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The Experience of a Single Equalities Commission in Northern Ireland

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Dedication: Though it is not usual to dedicate a paper to anyone, I should like to dedicate this one to an unusual man who died last year – Sir Robert Cooper. As Bob Cooper, he led the Fair Employment Agency and Commission during troubled times, from the beginning until the merging of the equality bodies. I was privileged to serve as one of his Commissioners during the last six years of its existence. By the time of that final year, the employment ratio between Catholics and Protestants was close to being rectified, even though, as noted in this paper, a significant community difference in unemployment remained. People who did not want there to be fair employment legislation in Northern Ireland attacked Bob. Those who were committed to making Northern Ireland a fairer place, and a place seen to be fair, were inspired by him – as I was.

The Experience of a Single Equalities Commission in Northern Ireland

1. Introduction

The first thing to say is that the experience of a single equalities commission coincides with the existence in Northern Ireland of combined equality legislation; notably in the form of the Statutory Duties on public authorities in the Northern Ireland Act 1998 [Section 75(1) and (2)] to promote equality across nine grounds. A Single Equality Bill was announced by the previously devolved Executive in its first Programme for Government in 2000 and the first consultation on what it might look like began in 2001. In October 2002, the devolved institutions were again suspended and the latest consultative stage, completed in November 2004, was carried under Direct Rule. It seems, however, that there is still no agreement 'about what precisely it will contain' (Hinds and O'Kelly, 2005, p. 26).

Collins (2005, p. 24) notes that a single Commission does not require there to be a single equality act but that it would be helpful to have one that harmonized provisions for monitoring and affirmative action and the groups covered by protection against discrimination in the provision of goods, facilities and services.[1] Taken together, as the agency and the Statutory Duties are in this paper, consideration of Northern Ireland's five years (plus) of experience of them is timely because of plans for institutional and legislative change in Great Britain.[2] It should, however, be noted that the institutional proposal there is for a combined Commission on Equality and

[1] i.e., age and sexual orientation. See also ECNI/Cross (2003, p. 13), where it is also argued that there is concern that EU equality obligations are being implemented through Regulations under the European Communities Act 1972, limiting the opportunities for debate that there would have been under primary legislation. Moreover the new Regulations might pre-empt 'a full and far reaching debate on the Single Equality Act, which should harmonise legislation to the best of existing standards, comply with international obligations and take a comparative best practice approach towards experience in other jurisdictions'.

[2] By 2004-5, the year when the government introduced an Equality Bill, three grounds of inequality were recognized in Great Britain, through 26-35 statutes, 52 statutory instruments, 13 Codes of Practice, 3 codes of guidance, 9-16 EU directives and 6 international treaties, enforced by 3 agencies and 7 government departments. (Lovenduski, personal communication). See Appendix I for legislation in Northern Ireland.

Human Rights while, in Northern Ireland, the Human Rights Commission[3] is distinct from the Equality Commission (ECNI).[4]

In terms of legislation, change in both Northern Ireland and Great Britain was preceded by the Treaty of Amsterdam which introduced nine categories of person[5] to be protected by EU equality law (European Framework Directive on Equal Treatment 2004). The proposed Constitutional Treaty, should some version of it survive, continues the approach of tackling them together, while – at the insistence of the European Women's Lobby – not disabling existing provisions that allow for the specific measures for women (Lawson, 2005).[6]

In Northern Ireland, there were concerns from different perspectives – as there now are in Great Britain - about both single equality agencies and single equality legislation (Hinds, 2003, 189).[7] Does their creation reflect or go against the views of equality constituencies? Are they likely to introduce or reinforce hierarchies of equality? And, as noted, what may be the risks to specific measures designed to promote equality (as opposed to eliminating discrimination)? It seems that there is no systematic study that 'has demonstrated that single or combined agencies are more or

[3] Its establishment was a major point of agreement in the Belfast or Good Friday Agreement, though it has faced political difficulties ever since. However, it and the Equality Commission have a good relationship expressed in a Memorandum of Understanding between them, their regular meetings and close working relationship. An amalgamation of them – *a la* the DTI White Paper, *Fairness for All: a New Commission for Equality and Human Rights* - has been briefly considered but rejected as 'inappropriate [in Northern Ireland] at this time', though it should be 'kept under review' in the light of experience in Great Britain (OFMDFM, 2005, pp. 21, 50-2).

