


POSITIVE DUTY

An Opportunity for Equality Mainstreaming

2012 Mainstreaming Equality Conference Presentations



THE EQUALITY AUTHORITY
AN TÚDARÁS COMHIONANNAIS



The Equality Mainstreaming Unit is based in the Equality Authority and was set up under the Human Capital Investment Operational Programme 2007-2013. Its specific aim is to facilitate and support institutional change within small and medium enterprises (SMEs), employers' networks, trade unions and the vocational education and training sector, by strengthening their capacity to combat discrimination, to promote equality and to accommodate diversity.

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Introduction

Ireland's equality legislation (the Employment Equality Acts 1998-2011 and the Equal Status Acts 2000-2012) prohibits discrimination in employment and in the provision of goods, services and facilities on nine grounds: age, civil status (previously marital status), disability, family status, gender, race, religion, sexual orientation and membership of the Traveller community. This legislation also established the Equality Authority as a statutory body - with a mandate to work towards the elimination of discrimination and to promote equality of opportunity.

As part of this mandate, the Equality Authority has implemented a programme of work through its Equality Mainstreaming Unit (which is co-funded by the ESF) to support equality mainstreaming in labour market education and training and in the workplace.

Equality mainstreaming is about placing equality considerations at the heart of decision making. It means the systematic integration of an equality perspective into everyday work. It aims to change organisational cultures so that an equality perspective becomes an integral part of what we plan and provide.

The Equality Authority will soon be merged with the Irish Human Rights Commission. The draft legislation to establish the new Irish Human Rights and Equality Commission provides for the introduction of a positive duty in the public sector. A positive duty is a requirement for public sector organisations to have due regard to eliminating discrimination and promoting equality for groups covered by the equality legislation, and to protect human rights. Essentially, what a positive duty does, is to place equality mainstreaming on a statutory basis .

This publication brings together three papers delivered at a conference on the theme of positive duty organised by the Equality Authority in October 2012. The aim of the conference was to facilitate discussion and debate on what positive



duty means, why it is needed and how it can it work. The papers published here look at how public sector duties operate in other jurisdictions – specifically England and Wales, Scotland and Northern Ireland. They discuss the purpose and breadth of these public duties, how they came about, and more importantly their implementation and success. Together they offer very valuable insights and learning at a time when a public sector duty on equality and human rights is being considered for Ireland.



Contributors' Biographies

Helen Mountfield

Helen Mountfield QC is a barrister specialising in public law and human rights at Matrix Chambers in London, UK. She is recognised as a leading specialist in equality law, with particular expertise in the operation of public sector equality duties. She was counsel for the successful claimant in the first litigated case on public sector equality duties, and has been involved in many of the leading cases in England and Wales on public sector equality duties, concerning subjects as broad as education, post office re-organisation; library closures; and funding of specialist domestic services for women from minority ethnic groups. She has been counsel in several cases concerned with public sector equality duties and education. Helen was appointed a civil recorder in 2009; and Queen's Counsel in 2010. She is co-author of the Blackstone Guide to the Human Rights Act 1998, edits the White Book on human rights and was part of a team which devised equality law training for the Judicial Studies Board in 2011.

Chris Hall

Chris Hall is Head of Stakeholder Relations and Communications for Equality Challenge Unit where he has worked for the last four years. He is part of the senior management team and also leads ECU work in Scotland. Prior to joining ECU, Chris Hall worked at Universities and Colleges Employers Association as secretary to the Higher Education Joint Equalities Forum and assistant secretary to the national pay negotiation committees. He has also worked at the Higher Education Funding Council for England, the University of Warwick and the University of the West of England. Chris's first degree was in economics. He has recently completed a graduate diploma in law, which included a focus on gender pay discrimination.



Eileen Lavery

Eileen Lavery is Head of Advice and Compliance in the Equality Commission for Northern Ireland, an independent public body established under the Northern Ireland Act. The Commission has responsibility for the elimination of discrimination on the grounds of sex, race, disability, religious belief and political opinion, sexual orientation and age. It has also key responsibilities in relation to the duties on public authorities (equality mainstreaming). Eileen heads up the Equality Commission's casework in terms of the provision of advice and legal assistance to individuals who believe they have been the victims of unlawful discrimination. She is also responsible for formal investigations of potentially discriminatory practices and for investigations relating to the statutory equality duties on public authorities. Eileen Lavery has been working in equality and discrimination for over 30 years.



1. The Public Sector Equality Duties: Have They Changed Educational Culture in the UK?

Helen Mountfield, QC (England), Matrix Chambers

I recently gave a talk to some postgraduate students studying human rights, one of whom asked me about whether the public sector equality duty in the United Kingdom would have developed in a different way if the early cases had not mostly been about public sector cuts and taken place in an age of austerity. I have thought about that question and believe that it probably would have done. It is important to emphasise that the public sector equality duty is about *thought*; i.e. the way that people performing public functions think about equality. It is not just about how we trim budgetary cuts to minimise disadvantage and inequality, it is about changing culture so that concern for the equality effects of all public decisions are always brought 'into the mix' as part of the decision-making process.

