report, paras. 1.38–1.52, pp. 16–20.
- 87 Labour Force Survey, Spring 1999.
- 88 Third Age Employment Network, **Key facts on Age Diversity and Employment**, available at <http://www.taen.org.uk/Publications/factsweb.html> (last accessed 17 June 2003).
- 89 Speech by Julie Mellor, Chair, Equal Opportunities Commission, Westminster 8 March 2003.
- 90 R. Foroohar et al. "Race in the Boardroom", **Newsweek**, Feb. 18 2002, 28–32.

- 91 See Fitzpatrick, Hegarty and Maxwell, "Fair Employment Law in Northern Ireland: Debates and Issues", in D. Magill and S. Rose (eds.), **A Comparative Review of Fair Employment and Equality of Opportunity Law** (1997), Ch. 7.
- 92 Hepple Report, para. 3.11, at p. 60.
- 93 **Ibid.**
- 94 See the Hepple Report, para. 3.9, p. 60.
- 95 The Hepple Report, pp. 57–9, paras. 3.5–3.7.
- 96 See UK Cabinet Office, **Equality Statement**, 30 November 1999.
- 97 See section 71 (1) Race Relations Act (as amended). A more limited duty is imposed upon immigration and naturalisation authorities: see C. O’Cinneide [2001] Public Law 220, 230, n. 47.
- 98 CRE, **Statutory Code of Practice on the Duty to Promote Race Equality** (CRE: London, 2002).
- 99 **Ibid.**
- 100 See **Guardian Society**, 4 June 2003.
- 101 See O’Cinneide, C. (2001), "The Race Relations (Amendment) Act", [2001] Public Law 220, at p. 229.
- 102 See C. Collins (2002), **Race and the Public Service Reform Agenda: Policy Making in Whitehall** (London: Institute for Public Policy Research, 2002).
- 103 Schneider Ross/CRE, **Towards Racial Equality** (London: CRE, 2003), executive summary available at www.cre.gov.uk. All the information cited here is from this report.
- 104 See C. McCrudden, "The Equal Opportunity Duty in the Northern Ireland Act 1998: An Analysis", in **Equal Rights and Human Rights – Their Role in Peace Building** (Committee on the Administration of Justice, 1999), 11–23.
- 105 See C. McCrudden, "Equality" in C.J. Harvey (ed.), **Human Rights, Equality and Democratic Renewal in Northern Ireland** (Oxford: Hart, 2001), 75–131, for an excellent account of the origins and introduction of the s. 75 duty.
- 106 See the **Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities 1 January 2000 – 31 March 2002** (Belfast: Equality Commission of Northern Ireland, 2003), available at www.equalityni.org/uploads/word/280503FinalFullS75Report.doc
- 107 **Ibid.**
- 108 **Ibid.**, at p. 19–20.
- 109 **Ibid.**
- 110 **Ibid.**, at p. 20.
- 110 Taking equal opportunities seriously

