

A New Public Sector Equality & Human Rights Duty

March 2015 Paper 3 of series: Setting Standards for the Irish Equality and Human Rights Infrastructure.



Foreword

This paper “A New Public Sector Equality and Human Rights Duty” is the third in a series of publications to inform and enable best practice standards for our human rights and equality infrastructure. The public sector equality and human rights duty, which was introduced with the enactment of the Irish Human Rights and Equality Commission Act 2014, marks an important evolution in our legislative framework to promote equality, protect human rights and prohibit discrimination. The duty also provides an important practice site to develop new ways of developing an integrated approach to addressing equality and human rights concerns.

This paper has been published by the Equality & Rights Alliance (ERA), a coalition of civil society groups and activists. ERA, established in August 2008, works to strengthen political and popular commitment to an effective and resilient equality and human rights infrastructure in Ireland and to provide strategic leadership in protecting, strengthening and critiquing the equality and human rights infrastructure.

We are grateful to Rachel Mullen, Coordinator of the Equality & Rights Alliance, who has researched and drafted this paper. We are also grateful to Claire Bruton BL who provided ERA with legal observations on the public duty, to inform this paper. We would like to thank the Joseph Rowntree Charitable Trust for supporting this initiative.

Niall Crowley

Chair, Equality & Rights Alliance

1. Introduction	2
2. What is a Public Sector Duty?	4
3. Provisions of the Public Sector Duty: IHREC Act Section 42	6
3.1. Public bodies coming within the scope of the duty	
3.2. Scope of the duty	
3.3. Obligations under the duty	
3.4. The role of the IHREC	
4. The Duty in Practice	13
5. Developing an Integrated Approach to the Duty	19
5.1. Values-based approach	
5.2. Capability approach	
6. Conclusion	25

1. Introduction

The Irish Human Rights and Equality Commission Act 2014, provides for the introduction of a public sector equality and human rights duty.¹ This is a welcome and promising evolution in Ireland's domestic legislative framework to promote equality, prevent discrimination and protect, respect and fulfill human rights.

The 2011 Programme for Government contained a commitment to "require all public bodies to take due note of equality and human rights in carrying out their functions."² In 2011 the Equality and Rights Alliance (ERA) produced a paper: "Setting out the Case for a Public Sector Positive Duty."³ The paper outlines the rationale for the introduction of a positive duty for public sector bodies as the most effective way to realise the commitment in the Programme for Government 2011. Since that time ERA has advocated for the introduction of a positive duty as part of the legislation to establish the merged Irish Human Rights and Equality Commission.

A strategy for public sector reform was produced by government in 2011.⁴ The key components of this reform agenda are: placing customer service at the core; improving access to services; maximising new and innovative service delivery channels; getting better value for money; developing new ways of working; and having a strong delivery and implementation focus.⁵ A public sector equality and human rights duty is an important tool in contributing to this public sector reform agenda. Therefore, a commitment to achieving the highest level of ambition regarding the duty, should be a key concern for government.

Public bodies are not simply providers of services, they play a central role in what is often referred to as 'place-shaping': "promoting the feeling of belonging to local areas, strengthening notions of citizenship and celebrating values of diversity".⁶ Public bodies play a key role in enhancing social cohesion and it is, therefore, a long overdue addition to the legislative framework, to require public bodies take a more proactive approach to addressing equality and human rights concerns. The new duty, introduced in Section 42 of the Irish Human Rights and Equality Commission Act 2014, represents the first combined equality and human rights public sector duty to be introduced in domestic legislation in an EU Member State.

While other European jurisdictions, notably, Northern Ireland, the UK and Norway, have had equality duties as part of their domestic law for a number of years, the Irish duty is the first to have a combined equality and human rights focus.⁷

This represents both an opportunity and a challenge. The opportunity lies in the potential for Ireland to set a standard for the operation of a combined equality and human rights duty for public sector bodies. The challenge lies in avoiding a siloed approach to the duty, addressing equality and human rights

concerns separately, but rather, for public bodies to develop an integrated approach when applying the duty, and in terms of any guidance and tools developed by the IHREC to assist public bodies to implement the duty. Ireland will be breaking new ground in this regard, and the opportunity exists to lead an approach to integration which could be an exemplar in the EU.

This paper examines: the potential of the duty to drive a more proactive approach to addressing equality and human rights concerns across the public sector, the provisions and scope of the duty, the proposals of the Equality and Rights Alliance for implementing the duty, and two frameworks for consideration to implement the duty in a manner which integrates equality and human rights concerns.

1. Irish Human Rights and Equality Commission Act 2014 S42
2. "The Programme for Government 2011" pg. 24.
3. Setting out the case for a public sector positive duty: a briefing paper by: Equality & Rights Alliance May 2011. Available on the ERA website; www.eracampaign.org
4. "Government Statement: Public Sector Reform Plan" Department of Public Expenditure and Reform, November 2011.
5. IBID pg. 3.
6. Zubaida Haque "The Changing Landscape of Equalities, Cohesion, Human Rights and Public Services" in "2020 Public Services Trust at the RSA: Equality, Cohesion and Public Services" published by the Public Services Trust, UK, 2010.
7. In Northern Ireland, a positive duty requiring designated public sector organisations to have due regard to equality in carrying out their functions has been in place since 1998. In the UK between 2002 and 2006 separate race, gender and disability positive duties were introduced and a consolidated equality duty covering the protected grounds of: gender, disability, race, age, sexual orientation, gender identity, religion or belief, was introduced in 2010.

2. What Is A Public Sector Duty?

Public sector equality and/or human rights duties require public bodies to take proactive steps to actively promote equality, protect human rights and combat discrimination having regard to all of their functions and powers. They are, therefore, aimed at going beyond simply avoiding potentially discriminatory acts against employees and service users. In the case of the new Irish duty, public bodies are required to consider how they will advance equality for the groups protected under equality legislation and how they will protect the human rights of all citizens in regard to the human rights obligations in the Constitution and in domestic legislation. Such a duty requires public bodies to consider the human rights and equality impact of their policies, services, procedures and practice and to ensure that the promotion of equality and human rights becomes a core part of the way in which the organisation operates and conducts its business, rather than an add-on or a reaction to incidents of discrimination or human rights violations that arise.