Purpose and History

It is worth looking at how there came to be a public sector equality duty in the UK, because, so far as I am aware, there is not yet an equivalent provision anywhere else. The UK introduced a public sector equality duty as part of the institutional and cultural response to the murder of a child, a black teenager, in south-east London in April 1993. His name was Stephen Lawrence and the initial police response to his murder was fairly shocking.

An inquiry into the murder, set up under retired High Court Judge Sir William Macpherson, concluded that there had been institutional racism in the Metropolitan Police Service. This finding upset people who thought it implied that every police officer was racist, but that is not what the Macpherson report was saying. The report criticised the police as an *institution*: not only considering whether there were some individual racists involved, but also finding that the police as an institution had failed to examine the way it did business and the way it approached members of minority communities, people whose interests it had not thought through when considering how it approached delivering its services. The institution was not analysing its procedures and their effects on every member



of the community. The Macpherson report went on to say that this is not just about the police, it is not even just about the justice system, it is about everybody. The report concluded that ‘it is incumbent upon every institution to examine its policies and practices and their outcomes to guard against disadvantaging any section of our communities’. In other words, every institution must examine what it does to avoid disadvantage.

A New Approach to Equality

In response, the government amended the Race Relations Act 1976, through the Race Relations Amendment Act 2000, to create a generally applicable public sector equality duty. To begin with, this duty applied to race only. It was then extended to gender and disability equality. When the Equality Act 2010 came into force, the duty was broadened to cover all equality strands. The government minister introducing the public sector equality duty (Mike O’Brien, MP) said that it was important to recognise that this was about changing the culture, and that it was not just about paying ‘lip service’ to the idea of equality.

The UK already had various legal provisions against discrimination on various grounds, but the public sector equality duty changed the structure and focus. Instead of waiting for somebody to establish that they had been discriminated against and seek damages or a declaration – which requires individuals to know their rights and to be brave enough to put their heads above the parapet – the duty requires public authorities to think about potential discrimination in advance. It is a duty of consideration, through which public authorities guard against disadvantaging people by thinking about the potential equality effects of things they do before they do them.

Another important feature of the public sector equality duty is the move from avoiding discrimination to promoting equality. It is a feature of human nature that people find it difficult to imagine other people’s life experiences and tend to think that if they treat others as they would treat themselves, then their behaviour is not discriminatory. The problem with this is that always treating everybody in the same way does not achieve substantive equality, because the models we have in society are built around a norm that does not apply to everybody.



The public sector equality duty is about mainstreaming thought about equality and advancing and promoting it. Despite some criticism of the way it was drafted, the main provisions of the Equality Act 2010 offer a pretty clear model. The Act provides that a public authority must in the exercise of its functions have due regard to three statutory equality considerations, which are described as ‘needs’.

The first thing to notice is that the duty covers every function of a public authority and not just those with obvious equality implications. But the amount of ‘regard’ that is ‘due’ to equality will depend on the function that is being performed. Having ‘due regard’ to equality means, for example, that if you are designing a meteorology service you may not need to give the same level of regard to equality as you would if you were designing an education service or cutting a social welfare programme.

The second feature of the duty is that it is incumbent on a public authority to have due regard to three statutory equality ‘needs’. The legislation could simply have said that public authorities must ‘have regard to equality’ as a relevant consideration. Instead, it emphasises the *need* to do three things:

1. **To eliminate unlawful discrimination:** public authorities have a duty to address discriminatory policies and practices and to eliminate them.
2. **To advance equality of opportunity** between people who share a relevant protected characteristic and people who do not: this positive obligation goes beyond the need to avoid discrimination. In fulfilling its functions, a public authority has to give due regard to the need to advance equality.
3. **To foster good relations** between people who share a relevant protected characteristic and people who do not: fostering good relations involves both tackling prejudice and promoting understanding.

The protected characteristics in the UK are similar to those in Irish legislation, but members of the Traveller community are included in the protection against discrimination on grounds of race in the British model.

The equality duty also applies to bodies that are not public authorities but that exercise public functions. It is unclear how far that duty will extend, but it may be of some relevance in the further and higher education sector.



Advancing Equality of Opportunity

Section 149(3) of the Equality Act 2010 states that

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

This helpfully sets out what is meant by advancing equality of opportunity. This explanation was missing in the predecessor legislation about race and gender and disability. To give 'due regard' to the need to advance equality of opportunity, it is essential to address what is needed to remove or minimise disadvantage and to meet the different needs of different groups and encourage their participation in public life (the legislation specifically mentions the need to take steps to take account of people with disabilities).

A public authority should not start by deciding what it is going to do. Rather, it must begin by establishing what the disadvantages of a particular proposed course of action may be for people from particular disadvantaged groups. Only when the disadvantages have been identified can the authority start to decide what needs to be done, or what could possibly be done, to address them.

It is important to emphasise here that the public sector equality duty is a duty of consideration and thought. It is not a duty to achieve equality of opportunity. Public authorities need to recognise what they can do and what they cannot do. They should not be afraid of articulating anything that is holding back equality of opportunity, as they need to identify what the disadvantages are in order to give due regard to what can or cannot be done to address them. Then, but only then, is the public authority in a position to think about what if anything can and should be done to give due regard to redress any such disadvantages.