- 111 **Ibid.**, at p. 21–22.
- 112 **Ibid.**, at p. 113.
- 113 **Ibid.**, at p. 108.
- 114 **Ibid.**
- 115 See P. Chaney and R. Fevre, **An Absolute Duty: Equal Opportunities and the National Assembly for Wales**, (Cardiff: Equal Opportunities Commission, 2002) available at www.eoc.org.uk/cseng/abouteoc/an_absolute_duty.asp
- 116 **Ibid.**
- 117 Report of the Mayor’s Equalities Policy Commission, November 2000, available at www.london.gov.uk/gla/publications/equalities.jsp
- 118 See also GLA, **Into the Mainstream: Equalities Within the Greater London Authority** (London: GLA, 2003) for a comprehensive summary of the GLA’s equalities initiatives.
- 119 Scotland Act 1998, Schedule 5, Part II, L2.
- 120 See for information on the work of this Committee, see http://www.scottish.parliament.uk/official_report/cttee/equal.htm
- 121 See n. 103 above: this quote is taken from the executive summary, p. 14.
- 122 UK Cabinet Office, **Equality Statement**, 30 November 1999.
- 123 Disability Rights Task Force, **From Exclusion to Inclusion**, (London: 1999), available at http://www.disability.gov.uk/drtf/full_report/index.html (last accessed 11 September 2003).
- 124 **Towards Inclusion – Civil Rights for Disabled People**, (London: DWP, 2001), available at http://www.disability.gov.uk/drtf/towards_inclusion/index.html (last accessed 11 September 2003).
- 125 See C. O’Cinneide, “A New Generation: Positive Duties and Disability Rights?”, paper delivered at Disability Rights in Europe Conference, University of Leeds 26th September 2003 and forthcoming in A. Lawson and C. Gooding (eds.) **Disability Rights in Europe** (Oxford: Hart, 2004).
- 126 For example breast screening uptake is 76 per cent for women in the UK, but between 17 per cent (family care) and 52 per cent (formal care) uptake by women with learning disabilities: see Office of National Statistics, 1998. Similarly, uptake rates for cervical screening for women 18 and over was between 3 per cent (for those with family care) to 17 per cent (for those with formal care) for women with learning disabilities, compared to a UK mean figure of 85 per cent of women between 20 and 64 years who had had a smear test in the last five years. See Department of Health, 1997
- 127 It might be suggested that a specific duty applying to education is unnecessary because of the requirements imposed upon educational authorities by the Special

Educational Needs and Disability Act 2001 (SENDA). However, the SENDA duties do not adequately cover reasonable adjustments comprising auxiliary aids and services or physical features, and therefore miss a potentially crucial part of the anticipatory duty in relation to education. In addition, although SENDA does set out requirements on local education authorities and schools in England and Wales to draw up accessibility plans and strategies to improve access to education at schools over time, this duty does not require the tackling of systemic discrimination or the achievement of outcomes. It does not require schools and LEAs to set down a vision of full accessibility and how they will work towards that, as a positive duty would: instead, these educational authorities need only set out only what they are going to do to improve accessibility and by when. A disability equality duty would clearly provide the outcome-orientated direction and impetus that is lacking, and provide an enforcement mechanism that is currently lacking.

- 128 See R. Prasad, "The Fact Vacuum", **Guardian Society** 4 June 2003.
- 129 See **Age Matters: A Report on Age Discrimination**, Australian Human Rights and Equal Opportunity Commission (Canberra: HREOC, 2000).
- 130 For further detail, see S. Spencer and S. Fredman, **Age Equality Comes of Age: Delivering Change for Older People** (London: IPPR, 2003).
- 131 See The Report of the Better Government for Older People Programme **All Our Futures** (London: HMSO, 2000). See also "Dignity, Security, Opportunity" (London: Age Concern, 2001); B. Hepple, "Age Discrimination in Employment", in S. Fredman and S. Spencer (eds.) **Age as an Equality Issue** (Oxford: Hart, 2003), Ch. 4.
- 132 See The King's Fund, **Age Discrimination in Health and Social Care** (London: The King's Fund, 2001), see http://www.kingsfund.org.uk/eHealthSocialCare/html/age_discrimination.html. See also J. Robinson, "Age Equality in Health and Social Care", in S. Fredman and S. Spencer (eds.) **Age as an Equality Issue** (Oxford: Hart, 2003), Ch.5.
- 133 Royal Commission on Long Term Care, **With Respect to Old Age: A Report by the Royal Commission on Long Term Care** (London: HMSO, 1999).
- 134 On education issues, see T. Schuller, "Age Equality in Access to Education", in S. Fredman and S. Spencer (eds.) **Age as an Equality Issue** (Oxford: Hart, 2003), Ch. 6.
- 135 See Dept. of Education, Research Paper RS262, **Adult and Community Learning: What? Why? Who? Where? A Literature Review on Adult and Community Learning**, (London: Dept. of Education, 2001).
- 136 B. Pitt "Abusing Old People" (1992) 305 *BMJ* 968.
- 137 See K. Mason and A. McCall Smith, **Law and Medical Ethics** (London: Butterworths, 4th ed.) at p. 268.
- 138 See **End Ageism in Employment**, Manifesto of the Employers' Forum on Age, 14 May 2001, at <http://www.efa.org.uk/>
- 139 See **Older People's Experience of Paid Employment: Participation and Quality of Life**, a research project of "Growing Older", a ESRC Research Programme on