This more proactive approach has the potential to reinforce the current legislative model to address discrimination and human rights violations. The current model is more reactive in nature in that it requires the occurrence of discrimination or human rights violations to trigger the taking of a case. In addition, the current model largely relies on the willingness and capacity of individuals to take a legal case. This individualised reactive model on its own is inadequate to address discrimination and human rights abuses at the systemic level. By requiring public bodies to also take proactive measures there is an important shift in focus from solely relying on victims of discrimination or human rights abuses to initiate a case, to one where the onus is also on the public body to take measures to prevent discrimination, promote equality and protect human rights in the first instance.

Ireland will be breaking new ground in this regard, and the opportunity exists to lead an approach to integration which could be an exemplar in the EU.

Public sector duties have been shown to:

- Enhance the provision of quality, inclusive, accessible and accountable public services that can reduce inequalities and advance the fulfillment of human rights across society, particularly in regard to the provision of key social goods (health, housing, education, social care) which have the potential to enhance the life chances of the population,⁸
- Support an informed and evidence-based approach to the work of public sector organisations,
- Drive cultural change within and across the public sector,
- Ensure value for money in public spending
- Improve outcomes for employees in the public sector, including: increasing productivity and innovation, reducing staff turnover and absenteeism, and enhancing organisational commitment,⁹
- Bring a greater breadth of experience, knowledge and perspective to the design and delivery of services and policy making.

8. The Equality Commission of Northern Ireland in its : Reports on the Implementation of the Section 75 Equality and Good Relations Duties by Public Authorities based on Public Authority Annual Progress Reports, 2003 to 2006, point to tangible outcomes of the duties including: Improved access to health, education and other services and increased access to employment in the public sector for people with a range of physical, sensory and learning disabilities; Improved access to a range of public services for people from minority ethnic groups; Increased representation of women in a number of District Councils; Increased childcare provision in target rural areas ;Mainstreaming of a number of Traveller health projects; Improved access to employment for older people across a range of public services; Improved facilities in a number of public services for women attending with children ; Extension of paternity leave entitlements to lesbian and gay employees in a number of health and social service trusts; Increased participation of minority ethnic communities in marketing for tourism.

Also, independent reviews on the UK Duties: Schneider Ross (2009) Equality Duties: Assessing the Cost and Cost-Effectiveness of the Specific Race, Gender and Disability Equality Duties, commissioned by the UK Government Equalities Office, found a number of tangible positive outcomes from implementation of the duties.

9. Review of the Scottish equality duty found a number of positive outcomes from the operation of the duty: changes in research, policy design and consultation; greater awareness and understanding of equality issues and capacity building across the public sector; and greater accountability by public authorities. Fitzgerald, Rona and Associate (2009) 'Equal opportunities and the Scottish Parliament: a progress review', Equality and Human Rights Commission research report 32.

For example, research by the National Centre for Partnership & Performance for the Equality Authority reviewed over 130 Irish companies and found a direct correlation between the introduction of high performance work systems which included a focus on equality and diversity, and increased levels of productivity and innovation, together with reduction in staff turn-over rates. Flood, P, Mkanwa, T, and O'Regan, T (2008) 'New Models of High Performance Work Systems: the business case for strategic HRM, Partnership and diversity and equality systems' , The National Centre for Partnership Performance, Dublin and the Equality Authority, Dublin.

See also: 'Talent not Tokenism- the business benefits of workplace diversity' (2008), CBI, TUC and the Equality and Human Rights Commission UK; Monks, K (2007) 'The Business Impact of Equality and Diversity-The International Evidence', The National Centre for Partnership and Performance and the Equality Authority, Dublin.

3. Provisions Of The Public Sector Duty: IHREC Act Section 42

3.1: Public Bodies Coming Within The Scope Of The Duty

Section 2 of the IHREC Act 2014 defines a ‘public body’ for the purposes of the duty. Any Department of State, for which a Minister of the Government is responsible, comes within the scope of the duty (the Department of Defence & the Defence Forces, however, are specifically exempt from the duty). The Act also specifically names: local authorities,¹⁰ the Health Service Executive, universities/ Institutes of Technology and Education and Training Boards¹¹ as coming within the scope of the duty.

The Act also provides that a public body shall include a body established: under an enactment (other than the Companies Acts) or charter; by any Scheme administered by a Minister of the Government; or under the Companies Acts in pursuance of powers conferred by or under another enactment, and financed wholly or partly by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government.¹² Semi-state bodies, such as RTE, ESB and CIE, are, therefore, covered by the duty as is An Garda Síochána. The reference to bodies established under charter, means that educational bodies such as Kings Inns and certain private schools established by charter are subject to the duty. Bodies such as the Dublin Airport Authority, An Post and EirGrid are also captured by the duty as they are companies where the majority of shares are held on behalf of a designated government minister.

As private bodies are not covered by the duty, private hospitals would, for example, be exempt.

Subsection (h), is important, as it allows that *“any other person, body, organisation or group financed wholly or partly out of moneys provided by the Oireachtas that stands prescribed for the time being (being a person, body, organisation or group that, in the opinion of the Minister, following consultation with the Commission, ought, in the public interest and having regard to the provisions and spirit of this Act, to be prescribed)”*.¹³ This clause could usefully be invoked at this early stage in the life of the new duty, to ensure that public bodies, which it is believed should come within the scope of the duty, but where ambiguity exists in this regard, are prescribed as public bodies for the purposes of the duty as quickly as possible.

10. Within the meaning of the Local Government Act 2001.

11. Established under S9 of the Education and Training Boards Act 2013.

12. IHREC Act Section 2 Interpretation, Public Bodies: subsections (f) and (g).

13. IHREC Act 2014, Interpretation: ‘public body’: Section (h)

3.2: Scope Of The Duty

Public bodies must consider the promotion of equality for, and prevention of discrimination against, groups protected under equality legislation (the Employment Equality Acts 1998-2012; and the Equal Status Acts 2000-2011). In terms of the scope of the duty to address human rights concerns, 'human rights' refers to:

- (a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution,
- (b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party and which has been given the force of law in the State or by a provision of any such agreement, treaty or convention which has been given such force, and
- (c) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Convention provisions within the meaning of the European Convention on Human Rights Act 2003.¹⁴

The duty, therefore, is applicable to those human rights guaranteed by the Constitution and which have the force of law in the State.