General Principles

There have been more than fifty cases concerning the public sector equality duty (in Section 149 of the Equality Act 2010 and predecessor legislation). The first case, *Elias v Secretary of State for Defence* [2006] 1 WLR 3213, was in 2005, and in that and subsequent cases, the courts have set out various general principles about what the public sector equality duty means. These cases have been helpful in encouraging debate and highlighting that this duty is not just about fine words, it is about enforceable principles.

The courts have said that decision makers must be aware of their duty to have due regard to equality. An equality policy is useless if it simply sits in a nice shiny file on a shelf. The people who are making decisions have to be aware of the policy and of the specific content of the duty. That does not mean that decision makers are expected to make statements such as ‘I have had regard to Section 149 1b(i)’, or anything like that, but they do have to understand the content of the duty and what it means. There have been cases in which decision makers said, ‘When I cut this public service I knew about equality because I am a local councillor and I am very much aware of equality issues generally.’ That is not enough. The courts require decision makers to demonstrate that they have thought in detail about what steps to take in response to an equality issue.

The courts have also said that due regard is that which is appropriate and proportionate in the circumstances. Therefore, the more obvious the equality effects of a decision, the more regard has to be given to it. Where a large number of people from a disadvantaged group or groups will be affected, the due regard required to be given to the equality needs is clearly very high (see *R (Hajrula) v London Councils* [2011] WHC 448 (Admin)). The courts have frequently said that the public sector equality duty must be performed ‘in substance, with rigour and an open mind’. It is not just about claiming to know that equality is important; it is about designing policy with the statutory equality needs sufficiently in mind.

The courts have pointed out that consideration of equality is an essential preliminary to a decision, rather than a rear-guard action when somebody makes a criticism or complaint (see *BAPIO Action* below). It has got to be an integral part of policy development at a formative stage. Equality analysis or



assessment is not a step, or a document that has to be produced and distributed: it is an ongoing and continuing duty of due thought and due regard. A lot of public authorities have responded to this duty by producing equality impact assessments, and this process is not a bad way of mainstreaming thought about equality. But an equality impact assessment is a tool and not an end in itself.

Changing the Culture

The public sector equality duty is gradually changing culture and thought and it has been helped by the comments of judges in some of the early cases. In the *Elias* case, for example, Lady Justice Arden offered some extremely helpful reasons on why equal treatment is essential in a democracy. She said that judges have a constitutional role to play in the process of transforming society into one in which individuals are valued and treated equally. In pointing out why unlawful discrimination is so serious, she highlighted how discrimination in educational opportunity hinders economic and social progress. She noted that in the case before the Court of Appeal, which was about indirect discrimination, there had been a finding at first instance of a breach of the public sector equality duty and that, although the Ministry of Defence was not challenging that finding on appeal (arguing instead that it had not actually discriminated), it was important for the ministry to recognise that the breach of the public sector equality duty was not just a technical matter. Failing to have due regard to equality is a very important failing and she hoped that the authorities would bear that in mind for the future.

Lord Justice Sedley has said, in *R (BAPCO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, that inattention to equality not only is unlawful but also is bad government. This insightful observation emphasises why regard to equality is important. If you are not designing policy with everybody's needs in mind, then you are not developing good policy. Public policy is for the public, which includes everybody.

In a case concerning post office closures, *R (Brown) v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin), the judges of the Divisional Court described the role that thinking about a disability had played in the development of public policy and decision making as 'regrettably little'. They pointed out that the underlying objective of the public sector equality duty was to raise awareness of the need to take account of disability and bring it 'into the mix' when policy is being designed.



Another case concerned the cancellation of a major school-building programme called 'Building Schools for the Future': *R (Luton Borough Council & Others) v Secretary of State for Education* [2011] EWHC 217 (Admin). Several local authorities whose schemes were at an advanced stage of development challenged that decision. They succeeded in their challenge to the cancellation of their particular schemes and one of the reasons given was that the minister had not thought about the equality implications of his decision. The minister claimed that he had since considered the equality issues and agreed that some of the school projects being cancelled were for children with disabilities and for areas with large minority groups, but stated that he did not think it was discriminatory. The judge said that the purpose of the duty is to avoid inadvertent discrimination, which requires decision makers to think about equality issues in advance; as the minister failed to do this, his decision was found to be unlawful.

R (Kaur & Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin) was about cuts to domestic violence services provided by a well-known organisation in the UK called Southall Black Sisters. This grassroots organisation has developed particular expertise in hard-to-reach communities. The local authority that provided some of its funding argued that it was discriminatory for it to provide funding to an organisation that serves only one section of the community and that for the future, it should only fund organisations that provide services to any victim of domestic violence. The local authority had decided that it should not provide any share of its domestic violence funding to this specialist service. The judge found that the local authority had taken the wrong approach to equality and discrimination, and said that specialised services from a specialised source could further the objectives of equality and cohesion. He did not say that the local authority had to fund specialist services as well as mainstream services, but he focused on what equality means: it does not mean treating everyone identically and never making provision for difference, it means asking what may be needed to provide for difference so as to move towards substantive equality.