- Extending Quality of Life, <http://www.shef.ac.uk/uni/projects/gop/gop15.html>.
- 140 See Weller, P., Feldman, A. and Purdam, K., **Religious Discrimination in England and Wales – Home Office Research Study 220**, (London: Home Office, 2001). See also T. Choudhury, Open Society Institute (2002), **Monitoring Minority Protection in the EU: The Situation of Muslims in the UK**, p. 96.
- 141 See An-Nisa Society (1992), **Second Review of the Race Relations Act 1976 – A Response**, Wembley: An-Nisa Society, p. 4.
- 142 See Commission on British Muslims and Islamophobia (2002), **Race Relations Amendment Act: What Should Race Equality Schemes and Policies Include?**, London: Commission on British Muslims and Islamophobia, available at http://www.runnymedetrust.org/meb/islamophobia/race_relations_amendment_act.html (last accessed 13 December 2002).
- 143 See Open Society, *op cit.*, at p. 96.
- 144 For the limitations of existing approaches, see E. Burney and G. Rose, Home Office Research Study 244, **Racist Offences – How is the Law Working?: The Implementation of the Legislation on Racially Aggravated Offences in the Crime and Disorder Act 1998** (London: Home Office, 2002).
- 145 **MacDonald v Advocate-General; Pearce v Governors of Mayfield School** [2003] UKHL 34, 19 June 2003.
- 146 See UK Cabinet Office, **Equality Statement**, 30 November 1999.
- 147 For useful examples of incorporating gender perspectives in service delivery, see T. Rees, **Mainstreaming Equality in the European Union** (London: Routledge, 1998).
- 148 See HM Treasury, **Public Spending and Services: Public Service Agreements 2001–4**, Home Office (London: 2001), available at http://www.hm-treasury.gov.uk/Documents/Public_Spending_and_Services/Public_Service_Agreements_2001_2004/pss_psa_homeoff.cfm (last accessed 22 November 2003). See also EOC, “Equality Body Must be Backed by Stronger Laws on Sex Equality”, press release, 29 October 2003.
- 149 EOC, *ibid.*
- 150 See C. O’Cinneide, above at n. 2, 28.
- 151 See A. Phillips, **Which Equalities Matter?** (London: Polity, 1999); S. Fredman, **The Future of Equality in Britain**, EOC Working Paper Series No. 5, (Manchester: EOC, 2002), especially pp. 24–35; C. O’Cinneide, **A Single Equality Body: Lessons From Aboard**, EOC Working Paper Series No. 4, (Manchester: EOC, 2002), 11–12. For an analysis of equality as a foundational principle, see R. Dworkin, **A Matter of Principle** (Oxford: Clarendon Press, 1986).
- 152 See S. Hannett, above at n. 6.
- 153 For an excellent analysis of the importance of a common principle of equality as a necessary foundational value for developing a coherent framework for cross-strand approaches, see K. Zappone, **Charting the Equality Agenda: A Coherent Framework**

for Equality Strategies in Ireland, North and South, June 2001, Equality Authority and Equality Commission for Northern Ireland available at <http://www.equalityni.org/uploads/pdf/kzreport.pdf> (last accessed 14 November 2003).