The Constitution sets out a number of fundamental rights:

- Right to life (Article 40.3)
- Equality before the law (Article 40.1)
- Right to a fair trial (Article 38.1)
- Right to liberty (Article 40.4)
- Right to freedom of expression, assembly and association (Article 40.6.1)
- Protection of the family (Article 41)

In addition, the Courts have interpreted the Constitution as including certain human rights, not explicitly set out in the Constitution but which are given meaning by the Courts. These include:

- Right to bodily integrity
- Right to freedom from torture, inhuman or degrading treatment or punishment
- Right to work and earn a livelihood
- Right to privacy ¹⁵

The European Convention on Human Rights (ECHR) Act (2003) is the only human rights instrument that has been incorporated into domestic law. The ECHR Act (2003), which incorporates the European Convention on Human Rights into Irish law, encompasses the following civil and political rights:

- Right to life (Article 2)
- Prohibition of torture and ill-treatment (Article 3)
- Prohibition of slavery, servitude or forced or compulsory labour (Article 4)
- Right to liberty and security (Article 5)
- Right to a fair trial (Article 6)
- No punishment without law (Article 7)
- Right to respect for private and family life (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- Right to marry (Article 12)
- Right to an effective remedy (Article 13)
- Prohibition of discrimination in the enjoyment of Convention rights (Article 14)
- Protection of property (Protocol 1, Article 1)
- Right to education (Protocol 1, Article 2)
- Right to free elections (Protocol 1, Article 3)

While the S42 duty is applicable to those human rights treaties and conventions that have the force of law in the State, Ireland is party to a number of human rights instruments that have significant relevance for the operation of a range of key public bodies.¹⁶ A key example in this regard, is the obligation in Article 2(1) of the UN International Covenant on Economic Social and Cultural Rights (ICESCR) whereby the State is obliged to use the “maximum of its available resources” to progressively achieve the full realisation of economic, social and cultural rights set out in the Covenant. Such rights pertain to key areas of public service provision: education, housing, water, health and decent working conditions. The UN ICESCR, therefore, places an obligation on the State to ensure that resources spent by the State, in particular via the provision of key public services, are allocated in such a manner to maximise the protection of, respect for and fulfillment of economic, social and cultural rights. Public bodies, therefore, should use the duty as a platform to give broad consideration to its obligations under UN instruments.

The EU Charter of Fundamental Rights is also relevant in terms of the application of the duty.¹⁷ The Charter contains the full spectrum of rights and freedoms under six areas: dignity, freedoms, equality, solidarity, citizens’ rights, and justice.

The case law on how the Charter should apply to Member States is still evolving, however, case law from the Court of Justice of the EU indicates that there are currently three situations in which it is clear that the application of the Charter of Fundamental Rights is triggered in a Member State.¹⁸ These are worth noting for the purposes of the application of the S42 duty. The Charter of Fundamental Rights is triggered:

1. Where the Member State is implementing EU law or EU regulations (such as EU Equal Treatment Directives).
2. When a Member State authority exercises a discretion that is vested in it by virtue of EU law. In cases to the Court of Justice of the EU (CJEU) in 2011 and 2013, the Court held that a Member State is required not to transfer an asylum seeker to the Member State initially identified as responsible, where systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible provide substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment in violation of Article 4 of the Charter.¹⁹
3. Where national measures are being implemented linked to the disbursement of EU funds. In a 2013 case, the CJEU held that in implementing Council Regulation 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund, Member States are required to respect the principles of equal treatment and non-discrimination, enshrined in Articles 20, 21(1) and 23 of the Charter.²⁰
4. The new round of EU Structural Funds 2014-2020, in which Ireland's allocation is nearly €2billion, requires disbursement of all funds to respect cross-cutting principles of equality, social inclusion, combating poverty, combating discrimination, ensuring disability accessibility, and enhancing the institutional capacity and participation of stakeholders including civil society.²¹ Articles 5, 7 and 9 of the Common Provisions Regulation are horizontal principles to be carried through all of the individual European Structural Investment (ESI) funds and are cross-cutting policy objectives for the implementation of all ESI Funds.²²

14. IHREC Act 2014, Part 3 Section 29: definitions.

15. Irish Human Rights Commission (2010) "Human Rights Guide for the Civil and Public Service" IHRC, Dublin.

16. Ireland has ratified, and has therefore agreed to be bound by, the following international UN human rights instruments: International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC).

17. The Charter of Fundamental Rights was given legal effect by the Lisbon Treaty and requires Member States to comply with the provisions of the Charter when implementing EU law i.e. the Charter applies when a Member State adopts or applies a national law implementing an EU Directive or EU regulation. It entrenches: all the rights found in case law of the Court of Justice of the EU; the rights and freedoms enshrined in the European Convention on Human Rights; and other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments.

3.3: Obligations Under The Duty

Section 42(1) outlines what public bodies are obliged to do:

42(1) A public body shall, in the performance of its functions, have regard to the need to—

- (a) eliminate discrimination,
- (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
- (c) protect the human rights of its members, staff and the persons to whom it provides services.

Public bodies are required to consider the elimination of discrimination, the promotion of equality of opportunity and the protection of human rights in regard to the totality of their functions (as employers, policy makers, service providers, and procurer of services). The duty gives some indication of how compliance with the need to ‘have regard to’ should be measured:

42(2) For the purposes of giving effect to subsection (1), a public body shall, having regard to the functions and purpose of the body and to its size and the resources available to it—

- (a) set out in a manner that is accessible to the public in its strategic plan (howsoever described) an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues, and
- (b) report in a manner that is accessible to the public on developments and achievements in that regard in its annual report (howsoever described).²³

In the UK, where public sector equality duties have been in place for a number of years, case law has interpreted ‘due regard’ for the purposes of applying the duty in practice, as that which is appropriate and proportionate. In determining what is appropriate and proportionate, public bodies should consider their:

- Remit and potential to promote equality and eliminate discrimination and to protect human rights in key areas,
- Size, reach and level of resources,
- Specific function and policy areas which are most relevant to improving outcomes for groups experiencing inequality, discrimination and human rights violations.