The Culture of Education

The public sector equality duty has affected the culture of education. In *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), a schoolgirl called Sarika Angel Watkins-Singh wanted to wear her Sikh kara (a religious bangle) to school. She was one of the very



few pupils from a minority group in her school. The school did not permit her to wear the kara as it breached the uniform policy, which allowed no jewellery other than earrings and a watch. When various Sikh organisations wrote to explain the importance of the kara to Sikhs, the school refused to make an exception to its policy and treated the issue as a disciplinary matter. As Sarika was breaking the school's rules, she was taught in isolation for several weeks before ultimately being expelled from the school.

The court declared that Sarika's treatment was indirect race discrimination against her and also a breach of the public sector equality duty in that there had been no due regard to equality. The judge said, 'That is what led you to discriminate. You didn't think about it. If you had thought about it properly you would have understood.' The school argued that making an exception to the uniform policy for Sarika would single her out as different and noted that she had already been the subject of some race discrimination in the school. Effectively the school had claimed that it could not protect her from discrimination if she also sought to be distinguished as different. The judge found that approach very worrying and pointed out the important obligation imposed on a school to ensure that its pupils are tolerant. He said that without such principles being adopted in a school it is difficult to see how a cohesive and tolerant multicultural society can be built. This case raised an important observation on how we have to develop a culture in which people can both expect equality of opportunity and be entitled to be different. The public sector equality duty forces public bodies to look at those needs and to address what they mean.

A similar case involving a Catholic College, *R (G) v St Gregory's Catholic Science College* [2011] EWHC 1412 (Admin), found that the school's prohibition of a cornrows (braided) hairstyle had an unjustified and indirectly discriminatory effect on boys of African origin in that school. It was found that the school had not thought about the equality implication before imposing that rule.

There have been only two Supreme Court decisions touching on the public sector equality duty, one of which, *R (E) v Governing Body of JFS* [2009] UKSC 15, involved the entry criteria to a Jewish faith school. The school discriminated in favour of those recognised as Jewish by the Office of the Chief Rabbi, and the Supreme Court found that policy discriminatory on grounds of race as well as religion. The school is allowed to discriminate on grounds of religion because it



is a faith school, but it is not allowed to discriminate on grounds of race. One of the judges mentioned in passing that the failure to comply with the public sector equality duty had possibly fed into that thinking.

The public sector equality duty has also had an effect on thinking about the structure and finance of education. The cost of going to university in the UK has trebled in recent years, and it now costs £9,000 a year for the tuition fees in many universities. In *R (Hurley & Moore) v Secretary of State for Business* [2012] EWHC 201 (Admin), two prospective students brought a challenge to the controversial decision to triple the previous fee. The challenge did not succeed, but the court did find that the government had not had due regard to all the equality implications of that package and stated that more thought had to be given in future.

In summary, the courts have told public authorities, in England and Wales at any rate, to think about equality matters before reaching a decision. Failure to do this is possibly unlawful and certainly bad government. I hope that a public sector equality duty is introduced in Ireland and would be very interested to see how it operates.



2. Equality Mainstreaming in Further Education: The Scottish Experience

Chris Hall, Head of Stakeholder Relations and Communications,
Equality Challenge Unit

This paper focuses on the work that Equality Challenge Unit (ECU) has been doing with colleges in Scotland to help them to mainstream equality. It considers what mainstreaming has meant for those universities and colleges that have taken part in the programme and looks at some of the lessons learned to date.

ECU's Remit

ECU was set up in the UK about ten years ago, broadly in response to the introduction of the Human Rights Act in 1998 and 2001 legislation that introduced a positive duty on universities to advance race equality. Initially ECU worked with universities in England and Wales, but in the last few years the unit has also been working with universities and colleges in Scotland. It is important to note that equality legislation is applied in different ways in Wales, England, Scotland and Northern Ireland due to the different specific duties of the Equality Act 2010. ECU's focus on the higher education and college sector has enabled the unit to develop a real depth of understanding about the main issues institutions face in meeting the specific duties across the four countries.

ECU is an independent charity that is mainly funded through the funding councils for Wales, England, Scotland and Northern Ireland. The government and funding councils support advancement of equality in higher and further education but the charitable status of ECU allows the unit independence to make statements and push the agenda in ways that perhaps are not open to some other government equality bodies, despite the independence accorded to them under the Paris Treaty.

The Equality Act 2010 introduced a public sector equality duty on public authorities and educational establishments across the UK to eliminate discrimination, advance equality of opportunity and foster good relations. These authorities have a duty to pay due regard to these principles. Underpinning this



duty are specific duties in secondary legislation that compel public authorities to take certain actions. Through these mechanisms, individuals and organisations can hold universities and colleges (and other public authorities) to account.

These specific duties differ across England, Scotland and Wales. In England, for example, there are very few specific duties. The main one by which people can hold English higher and further education institutions to account is that they have to set an equality objective. Such an objective could be, for example, to increase the representation or achievement of people with disabilities at university.