- 154 See I. M. Young, **Justice and the Politics of Difference** (Princeton: Princeton University Press, 1990), Ch. 6; see also H. Collins, "Discrimination, Equality and Social Inclusion" [2003] M.L.R. 16.
- 155 See Zappone, above at n. 153.
- 156 See S. Jivraj, T. Tauqir and A. de Jong, **SAFRA Project: Initial Findings**, January 2003.
- 157 See H. S. Mirza and A. Sheridan, **Black and Ethnic Minority Women: Understanding Identity, Access and Equality in the Health Service**, (EOC, 2003).
- 158 See S. Fredman, *The Future of Equality in Britain*, EOC Working Paper Series No. 5, (Manchester: EOC, 2002), 34–35.
- 159 See the Hepple Report, *op cit.*, paras. 3.14–3.16, at p. 62–63. The Report also recommended that equality schemes should be supplemented by a requirement to "collect and publish such information as is appropriate and necessary to facilitate the performance of its duty".
- 160 Recommended by the Hepple Report, paras. 3.14–3.16, pp. 62–3.
- 161 *Ibid.*, 2.34–2.40, p. 32–33.
- 162 For a strong argument in favour of religious monitoring, see T. Choudhury, **Monitoring Minority Protection in the EU: The Situation of Muslims in the UK**, (London: Open Society Institute, 2002).
- 163 Report of the Mayor's Equalities Policy Commission, November 2000, available at www.london.gov.uk/gla/publications/equalities.jsp
- 164 See H. S. Mirza and A. Sheridan, **Black and Ethnic Minority Women: Understanding Identity, Access and Equality in the Health Service** (Manchester: EOC, 2003).
- 165 The prohibition on unlawful direct or indirect racial discrimination in the Race Relations Act was held in the case of **R v Entry Clearance Officer, Bombay (ex parte Amin)** [1983] 2 A.C. 818 (House of Lords) only to apply to public functions which involved employment, education, housing or the provision of goods and services. While the race Relations (Amendment) Act 2000 removed this restriction, this precedent also applies to the gender and disability legislation, which has not been similarly amended.
- 166 See the Hepple Report, para. 3.13, at p. 61.
- 167 *Ibid.* See also H.C Debates, 4 November 1998, col. 573–575.
- 168 The use of the term "equalisation of opportunity is to be pursued" in the private members bill is therefore problematic, as it departs from the use of "equality of opportunity" that has been standard usage in statutory duties since s. 71 of the 1976 Act. It is presumably used as s. 2 of the Disability Rights Commission Act 1999

refers to one of the functions of the Commission being to work towards the “equalisation of opportunity”. However, “equalisation” is weaker than “equality of opportunity”, as it replaces a commitment to a definite end with a weaker commitment to progressive steps: “pursued” may also be weaker than “promoted”. In the context of a positive duty, however, “pursuing equalisation of opportunity” is considerably weaker than promoting equality of opportunity, and arguably removes any requirement to work towards outcomes.

- 169 The CRE is also enabled by s. 44 of the RRA to give financial or other help to organisations concerned with promoting racial equality and good race relations. This provision has resulted in the development of a local focus for the CRE’s work through a network of local Race Equality Councils (RECs). This partnership between a statutory organisation and voluntary organisations has generated some impressive achievements, including the development of partnerships between key local stakeholders in the public, private and voluntary and community sectors and the enabling of communication and participation between marginalised groups and mainstream agencies on key social policy and equality issues.
- 170 K. Eyben, D. Morrow & D. Wilson, **A Worthwhile Venture, Practically Investing in Equity, Diversity and Interdependence in Northern Ireland**, (Belfast: University of Ulster, 1997.)
- 171 Note that the Norwegian Gender Equality Act requires public authorities to “make active, targeted and systematic efforts to promote gender equality” in all sectors of society: see K. Mile, “**Mainstreaming Equality – Models for a Statutory Duty**”, in **Mainstreaming Equality: Models for a Statutory Duty – Conference Report**, (Dublin: Equality Authority, 2003), available at www.equality.ie (last accessed 22 November 2003).
- 172 The Northern Irish Equality Commission is preparing an analysis of good practice and compliance strategies in meeting the good relations requirement in the s. 75 duty.
- 173 See the Hepple Report, para. 5.17, at p. 63, citing Prof. Gillian Morris’ response to the Review’s options paper.
- 174 See C. Collins, **Race and the Public Service Reform Agenda: Policy Making in Whitehall** (London: 2002, Institute for Public Policy Research).
- 175 S. Nott, “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). For the need for the representation of disadvantaged groups in general, see I.M. Young, **Justice and the Politics of Difference** (Princeton: Princeton University Press, 1990); see also I. M. Young, “Deferring Group Representation” in I. Shapiro and W. Kymlicka (eds.) **Ethnicity and Group Rights: NOMOS XXXIV** (New York: NYU Press, 1997).
- 176 See Donaghty, above at n. 50, 12.
- 177 The concerns expressed by Kenan Malik and Brian Barry, amongst others, as to the negative impact of “difference multiculturalism” and the official recognition of

static, homogeneous and mutually exclusive cultural groups are very relevant here: see K. Malik, **The Meaning of Race: Race, History and Culture in Western Society** (London: Palgrave, 1996); B. Barry, **Culture and Equality: An Egalitarian Critique of Multiculturalism** (Oxford: Polity, 2001).