In delivering on their obligations under the duty, a public body is required to make “*an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues*”. Sections 4 and 5 below, outline a framework setting out the steps public bodies could take to enable them to fulfill their obligations under the duty in terms of assessing the equality and human rights concerns, relevant to their functions and purpose, and subsequent action-planning, monitoring and evaluation.

Section 42(11) provides that “nothing in this section (42) shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under subsection (1)”. This would not, however, exclude the possibility of interested parties applying for a judicial review where it is considered that a public body is in breach of the duty. If, for example, a public body failed to respond, or gave a frivolous response, to an invitation by the IHREC to complete a review or action plan, then it would be open for judicial review proceedings to be initiated by the IHREC. It is well established in administrative law that public bodies exercising public functions are required to give reasons for their decisions and failure to do so can give rise to an application for judicial review being brought.²⁴

3.4: The Role Of The IHREC

Section 42(3) and (4) outline the role of the Irish Human Rights and Equality Commission (IHREC) in regard to supporting public bodies to fulfill their obligations regarding the duty. The Act states that the IHREC may:

- Give guidance to public bodies to encourage good practice in terms of implementing the duty,
- Issue guidelines on the duty,
- Prepare codes of practice for public bodies to develop “performance measures, operational standards and written preventative strategies” regarding the duty.²⁵

Section 42(5) also provides that where the IHREC considers that “*there is evidence of failure by a public body to perform its functions in a manner consistent with*” the duty, the IHREC may “*invite*” the public body to carry out a review in relation to the performance of its functions under the duty, or prepare and implement an action plan in relation to the performance of its functions under the duty, or both.²⁶ The IHREC can ask for this review or action plan to focus on a specific area where they believe the body is failing to address equality of opportunity, discrimination or human rights concerns, or a more general review and/or action plan can be sought.²⁷ This is an area where judicial review could be used to good effect as a type of enforcement mechanism within the duty. Where a public body fails to respond to the IHREC invitation to complete a review or action plan and no reason is provided, then judicial review proceedings could usefully be initiated.

Since its establishment, the Equality Authority has developed a significant body of expertise in supporting public authorities to develop equality mainstreaming measures. The Equality Authority produced a number of useful guidance documents for public bodies to support equality mainstreaming measures and established a learning network for public sector bodies to support and improve the equality competence of public sector organisations in the area of service provision.²⁸ In addition the Equality Authority has, for many years, supported public bodies through the steps of equality mainstreaming. This body of work must serve as a minimum standard starting point in implementing the duty.

The Irish Human Rights Commission had, more recently, developed a focus in this area by producing a human rights guide for the civil and public service and accompanying training for public and civil servants. However, this field requires significant further development to build up a body of expertise and knowledge to match that already developed in the equality field.

The challenge for the Irish Human Rights and Equality Commission will be to develop integrated guidance tools that support public sector bodies to give attention to human rights and equality concerns in a coherent and integrated manner. The development of an integrated framework that all public bodies, regardless of their remit, could use as a basis for implementing the duty, would provide some coherence and set a standard in terms of how the duty is implemented across the whole public sector. This could be a useful starting point for the IHREC in terms of any guidance tools it might develop. This could be achieved through the preparation of a code of practice on the duty and this should be a priority for the IHREC in enabling implementation of the duty across the public sector to a high level of quality and impact. This is particularly important given the absence of a robust enforcement mechanism attached to the duty.

18. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2013 Report on the Application of the EU Charter of Fundamental Rights <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0224&from=EN> .
19. CJEU, C-4/11 Bundesrepublik Deutschland v Kaveh Puid, 14.11.2013.
CJEU, joined cases C-411/10 and C-493/10, NS v Secretary of State for the Home Department, 21.12.2011.
20. CJEU, C-401/11 Blanka Soukupová, 11.04.2013.
21. Arts 5, 7 and 9 of the Common Provisions Regulation, Reg 1303/2014, OJ L 347, 20.12.2013, p. 320–469, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1303&:PDF>
22. The Irish Partnership Agreement 2014 for the implementation of EU funds states that the Irish Human Rights and Equality Commission will be requested to participate in the monitoring structures when these are put in place, in addition to intermediate bodies being asked to report on the contribution to, or achievement of, social inclusion and equality objectives, as part of the monitoring procedures and arrangements under the various Operational Programmes : Ireland Partnership Agreement, p.214, http://ec.europa.eu/contracts_grants/agreements/index_en.htm
23. IHREC Act S42(2).
24. In England and Wales, a number of judicial reviews have been undertaken to support enforcement of the equality duty in the UK.
25. IHREC Act S42 (3) and (4).
26. IHREC Act 2014 S42 (5).
27. IHREC Act S42 (6).
28. Good practice publications developed by the Equality Authority include: “An Equality Proofing Template.For the City and County Development Boards”; 2011 “Embedding Equality in Public Services: What Works in Practice” ; 2010 “Embedding Equality in School Development Planning”; Equality Impact Assessment Template (for VEC’s) <http://www.equality.ie/Files/Equality%20Impact%20Assessment%20Template.pdf>

4. The Duty In Practice

The S42 duty will require public bodies to take a more considered, proactive approach to eliminating discrimination, promoting equality of opportunity and protecting human rights, regarding their functions as an employer, policy maker, service provider and procurer of services. This process is essentially about bringing a consciousness of equality and human rights concerns to all of the organisation's principles, strategies, plans, policies, programmes, procedures, and practices in order to ensure equality of outcome and the fulfillment of human rights for service users, employees and those affected by the policy decisions of the organisation.²⁹

The duty will oblige public bodies to focus at three levels:

1. Policy making, service design, and internal procedures
2. Policy implementation, service delivery, and internal practices
3. Evaluation, review and monitoring of policies, services and internal operations

It will require action at three stages:

Stage 1: Pre-planning and preparation for the implementation of the duty and creating the conditions for its implementation,

Stage 2: Assessing the equality and human rights concerns which are relevant to the various functions of the organisation and action-planning to address those concerns,

Stage 3: Monitoring, evaluating and reporting on outputs and outcomes.