Scottish Mainstreaming Duty

In Scotland, the specific duties are stronger. There is a duty to develop and publish a set of equality outcomes that cover all nine protected characteristics (which is quite a departure from the situation prior to the Equality Act, when there was only a duty to consider gender, race and disability). Universities and colleges in Scotland have to assess the impact of their policies and practices against the needs of the general duty, i.e. whether they have paid due regard to all staff and students in terms of each protected characteristic. They must also publish gender pay gap information and statements on equal pay for gender, race and disability, which will shed light on the still very stubborn pay gap that exists in UK universities – where the gap in pay between men and women is approximately 20 per cent despite equal pay legislation being in place for over forty years.

The mainstreaming duty in Scotland's colleges and universities means that they have to report on progress made in integrating the public sector equality duty into all their functions: what each institution has done to eliminate discrimination, to promote equality of opportunity and to foster good relations between the different protected characteristic groups. These reports must be published.

Colleges and universities claim, by their very nature, to be inclusive – they are learning organisations that open their doors to society to up-skill, and part of the college function in Scotland is the education of learners with vulnerabilities and disabilities to facilitate their economic inclusion in society – but also argue that this is difficult to demonstrate. ECU wanted to support colleges and universities to mainstream through a variety of different programmes, in which we sought to explore what mainstreaming is and how it can be measured and reported on.



The ECU Programme

The public sector equality duty requires colleges to monitor, measure and report on their actions across all the characteristics. The colleges' first reports on mainstreaming, another of the duties, are due in April 2013, yet the details of the specific duties were announced only in early 2012, so a strong and quick action learning programme was needed. Twelve colleges were interested in taking part. We put them together in a room and asked them to discuss the equality-related activities they were already doing. Once they had thought about that, we asked: What is mainstreaming? What does it mean for you? What's your vision? It quickly became clear that mainstreaming is quite a woolly concept.

ECU also undertook some research on the topic and looked at what the various mainstreaming tools involve. The resulting report states:

Mainstreaming may start with implementing effective processes and procedures but it goes beyond this to challenge and question the status quo. This means changing attitudes, the way in which people behave, the language that is used and how those messages are conveyed. It takes equality and diversity into the heart of an institution, moving it from a bolt-on aspect of delivery to an integral part of the way it thinks and functions. Often referred to as a journey, mainstreaming is an organic process of change. This is challenging in itself not least because changing behaviour is difficult, it doesn't happen overnight and is often hard to express in terms that can be incorporated acceptably into institutional policy and strategy.

It is very important to recognise that mainstreaming cannot happen overnight. Mainstreaming involves thinking about different aspects of equality and diversity and the equality challenges that we are likely to come across. We need to remain focused on identifying what the challenges are and understanding how we can overcome those challenges before we can build our processes and procedures to effectively take account of them.

In terms of ECU's action learning programme, the participating colleges were required to create a team and we recommended that it include somebody who understands what the equality and diversity challenges are, somebody who can look at and interpret the data, a middle manager with the authority to commit to



changing the organisation and a senior manager who will champion the process and the issues that need to be taken forward at executive level.

We held three facilitated meetings with all the colleges together. These meetings took place over a period of nine months, which is a very short timeframe in which to take action on mainstreaming. The important goals for the process were that the colleges disaggregated what mainstreaming is, identified their challenges, and, showing due regard to these challenges, put in place some actions to address them.

At the first meeting, as discussed above, we worked with the colleges to develop a mainstreaming activity plan. It is important to think about the steps that you need to take, such as collecting the required data and then deciding what you do with the data, rather than seeing mainstreaming as an end-goal. At the second facilitated meeting we worked with the colleges on their strategies and action plans. Then at the third meeting we reviewed the progress that they had made and helped them plan their next steps.

Models of Mainstreaming

Each college took a different approach, with some looking at staff services and some at student services. They also constituted their teams quite differently, but what was consistent was that they all included a member of senior management, a member of middle management and somebody who understood equality and diversity more acutely. It is worth considering some of the approaches taken.

Telford College is a large college in quite a deprived area on the west side of Edinburgh. It has recently built a new multimillion-pound campus. The college aims to make the principles and values of equality and diversity integral to the people who work there and also to give staff the confidence to challenge inappropriate behaviour or to drive forward more appropriate behaviour in some cases. It wants everybody to understand what equality means in their everyday job – why it is relevant to the back office person, the lecturer, the librarian, and so on. This will involve thinking about accessibility, perhaps making sure that PowerPoint presentations are in an appropriate font size for people with visual impairments and so forth.



Equality is sometimes seen as a luxury, something that we do because it is a good thing to do. Telford College also recognised a real business purpose in mainstreaming equality because if it can drive forward inclusive values and cultures it is likely to see better learning results and other quality improvements. It made sure that the required data was available at the beginning of the process in order to measure and monitor the progress achieved by the more inclusive agenda. This approach also assisted the college to gather the evidence needed to demonstrate success and due regard.