[4] Another point of distinctiveness is that the ECNI has a close relationship with its counterpart in the Republic of Ireland in pursuit of the aim of having common standards in both parts of the island (Hinds, 2003, p. 190).

[5] Sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation (plus nationality and a declaration on disability) – from which derives some of the domestic legislative changes referred to in this paper.

[6] There is, nevertheless, some concern that, notwithstanding the benefits of an integrated approach, those of gender-specific measures may be at risk. See EWL, 2005 and EU, 2005.

[7] In both parts of the UK, equality advocates are concerned abut potential hierarchies. Business concerns are a little different. In Northern Ireland, there is an employer concern about monitoring requirements applying across all equality strands. In Great Britain, one view sees a risk in a single, more powerful agency while another view sees a single body as easier to control.

less effective than are separate agencies' (Lovenduski, personal communication). Nor, indeed, are there any that systematically tackle the impact of single equality legislation on maximizing the benefits of integration while simultaneously dealing with specific conditions in one or other of the equality strands.

This paper certainly does not provide that systematic study. Such work is being undertaken by Joni Lovenduski and the beginnings of her research demonstrate the vastness of the task. She points out (personal communication) that it requires analysis of theoretical and empirical debates in disciplines such as law, sociology and political science about a variety of concepts and practices. These include: the nature of equality; discrimination and rights; multi-culturalism; the intersectionality (or not) of experiences of (in)equalities and measures to combat them; and the mobilization and substantive representation of those equality groups brought together in single agencies and legislation. It also requires comparative analysis: of judicial proceedings for all equality groups before and after the move away from single strand agencies; and of experience at different levels of governance within a state and between different countries – identifying forms of policy learning or transfer that have been successful or not.

Without having carried out such research myself, all I can do today is to outline the history of reform in Northern Ireland, to pick out three of the key questions and to make some provisional conclusions about whether the experience in Northern Ireland has been positive or negative. The three key questions are: the extent to which equality constituencies were involved in the reform process and are so in its implementation; whether or not there is any evidence that one constituency has done better than another out of the changes; and whether the presence of a combined agency and single legislation jeopardizes the possibility of specific measures tailored

to the specific circumstances of one of the constituencies. My conclusion is that experience in Northern Ireland has been positive.

2. History of reform in Northern Ireland

Vis a vis the title of the conference, it must be said that reform in Northern Ireland is *not* a consequence of devolution but it *did* become embedded in the Belfast or Good Friday Agreement and the Northern Ireland Act. During the period of discussion of devolution there was a 'significant level of interest shown by individual politicians and political parties' (Collins. 2005, p. 22) in progressing towards greater equality in the new Northern Ireland, not least on the part of the Northern Ireland Women's Coalition to ensure that the form of equality to be enshrined was broader than 'parity of esteem' in respect of the 'two communities' (Hinds, 2003, pp. 186-9).

Annex 1 to this paper lists all the equality legislation applying to Northern Ireland before and after devolution. There it can be seen that legislation in 1989 considerably strengthened the law relating to religious belief and political opinion by introducing – uniquely in the United Kingdom (UK) – a duty on employers to monitor the composition of their workforces, to make monitoring returns to the Fair Employment Commission (FEC) and, if the returns were unsatisfactory, to devise and implement an affirmative action programme, agreed by the FEC. This change was preceded by a consultative paper, *Equality of Opportunity in Employment in Northern Ireland: Future Strategy Options,* published in 1986 (Department of Economic Development, 1986). This document, published more than a decade before devolution, mooted the possibility of a single equality agency. Because of the significance of the changes to be brought into fair employment legislation, it was decided that the time was not suitable 'to introduce a further radical change' (Equality Commission Working Group, 1999, p. 7).