When 'affected' groups are referred to in the following sections, this refers to people protected under the nine grounds in equality legislation and people who experience discrimination on the basis of socio-economic status. While not currently covered by equality legislation, any action to implement the new duty should include a focus on people discriminated against because of their socio-economic status. This is on the basis that public bodies hold significant potential to address economic inequality, through the redistribution of key social goods, and many have a remit to address poverty as part of their policy-making and service delivery functions.³⁰ In addition, the non-discrimination provisions in international human rights instruments, which have been ratified by the Irish State, go beyond the grounds covered in Irish equality legislation and include grounds that encompass socio-economic status.

29. The European Commission (2011) "Compendium of Practice on Non-Discrimination/Equality Mainstreaming" is a useful starting point for organisations who want to understand mainstreaming and the stages involved.

30. Government departments, local authorities and state agencies are currently required to undertake Poverty Impact Assessments on key policy proposals

Stage 1: Pre-Planning and Preparation

Since the enactment of equality legislation many public sector organisations have developed good practice in taking a more proactive approach to addressing equality and discrimination concerns across their functions. There has been less focus on addressing human rights concerns in this way. The obligation under equality legislation to reasonably accommodate the needs of employees and service users with a disability also offers a body of good practice from which to draw when implementing the duty.

In bringing a focus on socio-economic status to the duty, there is a body of practice to build on, including the work of government departments and state agencies to undertake Poverty Impact Assessment³¹ and of the Department of Social Protection to undertake a Social Impact Assessment of the budget.³² The focus on human rights presents new challenges. However, it could draw from the work of NGOs that have proposed models for equality and human rights proofing of the budget. There is also a body of experience at European level where the European Commission has worked to mainstream the provisions of the Charter of Fundamental Rights in its policy work.³³ The implementation of the duty, therefore, should be seen in the context of building on existing obligations and on a body of practice already in place.

In the pre-planning stage the organisation should identify a working group (drawn from senior management across different functions) to oversee and drive the process. Specific training/awareness raising initiatives should be considered for the working group to ensure there is a common understanding of equality and human rights concepts and of the implications of the duty.

The working group could usefully conduct a review to address the following questions as part of the pre-planning stage:

- What does the duty require us to do and what might this look like in practice in our particular organisation?
- What opportunities does the duty afford the organisation and how does it build on our current work to address equality and human rights concerns?
- Are there legacy issues that the organisation should extract learning from to aid the work (such as previous discrimination claims/complaints by employees and/or service users)?
- What steps can we take at the outset to ensure that we take a strategic approach so that this work becomes embedded and a core part of how we operate?
- What framework will we use to ensure an integrated and effective approach to both equality and human rights?
- How do we ensure the participation of groups affected by inequality, discrimination and human rights abuses to inform this work at all stages?

Stage 2: Assessment and Action-Planning

Public bodies, in deliberating on the level of regard they should give to the duty, are obliged to consider: their functions and purpose, their size and the available resources. As noted previously, it is recommended that any decision on the level of regard, should be on the basis of what is deemed to be proportionate and appropriate for the body, given its remit, its potential to promote equality, eliminate discrimination and protect human rights in key areas, its level of resources, and its reach.

The **Assessment** and **Action-Planning** phase should start by developing an understanding of the equality and human rights issues that are of relevance to the organisation as an employer, policy maker, service provider and procurer of services. In relation to service users and those impacted on by the organisation's policies this will involve:

- Engaging with external stakeholders representing affected groups experiencing inequality or human rights issues. This engagement should serve to get an overview of the main issues impacting on these groups, across all functions of the organisation,
- Gathering information to assess the positive/negative and potential impact of the organisation on these issues as a policy maker, employer, service provider and procurer of services,
- Reviewing the organisation's plans, policies and programmes for their impact on equality and human rights issues for affected groups. This review should analyse the strengths/weaknesses/gaps in these elements,
- Reviewing national, regional and local equality and human rights data on the current situation for the affected groups in the areas for which the public body has responsibility.

In relation to employees or potential employees this will involve:

- Engaging with staff to get an overview of the main equality and human rights issues, for members of affected groups, as employees or potential employees,
- Gathering information on the presence and experience of staff from across the affected groups,
- Reviewing the organisation's internal policies, procedures and practices for their impact on equality and human rights for these groups within the organisation. This review should analyse the strengths/weaknesses/gaps in these internal elements.

The organisation should then have a clear picture of where it is performing strongly, in terms of achieving clear outcomes for affected groups experiencing inequality and human rights issues, and where change is required. However, after the above work, the organisation may uncover areas where it is unclear what the potential or actual impact is for specific groups, or areas where it is having a negative impact for some groups. These areas will require further more detailed assessment.

The second step in the **Assessment** and **Action-Planning** phase should implement this further more detailed assessment. Two tools can be employed:

Equality and human rights impact assessment:³⁴

Impact assessment is, ideally, carried out at the development stage of a policy or design stage of a service. However, it can be used to assess changing or existing policies or services. Impact assessment is used to systematically assess the likely, or actual, effects of a policy or service on the affected groups experiencing inequality and human rights issues. Impact assessment aims to determine whether a policy or service:

- Promotes equality and fulfills human rights for affected groups,
- Accommodates the diversity of people from affected groups,
- Does not discriminate against or violate the human rights of affected groups.

The key steps involved in impact assessment are:

1. Data gathering to determine the situation, experience and identity of people from the affected groups among the target population for the policy,
2. Assessment and analysis of the data gathered, to determine the likely or actual impact of the policy or service on people from the affected groups,
3. Engaging with organisations representing people from the affected groups to assess the information gathered and analysis done, and to explore the implications of these,
4. Action required to change/enhance the policy or service is identified on foot of the data analysis and assessment and engagement with representative organisations,
5. Monitoring the action taken to ensure it has the desired impact and outcome.

Employment Equality and Human Rights Review:

An employment equality and human rights review is an examination of the internal operations of an organisation. It assesses the internal policies, procedures, staff perceptions and practices within the organisation for their impact on equality for, and human rights of, staff. Equality and human rights reviews:

- Establish equality and human rights issues internal to an organisation,
- Identify the steps that need to be taken internally to enhance the capacity of the organisation to achieve equality and fulfill human rights for staff.