- 178 **Review of Anti-Discrimination Legislation** (London: Stationery Office, 1999).
- 179 See the Hepple Report, para. 3.11, at p. 60.
- 180 The CRE could either take notice of an individual compliant in deciding to use its powers of formal investigation, or its powers to bring a non-compliance notice under ss. 71D and 71E of the Race Relations (Amendment) Act 2000. It could also in all likelihood support a individual in bringing judicial review proceedings, under its general power to assist individuals in legal action under s. 66 of the Race Relations Act 1976.
- 181 As specifically provided for in Schedule 9, para. 10(1) of the Northern Ireland Act 1998.
- 182 See C. O’Cinneide, “The Race Relations (Amendment) Act 2000” [2001] PL 220, 230. The CRE and NIEC could in all likelihood bring judicial review as parties having a “sufficient interest” in the implementation of the duty: see **R v Secretary of State for Employment, ex parte Equal Opportunities Commission** [1995] 1 A.C. 1, HL.
- 183 See **Meade v Haringey LBC** [1977] 1 W.L.R. 637.
- 184 See CRE, **Auditing for Equality** (London: CRE, 1999).
- 185 Hepple Report, p. 64, para. 3.21.
- 186 *Ibid.*, p. 64, para. 3.21.
- 187 See s. 71D of the Race Relations (Amendment) Act 2000.
- 188 S. 71E.
- 189 S. 71D.
- 190 See Articles 3 and 4 of the Race Relations Act 1976 (Statutory Duties) Order 2001, which require listed public authorities to put various arrangements in place and also to fulfil these duties in accordance with such arrangements (author’s italics).
- 191 See Article 2(1) of the Race Relations Act 1976 (Statutory Duties) Order 2001, which imposes a requirement only to publish a Race Equality Scheme (author’s italics).
- 192 Ss. 48–52, 58–62 of the Race Relations Act 1976 permit the CRE to launch formal investigations for any purpose connected to its functions, which would in all likelihood extend to compliance with the general duty: it is not so clear whether the CRE could use this power to issue a Non Discrimination Notice under this power, as this requires clear evidence of an “unlawful discriminatory act”: see **London Borough of Hillingdon v CRE** [1982] I.R.L.R. 424 (HL).
- 193 See Schedule 9, paras. 6 & 7, of the Northern Ireland Act 1998.