Stow College in Glasgow was concerned that its admissions processes were not as fair as they could be; for example, there was a slight disjuncture between the number of applicants with a disability and the number of students with a disability. The college conducted an internal review of admissions procedures to identify the key issues. This was followed by real-time equality impact assessments, which made recommendations to help address the issues immediately. The college has now put in place a resource to help admissions staff understand what an impact assessment is and how they can take action to improve the student experience.

Conducting impact assessments is one of the specific duties in Scotland, but, through doing this and putting measures in place as a result, Stow College demonstrated that it is taking mainstreaming forward. Having focused on this one area, the college is in the process of rolling it out for other college functions.

The courts have taken quite a pragmatic approach to equality legislation and seem to accept that as long as you are working towards and showing due regard to addressing equality issues, then you are meeting your public sector equality duty. Stow College identified a problem in one area and focused on it first, in the process (a) developing a model that works and that is now being applied across each of the college's functions and (b) protecting the college from litigation.

James Watt College wanted to develop a system through which staff members could test their own equality and diversity knowledge. It asked them questions such as: What do you know about equality and diversity? What are the gaps in your knowledge? Do you understand what it means to be inclusive in terms of sexual orientation or gender or trans status? Such questions encouraged staff members to reflect on the issues and their personal knowledge and competencies.



The college then looked at the staff-identified gaps and needs and built them into the staff development programme and staff appraisal process. This approach has encouraged staff ownership of the agenda. Rather than equality matters being a compliance element, they are seen as a development opportunity.

ECU has been involved in a similar programme with universities. Robert Gordon University in Aberdeen had a culture mission statement that said: 'We value, we respect.' As is the case in many organisations, nobody really understood what the mission statement meant. The university has started using its staff appraisal and development policy to help people think about equality in their day-to-day work.

Key Lessons

A few lessons have come out of this process that are worth bearing in mind when you think about mainstreaming.

- It is really important to have a clear vision of what mainstreaming actually means. ECU has produced several publications on the topic and these are available free to download from the unit's website.
- Think about mainstreaming in terms of pragmatic steps that you can take, but also look at the challenges you are likely to come across. Be clear about what it is that you want to achieve. Consider what you need to be doing to be inclusive, to advance equality of opportunity and outcome.
- Examine your existing policies and processes and really reflect on whether there is anything in these that may be inadvertently or indirectly discriminatory. Are there things that you are not actually doing that you could be doing? Know what the evidence-based issues are that you need to address. Link mainstreaming to your business need and role as an education provider.
- It is important to equip staff and students appropriately to help them understand what mainstreaming means and to reflect on their own skills. Engage across the institution at all levels. It is no good if only the equality and diversity practitioner or student experience person knows what is needed. Everybody has to understand what mainstreaming means for them, what their role is in it, what their actions are, what the appropriate



behaviours are. This does not mean simply delivering an equality training session, it requires a multipronged approach with various activities that pick up on different levels of understanding and are appropriate to the person's position within the organisation.

- The Stow College piloting example may be a useful model. Start small if you have not got the resources or full understanding. Try something. If it fails, then try something else. If you find something that works in one small area, then look at how that can be rolled out elsewhere.
- Robust monitoring and reviewing procedures are vital. Having the evidence to advance equality is so important. You may be doing all sorts of things that you think are inclusive and will level the playing field, but actually you are not making any real difference. Perhaps staff members are not being promoted because they are black or gay. Perhaps students are not completing courses or get lower grades because they have had a pregnancy during their studies or have a disability. Collect the necessary data to allow you to make sure that what you are doing is properly paying due regard to mainstreaming.

Mainstreaming is not going to happen overnight. The UK has had equal pay legislation since 1970, but across British society there is still a 14 to 15 per cent pay gap. In universities, which are meant to be thinking organisations and pride themselves on meritocracy, there is an even greater pay gap. Mainstreaming is a long-term process, but thinking about what the key challenges are is an essential first step.



3. Equality Mainstreaming: A Northern Ireland Perspective

Eileen Lavery, Head of Advice on Compliance, Equality Commission for Northern Ireland

This paper focuses on equality in Northern Ireland, a place with a long history of equality because it has a huge history of inequality. In Northern Ireland, various powers and duties derive from wide-ranging anti-discrimination legislation, and were extended from 1998 with the inclusion of the public sector equality duty. Alongside the Equality Commission for Northern Ireland (ECNI), there is a separate Human Rights Commission, a Community Relations Council and the recently established Children’s Commissioner and Older Person’s Commissioner. The powers of the Equality Commission to challenge discrimination and inequality are considerable. The Equality Commission promotes equality of opportunity, affirmative action and positive action. These terms are important. We work for the elimination of discrimination. We keep the legislation under review and we advise on the effectiveness of these mainstreaming duties, which we call our statutory equality duties.

Mainstreaming

What does mainstreaming mean? The Council of Europe defines it as the improvement and the reorganisation, development and evaluation of policy processes so that the equality perspective is incorporated in all policies and at all levels. This is important: we cannot consider equality for only some things some of the time; it has to be the consideration of all things at all levels.