The key steps in implementing an Equality and Human Rights Review are:

1. Data gathering in relation to the composition and position of staff of the organisation,
2. Data gathering on the perceptions and experiences of all staff and, in particular, staff from the affected groups,
3. Review of internal policies, procedures and practices for their impact on equality for, and human rights of, staff from the affected groups,
4. Engagement with staff from the affected groups to assess the data gathered and its implications,
5. Identification of steps that could be taken internally to achieve equality for and fulfill human rights of all staff.

The third and final stage in the Assessment and Action-Planning phase involves developing priorities for action.

Public bodies will need to develop and implement a plan of action. This could include:

- Developing new policies, programmes, or services,
- Reviewing or re-designing existing policies, programmes, or services,
- Introducing mitigating actions to address identified weaknesses in policies, programmes, or services and the impact of these weaknesses,
- Introducing or strengthening of internal systems for future impact assessment of all new policies, programmes, or services,
- Developing new internal policies or procedures,
- Reviewing or re-designing existing policies and procedures,
- Introducing mitigating actions to address weaknesses identified in internal policies or procedures and the impact of these weaknesses.

In developing this set of actions the organisation might consider the following:

- Priority should be given to areas where maximum impact can be achieved. The rule should be: it is not about what the organisation wants to do, it is about what action is necessary,
- In planning what actions to undertake, the organisation should remain outcome focused by regularly asking the question “what change do we want to see as a result of this action?”
- The involvement of internal and external stakeholders representing people from the affected groups in developing and prioritising actions is critical,
- Action plans should identify persons with responsibility for each action area and time lines for delivering on actions,
- Priorities should be based on sound information and evidence.

Stage 3: Monitoring, Evaluation, and Reporting

Public bodies are obliged to make available to the public their assessment of the relevant issues and the action they propose to take or have taken through their strategic plan or equivalent and the results and achievements from action taken.³⁵

On-going monitoring of the work should be undertaken by the working group tasked with driving the process within the organisation and those named as having key areas of responsibility in the action plan.

The following are key considerations to ensuring effective monitoring, evaluation and review of policies:

- Proper data systems must be established from the outset to ensure systematic data gathering, particularly in relation to the affected groups, to inform current and future actions to address inequality and human rights concerns,
- Measurable indicators should be set at the earliest phase of the planning for the duty, to ensure that change can be measured,
- Collaborative engagement with organisations representing people from the affected groups is an important component of the work to monitor, review and evaluate the work of public bodies to implement the duty.

31 Poverty Impact Assessment was introduced in 1998 as a result of a commitment in the original National Anti-Poverty Strategy. This commitment was strengthened further when it became a requirement in the Cabinet Handbook that Memoranda for the Government involving significant policy proposals “indicate clearly the impact of the proposal on groups in poverty or at risk of falling into poverty”. In addition the concept of Poverty Impact Assessment is fully embedded in the Regulatory Impact Assessment process which is carried out on a mandatory basis on particular policy proposals.

32 See for example FLAC’s work on undertaking a human rights-based approach to budgeting; http://www.flac.ie/download/pdf/flac_briefing_on_human_rights_approach_to_budgeting.pdf?issuusl=ignore and Amnesty Ireland (2014) “Bringing ESC Rights Home: Applying Ireland’s Economic Social and Cultural Rights Obligations to Budgetary Policy”.

33 European Commission, Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, COM(2010)573/4 and European Commission, Operational Guidance in Taking Account of Fundamental Rights in Commission Impact Assessments SEC(2011) 567 final.

34 For more information on equality impact assessment, see: The Equality Authority and the Irish Vocational Education Association (2007) “Guidelines for Conducting Equality Impact Assessments on IVEA and VEC Policies and Plans”.

35 IHREC Act S42 (2).

5. Developing An Integrated Approach To The Duty

The new duty will require public bodies to think and act in more transformative ways. The direction of travel in this regard, should be one of moving towards a focus on equality and human rights as a multi-dimensional phenomenon which requires consideration of outcome (what change has been achieved), process (how has it been achieved and how have affected groups been consulted and engaged with in the process) and autonomy (the choice and control afforded to affected groups in the process). The duty requires a focus on both equality and human rights concerns. The aim, therefore, should be to avoid a silo approach to equality and human rights concerns, and instead address these concerns in an integrated manner.

Two possible frameworks are suggested for consideration as a means of moving towards more transformative approaches which integrate equality and human rights concerns.

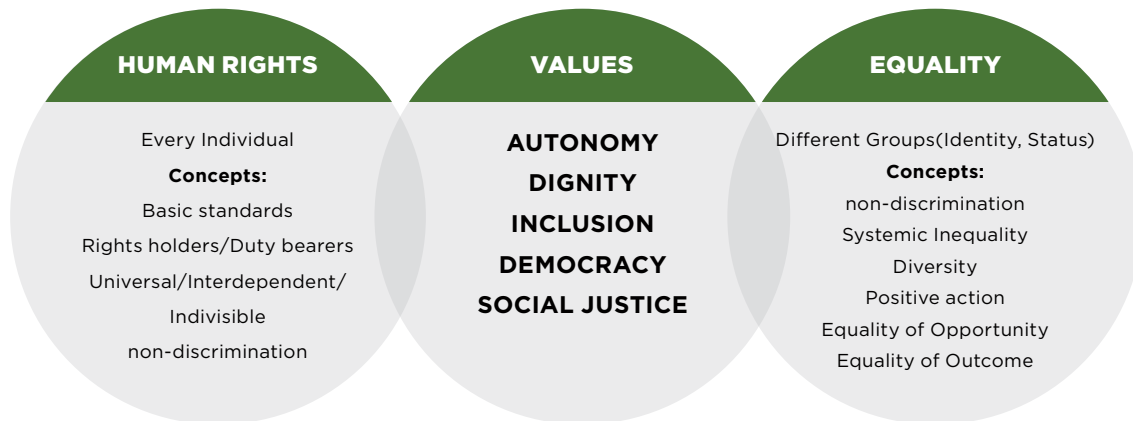
5.1 Values-Based Approach

Addressing equality and human rights concerns through the lens of values would involve identifying the values that connect and reinforce equality and human rights and using those values to guide the outcomes, goals, objectives and actions set to deliver on the duty.³⁶

A values-based approach can build on the strong values-based tradition that already exists in the public sector. Public service has always been viewed and communicated as being imbued with particular and unique values. A discussion paper, by the Institute of Public Administration, explored the values in the Irish public service and identified a range of values associated with public service including: honesty, impartiality, integrity, accountability, efficiency, fairness and equity.³⁷ The author notes that “confidence in the public service requires the development of a value-based culture through training, leadership and codes of conduct, and values statements, combined with preventative measures and recourse mechanisms. Whatever values are deemed appropriate for the public service, the evidence suggests that that performance will be enhanced through their meaningful integration into all aspects of the work of the service”.³⁸ This type of work provides a relevant context within which to develop and apply a values framework to integrate equality and human rights concerns into the work of public bodies.