- 194 See K. Mile, "Mainstreaming Equality – Models for a Statutory Duty", in **Mainstreaming Equality: Models for a Statutory Duty – Conference Report**, (Dublin: Equality Authority, 2003), available at www.equality.ie
- 195 See CRE Press Release, "Race Equality Pilot for Private Sector Organisations Announced", 18 November 2003.
- 196 See L. Barmes, "Promoting Diversity and the Definition of Direct Discrimination" (2003) 32 (3) *Industrial Law Journal* 200; see also L. Barmes with S. Ashtiany, **Diversity in the City: Initiatives in Investment Banks in the UK** (London: Nabarro Nathanson, 2003); L. Barmes and S. Ashtiany, "The Diversity Approach to Achieving Equality: Potential and Pitfalls" (2003) 32 (3) *Industrial Law Journal* (forthcoming).
- 197 See **Equality and Excellence: the Business Case** (London: Opportunity Now, 2001), Cabinet Office Strategy Unit, **Final Report: Ethnic Minorities and the Labour Market** (London: Cabinet Office, 2003).
- 198 Hepple Report, para. 3.4, p. 57.
- 199 *Ibid.*, para. 3.3, pp. 56–57.
- 200 See the Hepple Report, p. 57, para. 3.5, citing the research conclusions in N. Gunningham, P. Grabosky and D. Sinclair, **Smart regulation – Designing Environmental Policy** (Oxford: Clarendon, 1998). See also J. Ayres and J. Braithwaite, "Responsive Regulation: Transcending the Deregulation Debate" (Oxford: OUP, 1992).
- 201 R. Ely and D. Thomas, "Cultural Diversity at Work" (2001) 46 *Administrative Sciences Quarterly* 229–273.
- 202 See H. C. Jain, P. J. Sloane and F. M. Horwitz, **Employment Equity and Affirmative Action: An International Comparison** (London: M.E. Sharpe, 2003), 217–221.
- 203 See C. McCrudden, "The Evolution of the Fair Employment (Northern Ireland) Act 1989 in Parliament" in R. J. Cormack and R. D. Osborne (eds.), **Discrimination and Public Policy in Northern Ireland** (Oxford: OUP, 1991).
- 204 Equality Commission for Northern Ireland, **Annual Report 2000–2001**, p.25.
- 205 *Ibid.*, p. 25.
- 206 See P.J. Sloane and D. Mackay, "Employment Equity and Minority Legislation in the UK After Two Decades: A Review" (1997) 23 *International Journal of Manpower*, 18.
- 207 See H. C. Jain, P. J. Sloane and F. M. Horwitz, **Employment Equity and Affirmative Action: An International Comparison** (London: M.E. Sharpe, 2003), 31.
- 208 House of Commons Northern Ireland Affairs Committee Fourth Report (1999), para. 48.
- 209 The Hepple Report, above, para. 3.35.
- 210 See Jain, Sloane and Horwitz, *op cit.*, 22–27: for a more critical view, in particular as regards the limited impact of the legislation upon disabled persons see C. Agocs,

- "Canada's Employment Equity Legislation and Policy, 1986–2000: Unfulfilled Promises" in C. Agocs (ed.) **Workplace Equality: International Perspectives on Legislation, Policy and Practice** (London: Kluwer, 2003), Ch. 4.
- 211 See A. McColgan, "Equal Pay: Lessons from Ontario's Pay Equity Unit", Working Paper No 5, Independent Review of the Enforcement of UK Anti-Discrimination Legislation, November 1999.
- 212 See G. Strachan and J. Burgess, "Unfinished Business: Employment Equality in Australia", in C. Agocs (ed.) **Workplace Equality: International Perspectives on Legislation, Policy and Practice** (London: Kluwer, 2003), Ch. 3.
- 213 See K. Mile, "Mainstreaming Equality – Models for a Statutory Duty", in **Mainstreaming Equality: Models for a Statutory Duty – Conference Report**, (Dublin: Equality Authority, 2003), available at www.equality.ie
- 214 Equal Opportunities Act 1991: see http://www.ilo.org/public/english/employment/gems/eoo/law/sweden/l_eoas.htm (last accessed 22 November 2003).
- 215 See Mile, *op cit*.
- 216 F.J. Glastra, et al., "Between Public Controversy and Market Initiative: The Politics of Employment Equity and Diversity in the Netherlands", in C. Agocs, above at n. 210, Ch. 8.
- 217 The Hepple Report, paras. 3.37–3.40, pp. 69–71.
- 218 *Ibid.*, paras. 3.41–3.50, pp. 72–76.
- 219 *Ibid.* paras. 3.38–3.51.
- 220 See <http://www.odysseustrust.org/equality.html>
- 221 See the Hepple Report, para. 3.37.
- 222 *Ibid.*, para. 3.37, p. 69.
- 223 *Ibid.*, para. 3.38, p. 70.
- 224 See Confederation of British Industry, **Employment Trends Survey: 2003** (London: CBI/Pertemps, 2003).
- 225 See A.B. Bakan and A. Kobayashi, "Employment Equity Legislation in Ontario: A Case Study in the Politics of Backlash", in C. Agocs (ed.) **Workplace Equality: International Perspectives on Legislation, Policy and Practice** (2003: Kluwer, 2003), Ch. 5. See also in the same book, C. Eboe-Osuji and E. Mclsaac, "Repeal of the Ontario Employment Equity Laws: Denial of Equal Protection of the Law", Ch. 6.
- 226 See C. Agocs, "Systemic Discrimination in Employment: Mapping the Issue and the Policy Responses", in Agocs, *ibid.*, Ch. 1: see also C. Burr and F. Somerset, **Employment Equity: Co-operative Strategies for Organizational Change** (Scarborough: Prentice Hall, 1992).