Northern Ireland’s mainstreaming duties grew out of the earlier non-statutory attempts of ‘PAFT’ – positive appraisal for fair treatment. When public bodies were left to appraise their policies voluntarily, nothing much happened. The requirement has to be on a statutory footing to have any chance of success. In Northern Ireland’s case, that statutory obligation came about as a consequence of the agreement reached in the multiparty talks between the British and Irish governments and local representatives, which we loosely call the Belfast or Good Friday Agreement. Key elements of the Good Friday Agreement are about



rights, safeguards and equality of opportunity. Inequality has been a key aspect of the conflict in Northern Ireland and equality had to be and is a key part of the resolution. The structures in place and the way we do things are a crucial part of the journey towards a settled Northern Ireland.

Public Sector Duties

The Equality Commission oversees two main public sector duties and they are quite distinct. First, is the due regard to equality of opportunity duty covering nine grounds. These include people of different religious belief, political opinion, racial group (including Travellers), age, marital status or sexual orientation; men and women generally; people with a disability and people without; and people with dependants and people without. Second, is the good relations duty, which talks about a regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. The good relations duty is a more restricted duty.

There is an intentional hierarchical relationship between the Equality Commission's two main duties. One says 'due regard' and one says 'regard' and there is a hierarchy between the two terms. The equality of opportunity duty is more significant for public authorities than the good relations duty. We still refer back to *Hansard* and take the relevant parliamentary debates into account when defining the duties. The legal formulation of words is hugely important: when a court is considering whether a public authority should have done something differently, it will always go back to the intention of the words.

Section 75

Section 75, our mainstreaming duty, follows the pre-existing duty in the Race Relations Order that applied (but was replaced in the Equality Act 2010) in Great Britain. The public sector equality duty does not have any associated requirements, such as to prepare an equality scheme, whereas the current duty in Northern Ireland has very explicit requirements. Section 75 requires a public authority to set out in its equality scheme exactly what it will do to fulfil its mainstreaming duties. The Equality Commission has very specific powers and duties regarding those schemes. It is our job to approve equality schemes and this enables us to ensure that authorities conform with their statutory responsibilities.



There are also a range of processes within the schemes to which public authorities must commit. The Equality Commission sets out what the law means, what authorities have to do and what they should adopt in their working practices. The processes being developed and reviewed determine the potential equality impacts or, importantly, opportunities to better promote equality, which is crucial. It is not enough to 'not do bad things', you have to expressly do the good things. ECNI provides a very clear framework for decision making to help every public body to work within their equality scheme, including during consultation and decision making and communication.

Northern Ireland also still has distinct disability duties (which are part of the general equality duty in Great Britain) and public bodies must have a separate disability action plan.

Effectiveness Review

This makes for a busy equality landscape, but does it all work? Is life more equal now in Northern Ireland? Equality duties came into effect about 1999 and after a number of years it was necessary to ask such important questions. Indeed, the Equality Commission has a duty in law to keep under review the effectiveness of the mainstreaming and disability duties.

The final report of our Effectiveness Review was published in 2008. The review's conclusions and recommendations are based on strong evidence – ECNI commissioned no less than six separate research studies and conducted numerous consultations. It concluded that there had been a positive impact overall and made clear recommendations for improvements.

One of the most important review findings was that people felt included in the process of developing public policy. Public authorities now talk to the public; people who never expected to be in the business of public policy are now in the business of public policy making. However, individuals have not seen the kind of systemic changes to their lives that they anticipated the duties would bring about. The review showed up 'a need for ECNI strategic intervention': public bodies are good organisations, with public service in mind, but sometimes they need firm guidance and supervision in respect of equality and good relations considerations.



A Revised Approach

Following our Effectiveness Review we wanted to bring about a revised approach, but did not recommend legislative change for two main reasons. First, significant change can be achieved within the existing provisions. Second, the duties are housed in the Northern Ireland Act (i.e. the Good Friday Agreement) and there would be little support for re-opening talks on that agreement. Instead, we have sought to refocus the duties within the present legislative framework.

Public authorities are still required to have equality schemes, and to use the tried and tested methods of screening when devising or revising policies. Screening involves first considering how important an issue of public policy is to equality; if it is important to equality, the next question concerns how many people it is going to affect. In other words, decision makers must ask themselves: Is this policy something of real importance and can it make a substantial difference? If they answer 'A bit' or even 'Possibly', we encourage them to make the required changes at this screening stage. If the answer is a definite 'Yes it is and it could make a lot of difference', the public authority should conduct a detailed equality impact assessment. The voluntary and community sector in particular is involved in a detailed way with equality impact assessments. These processes have worked and need to be retained. They have made a real difference to the lives of many people who have experienced inequality but now feel that their situation is being addressed by public authorities.

We also recommend that public authorities undertake an audit of inequalities. This exercise involves examining the work of the authority and the key inequalities that are relevant to it. Identifying those key inequalities is essential before devising an action plan to address them appropriately.