In developing a set of values that would usefully assist in implementing the public sector equality and human rights duty, it is necessary to identify a core set of values that connect and reinforce equality and human rights. The following set of values are proposed as a framework to implementing the duty in an integrated manner: autonomy; dignity; inclusion; democracy; and social justice.

Values That Connect And Reinforce



- **Autonomy:** encompassing choice, agency, freedom, self-determination and the absence of coercion,
- **Democracy:** encompassing participation, voice, empowerment and accountability from those in positions of power,
- **Dignity:** encompassing respect, relationships of care and love, human worth and the absence of inhumane and degrading treatment, harassment and discrimination,
- **Inclusion:** encompassing a sense of belonging and community, interdependence, collective responsibility and a valuing of diversity,
- **Social Justice:** encompassing redistribution of wealth, income, jobs and social goods and the absence of privilege and entitlement.

This framework of values needs to be applied to securing outcomes for groups covered by the nine grounds under the equality legislation as well as the ground of socio-economic status.

The advantages of using a values-based approach as a framework to implement the public sector duty include:

- The approach is comprehensive in relation to human rights and equality while retaining a simplicity that ensures the duty can be implemented,
- Embedding plans, policy, service provision, and internal operations in a common value base with a capacity to drive new impacts on issues of equality and human rights,
- The potential to develop a common approach to the duty across the whole of the public sector with a common set of values (integrating equality and human rights) developed as a starting point for action,
- The approach is adaptable to particular sectors or contexts.

The IHREC could collaborate with relevant civil society organisations to develop a set of values that integrate equality and human rights and to elaborate on how such values might translate into specific objectives and actions for different public bodies. Guidance materials could be developed in this regard.

A values approach should be implemented in collaboration with internal and external stakeholders representing the affected groups. Implementation should involve the organisation in:

Stage 1. Pre-planning and preparation

- Developing and agreeing a set of core values that encompass equality and human rights concerns that are relevant to the role and functions of the body,
- Setting out what these values mean in concrete terms, regarding the body's role and remit and regarding specific affected groups, and setting objectives for each value,

Stage 2. Assessing and Action-Planning

- Engaging with external and internal stakeholders, representing affected groups, to get an overview of the main equality and human rights issues for these groups in relation to the understanding and objectives identified for each of the core values,
- Reviewing the organisation's plans, policies and services, in relation to the understanding and objectives identified for each of the core values and to analyse strengths, weaknesses and gaps,
- Undertaking impact assessment of plans, policies and services, as necessary, to determine the situation for people from the affected groups in relation to the understanding and objectives identified for each of the core values and to analyse strengths, weaknesses and gaps,
- Undertaking an employment equality and human rights review of internal operations, as necessary, to determine the equality and human rights issues for employees and potential employees from the affected groups in relation to the understanding and objectives identified for each of the core values and to analyse strengths, weaknesses and gaps in internal policies, procedures and practices,
- Identifying and detailing actions to be taken to address the issues identified and the weaknesses and gaps identified for each of the core values.

Stage 3. Monitoring, evaluating and reporting on outputs and outcomes

- Developing data systems to measure the situation and experience of people from the affected groups, who are among the target population for the plan, policy, or service, in a manner that is relevant to the understanding and objectives identified for the core values,
- Setting indicators to measure change in relation to the objectives identified for each of the core values,
- Conducting relevant evaluations as appropriate and ensuring progress of the actions identified is tracked and discussed on a regular basis at management level.

5.2 THE CAPABILITY APPROACH

The economist and philosopher Amartya Sen introduced the concept of ‘capabilities’ in the 1980s, initially as a means of measuring well-being.³⁹ Sen defined capabilities in terms of the substantive freedoms a person enjoys to lead the kind of life he or she has reason to value.⁴⁰ Substantive freedom, also described as ‘flourishing’, can be measured across the following dimensions:

- **Equality of outcome** (addressing the central and valuable things in life that individuals and groups achieve),
- **Equality of autonomy** (addressing issues of choice and control and the independence people have in order to make decisions),
- **Equality of process** (addressing the treatment of people in terms of dignity, respect, and in terms of addressing discrimination against people and groups).

‘Capabilities’ are what the person is enabled to be and to do, in order to flourish or to have substantive freedom.

The capability approach has been used by the Equality and Human Rights Commission in Britain, to develop a framework to measure the situation in relation to inequality and human rights in Britain.⁴¹ A list of central capabilities were developed drawing on the rights contained in the key international human rights instruments. These cover ten key domains with associated freedoms:

- **Life** (e.g. avoid premature mortality, protection from murder)
- **Health** (e.g. high standard of physical, mental, reproductive and sexual health, access to information and care, maintain a healthy lifestyle, live in a safe and healthy environment)
- **Physical security** (e.g. free from violence, free cruel and degrading treatment, protected from physical or sexual abuse, secure use of public spaces)
- **Legal security** (e.g. treated equally before the law, freedom from arbitrary arrest, right to a fair trial, access to information and advocacy)
- **Education and learning** (e.g. attain high standard of knowledge, understanding and reasoning, fulfilled and stimulated intellectually, including being creative, develop skills for participation, access information and technology to participate in society)
- **Standard of living** (e.g. standard of living encompassing nutrition, clothing, housing, warmth, social security, social services and utilities, and being cared for and supported when necessary, live with independence, dignity and self-respect)
- **Productive and valued activities** (e.g. decent paid job, just and favourable working conditions, care for parents and children, recognition of value of your work even if unpaid, balance between paid and unpaid work, care and leisure)

- **Individual, family and social life** (e.g. hope for the future, form intimate relationships, friendships and a family, spend time with and care for others including family, enjoy independence and equality in primary relationships including marriage)
- **Identity, expression and self-respect** (e.g. freedom of expression, of cultural identity and expression of gender, and of conscience, belief and religion, confidence that you will be treated with dignity and respect)
- **Participation, influence and voice** (e.g. participate in decision making that affects you, participate in forming government policy, form and join civil society organisations, participate in local community).