- 227 P.E. Morris, **Legal Regulation of Contract Compliance: An Anglo-American Comparison** (1991) 19 *Anglo-American Law Review* 87–144, 87–90.
- 228 See **R v Ealing L.B.C., ex p. Times Newspapers Ltd.** (1987) 85 LGR 316; **R v Lewisham L.B.C., ex p. Shell** [1988] 1 All ER 938; see also Morris, *ibid.*, 93–103.
- 229 Morris, *ibid.*, 93; see also 103–121. See also **R v Islington L.B.C., ex p. The Building Employers' Confederation** [1989] I.R.L.R. 382.
- 230 *Ibid.* 113–4.
- 231 *Ibid.*, 105.
- 232 CRE, **Public Procurement and Race Equality: Guidelines for Public Authorities** (London: CRE, 2003); CRE, **Public Procurement and Race Equality: Guidelines for Local Government** (London: CRE, 2003).
- 233 Hepple Report, paras. 3.62 to 3.65.
- 234 *Ibid.*, para. 3.71 – 3.73, pp. 83–84. For a general overview of EC procurement rules, see C. Bovis, "The Regulation of Public Procurement as a Key Element of European Economic Law" (1998) 4(2) *European Law Journal* 220–242.
- 235 Schneider Ross/CRE, **Towards Racial Equality** (London: CRE, 2003), p. 6.
- 236 See H. C. Jain, P. J. Sloane and F. M. Horwitz, **Employment Equity and Affirmative Action: An International Comparison** (London: M.E. Sharpe, 2003), 19; H.J. Holzer and D. Neumark, "What Does Affirmative Action Do?" (2000) 53 (2) *Industrial and Labour Relations Review* 240–71.
- 237 See Morris, above at n. 227, 130–141.
- 238 The Hepple Report, above, paras. 3.23–3.29.
- 239 Jain, Sloane and Horwitz, *op cit.*, 21.
- 240 Hepple Report., paras. 3.74–3.77, pp. 84–85.
- 241 UK Cabinet Office Strategy Unit, **Ethnic Minorities and the Labour Market**, (London: Cabinet Office, 2003).
- 242 Hepple Report, paras. 3.74–3.77, pp. 84–85.
- 243 See A. C. Reynaud, **Labour Standards and the Integration Process in the Americas** (Lima, Peru: International Labour Office, 2001), 248.
- 244 In Northern Ireland, as discussed above, disbarment from the contracting process is used as a penalty for non-compliance with the FETO duty. Note that the fourth Standing Advisory Committee on Human Rights report in 1997 argued for a closer link between the awarding of contracts and grants, and the promotion of affirmative action. This was not adopted in FETO 1998, but the Government was asked to reconsider this failure by the influential House of Commons Northern Ireland Affairs Select Committee in 1999.
- 245 Article 5 EU Council Directive 2000/43/EC of 29 June 2000 implementing the

principle of equal treatment between persons irrespective of racial or ethnic origin, OJ Series L 180/22; Article 7 EU Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ Series L 303/16.

- 246 See European Commission, "Proposal for a Council Directive on equal treatment between men and women outside the workplace", IP/03/1501, 5 November 2003.
- 247 S. Fredman, "Reversing Discrimination", (1997) 113 Law Quarterly Review 575; Case 450/93 **Kalanke v Freie Hansestadt Bremen** [1995] ECR I-3051, [1996] All ER (EC) 66, [1996] ICR 314; Case C-158/97, **Badeck v Landesanwalt beim Staatsgerichtshof des Landes Hessen**, Judgement of March 28 2000, [2000] IRLR 432.
- 248 See www.scvo.org.uk/equalities/default.htm for further information.