Equality Commission Strategy

To help with these revised processes, the Equality Commission produced revised guidance, with which public authorities' equality schemes must comply. It was hugely important that the revised guidance was of practical value and that it steered public bodies to effectively address key inequalities. In 2010 the Secretary of State approved our new guide. This guidance sets out exactly what must be in an equality scheme to meet the legislative requirements and includes further recommendations on good practice.



Every public authority in Northern Ireland was then required to produce a new/ revised scheme. The Equality Commission asked them to conduct an audit of inequalities before producing an action plan and to consult widely on their new scheme. As an encouragement, we produced a model scheme or template that could be used. Many made use of this, and some preferred the sense of ownership that comes from using their own words and style. There are about 200 public authorities in Northern Ireland who fall within the mainstreaming duty and at this point the Equality Commission has approved over 100 new schemes. This has been an enormous challenge but it has been worthwhile because every scheme we have approved has been accompanied by an audit of inequalities and either an action plan or a timetable date in which to complete one. The public authorities concerned could have limited their engagement with this process, but instead they accepted our advice to go beyond the legal requirements and committed to an audit of inequalities and an action plan.

It is hoped that this revised approach will result in more consistent screening and equality impact assessment processes. These will provide a good evidence base for decision making and a helpful framework for business planning. Equality is not an add-on to be considered after public authorities have set their three-year business plan, their annual business plan and worked out their finances. We want equality to be integrated early into those planning processes. We also want to see consultation with the representative organisations in the voluntary and community sector as part of each authority's decision-making procedures. Clearly there is still more to be done by public authorities to engage everyone, but the review highlights that Northern Ireland has made progress in this regard.

The Equality Commission is probably one of the best-resourced equality bodies in Europe, but it is still not possible to engage with every single decision that every one of the 200 public bodies in Northern Ireland makes. Instead, we have to monitor each public authority to ensure compliance with the commitments made in their scheme and be assured that they take those commitments forward. We also have a role to consider and investigate complaints. And we want to engage with public authorities on those areas where we have a particular interest; for example, we are working with the Northern Ireland Executive on its plans for welfare reform in terms of austerity and we are using the equality



schemes as tools to focus that engagement. We are also engaged with a review of employment law and using the commitments made in the relevant equality scheme (Department for Employment and Learning) to lead that review.

Reporting on Duties in Further Education

Two examples of the use of equality duties in higher and further education illustrate how Section 75 as a mainstreaming duty can fit within the public policy framework.

The first example concerns student fees in higher education. In Northern Ireland, the responsible public authority is the Department for Employment and Learning. It is designated for Section 75, it has an equality scheme in place and it must consider any proposal it brings forward in terms of its equality impact. It carried out an equality impact assessment and a full public consultation on the issue of increases in student fees. It was great that the department followed the processes that we recommend, but we believe its equality impact assessment could have been better. The department cited a lack of relevant data (for example, on what the impact of fees would be on people from different racial groups); however, public bodies have a duty to collect the data they require. The department decided not to increase the fees to the level that had been decided upon in Great Britain. Instead, a lower level of increased fees will apply in Northern Ireland.

The department's decision on fees means that the universities have to adjust their policies on student access. The universities must consider what the impact will be on their policies, particularly those policies aiming to widen access to higher education by encouraging people from the lower socio-economic groups to come into the university.

The second example involves further education colleges. There are nineteen such colleges in Northern Ireland, grouped together on a regional basis. They generally provide education for students in the 16 to 19 age band who did not proceed to higher education, as well as offering general adult education courses.

We recommend that every equality scheme commits the public authority to produce an annual report of progress. Such reports not only cover the key



scheme processes in terms of the policies that have been screened and impact assessed, but also identify a wide range of other activities and act as valuable documents that measure and record the equality journey of the authority. For example, the annual progress report of the South Eastern Regional College reveals a number of actions taken to raise awareness of equality issues.

The college has produced an online diversity calendar, in partnership with other colleges, to raise awareness of race and cultural issues within the existing student base. It has had a number of very positive workforce initiatives, including work placements for people with disabilities. It provided plans in horticultural colleges for people with visual impairments and is now expanding the scheme to include people with hearing impairments. A number of college schools provided specifically tailored courses for people with learning disabilities and mental ill-health. In many respects the range of activities promoting equality is very significant. The annual report also includes details of the policies that were screened and covers issues such as addressing employee pay gaps. It is really impressive to see that the annual progress report looks at much more than simply the processes that the college's equality scheme commits to.

Conclusion

In conclusion, the equality duties in Northern Ireland have had a very positive impact on public sector decision making and on service delivery. The duties have created a framework and an expectation that equality and good relations matter and will always be considered when public policy is being developed. We see a huge improvement in engagement on proposals and much more consultation with those who are affected by public policy. There is now a much greater level of accountability in terms of publishing the results of assessments and committing to action plans and progress reports. There are also some ongoing concerns, such as a tendency to get tied up in processes and the need for public bodies to stop using a lack of data as an excuse to avoid equality issues. What matters most, however, is leadership. If the leadership of a public body is committed to equality, then equality happens. My advice to anyone in the voluntary and community sector who wants to make change happen is to start by convincing the leader of the necessity for a proactive approach to equality matters.

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