The capabilities a person has will depend on a number of factors such as: their personal characteristics and identity; the people of influence in their life; the resources they can draw on; the services in their area; the rights and entitlements they can access; the legislative framework in their country.⁴² Capabilities enable “concerns such as differences in needs, underlying barriers and constraints (including underlying social, economic, cultural and institutional factors), social and cultural norms, adaptive expectations, and actual behavior and choices, to be given a greater role in the conceptualisation of equality and inequality”.⁴³

The advantages of using the capability approach as a framework to implement the public sector duty:

- It incorporates equality and human rights concerns,
- It addresses both subjective outcomes (e.g. dignity, respect) and objective outcomes (e.g. provision of housing),
- It encompasses a multi-dimensional focus on outcome, process, and autonomy,
- It is adaptable to the requirements of the local and/or service context.⁴⁴

The IHREC could collaborate with civil society to develop a set of capabilities that integrate equality and human rights and to elaborate on how such capabilities might translate into specific objectives and actions for different public bodies.

This approach should be implemented in collaboration with internal and external stakeholders representing the affected groups. Implementation should involve the organisation in:

Stage 1. Pre-planning and preparation

- Using the list of ten central capabilities developed by Burchardt et al, to develop a list of key capabilities (and their associated freedoms) that capture the equality and human rights issues for people from the affected groups that are relevant to the public body’s role and functions,
- Identifying how each of those capabilities translates into objectives that capture the role and functions of the body.

Stage 2. Assessing and Action-Planning

- Engaging with external and internal stakeholders representing people from affected groups, to get an overview of the main equality and human rights issues for these groups, across the objectives identified for the central capabilities,
- Reviewing the organisation's plans, policies and services across the objectives identified for each of the central capabilities and analysing the strengths weaknesses and gaps,
- Undertaking impact assessment, as necessary, on plans, policies and services to determine the situation for people from the affected groups in relation to the objectives identified for each of the central capabilities and to analyse strengths, weaknesses and gaps,
- Undertaking an employment equality and human rights review of internal operations, as necessary, to determine the equality and human rights issues for people from the affected groups in relation to the objectives identified for each of the central capabilities and to analyse strengths, weaknesses and gaps in internal policies, procedures and practices,
- Identifying and detailing actions to be taken to address the equality and human rights issues identified and in regard to the weaknesses and gaps identified.

Stage 3. Monitoring, evaluating and reporting on outputs and outcomes

- Developing data systems to measure the situation and experience of people from the affected groups who are among the target groups impacted by the plan, policy, or service across each of the objectives identified for the central capabilities,
- Setting indicators to measure change in relation to each of the central capabilities for people from the affected groups,
- Conducting relevant evaluations, as appropriate, and ensuring that progress, across the actions identified, is tracked and discussed on a regular basis at management level.

36 See Equality and Rights Alliance (2015) "Developing an Integrated Approach to Equality and Human Rights", for more detailed discussion of a values-based approach.

37 Muiris MacCarthaigh (2008) "Public Sector Values", CPMR Discussion Paper No. 39, IPA, Dublin, 2008, Page 64.

38 IBID pg. 66

39 Amartya Sen (1999) "Development as Freedom", Oxford University Press, 1999

40 For a more detailed discussion on the Capability Approach see: Equality and Rights Alliance (2015) "Equality and Human Rights: An integrated approach".

41 This work has been led by Tania Burchardt, Polly Vizard and their colleagues in the London School of Economics. For more information see: <http://sticerd.lse.ac.uk/case/default.asp> last accessed January 2015.

42 Presentation on the CA by Burchardt to ERA seminar in November 2014 (access on the ERA website: [http://eracampaign.org/uploads/tania%20Burchardt%20input%20\(1\).pdf](http://eracampaign.org/uploads/tania%20Burchardt%20input%20(1).pdf)).

43 Polly Vizard "Towards a New Model of Public Services: Capability and Rights Based Approaches", in "2020 Public Services Trust at the RSA: Equality, Cohesion and Public Services" op cit.

44 Burchardt, presentation to ERA seminar op cit.

Conclusion

The public sector equality and human rights duty offers potential to drive and support a proactive approach to the promotion of equality, the protection of human rights and the elimination of discrimination across the public sector. Civil society organisations and the IHREC are key stakeholders in setting the level of ambition for this duty and working collaboratively with public bodies to ensure effective outcomes from the duty, for people experiencing inequality, discrimination, and human rights abuses.

The IHREC will play a key role in developing guidance and codes of practice to set the standard for public bodies in implementing the duty. Civil society organisations will play a key role in encouraging public bodies to work to a high level of ambition in meeting the requirements of the duty and in collaborating with public bodies in implementing the duty to ensure tangible outcomes for the groups they represent.

This public sector duty is the first combined equality and human rights duty in the EU. An opportunity exists for the public services to become an exemplar practice site in developing integrated and coherent approaches to addressing equality and human rights concerns. It is hoped that the ideas and strategies suggested in this publication can support them in this regard.

The Equality and Rights Alliance, in this paper, sets out a template to guide the different stages involved in implementing the duty. We offer two possible frameworks (a values-based approach and the capability approach) that could be further developed to enable an approach to implementing the duty that integrates equality and human rights concerns. We hope that this work will stimulate a debate that will further develop these ideas and establish high standards for an effective implementation of the duty.

The Equality and Rights Alliance will work with our member organisations to develop an understanding and competence regarding the duty and to develop skills in terms of collaborating with public bodies in the implementation of the duty in a manner that integrates equality and human rights and that achieves real outcomes for the people they represent.

www.eracampaign.org