In addition to the government rationale, just noted, the concerns with which we are familiar today were felt in the wider community (Donaghy, 2003). On the one hand, the utter dominance of violent conflict of political opinion, seemingly in parallel with different religious beliefs, appeared to suggest that, in the work of a merged enforcement body, much higher priority would be given to the needs of the religious belief and political opinion constituency than to gender.[8] In addition, despite having fewer resources than the FEC or the Equal Opportunities Commission in Great Britain, the EOCNI had succeeded in carving out an innovative role, supporting a number of 'landmark' cases which – particularly those that went to the European Court of Justice, without a remit for religion and political opinion - pushed against the limitations of legislation (Collins and Meehan, 1994).[9] It was feared that the scope for exercising creativity would be hampered in an organization where gender might have a lower priority. As noted, however, the merger did not take place at that time.

For various reasons, there was growing interest in the 1990s in holding a review of fair employment legislation. These reasons included: the continuation of a differential between Catholics and Protestants among the unemployed, despite noticeable improvements in the balance in employment; continuing pressure from the Irish lobby in the United States of America (USA); and interest within Northern Ireland in putting on a statutory footing an improved version of the government's

[8] There were parallels in the United States of America (USA). When asked why the Department of Justice seemed keener on prosecuting on behalf of the Equal Employment Opportunities Commission cases involving race than those where gender was at issue, the answer was that: 'they were in the business of social turmoil and that, unlike Blacks, 'women were not out on the streets demanding their rights' (Freeman, 1975, p.79; Meehan, 1983, p.104). But see also shift in this balance, noted later in this paper.

[9] For example, a case against the Royal Ulster Constabulary (RUC) taken by Marguerite Johnston and others and supported by the EOCNI clarified the limits of exemption on grounds of national security by setting standards for evidence of it as a ground and requiring that, if proved valid, differential treatment must be proportionate. The case also resulted in one of the biggest ever (biggest at the time) financial awards for the women.

existing voluntary guidelines on Policy Appraisal and Fair Treatment[10] intended to promote 'mainstreaming'- or consideration of the impact across all public activities on the promotion of equality in relation to religion and political opinion; gender; ethnicity; marital status; dependent status; sexuality and age.

The Review of Employment Equality was carried out by the Standing Advisory Commission on Human Rights (SACHR) – to which I shall return. In response, the government published a White Paper, *Partnership for Equality* (Department of Economic Development, 1998), which, as well as accepting the recommendation for a statutory equality duty, introduced the idea of merging the equality bodies into a single Commission in order to better ensure effective implementation of the duty (*ibid*, paras 4.12-4.14). The White Paper was published in March 1998, at a point when negotiations had been taking place for some two years on the constitutional future of Northern Ireland and in the month before agreement was finally reached in Belfast on 10 April (Good Friday) 1998.

Equality and human rights had, together, formed a key focus of the negotiations leading from 1996 to the Agreement The Agreement, enacted through the Northern Ireland Act 1998 and other legislation and the subject of an international agreement between the Irish and British Governments, established the Human Rights Commission to supersede SACHR (see footnote 3 about keeping it separate, for the time being, from the Equality Commission). It was to have 'an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights' – a role that included scrutiny of draft legislation emanating from the new Assembly and advice to the UK government about other measures that ought to be taken to protect human rights. This included the responsibility to consider and

[10] It was judged to have had 'minimal' impact (Hinds, 2003, p.185).

to advise upon a set of 'rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland'. 'Taken together with the ECHR' this would 'constitute a Bill of rights for Northern Ireland' (Agreement, 1998, pp. 16-7; Northern Ireland Act 1998 Sections 68 and 69).

The Agreement announced that, subject to public consultation already underway, the British government intended there to be a new Equality Commission to replace the Fair Employment Commission (FEC), Equal Opportunities Commission for Northern Ireland (EOCNI), Commission for Racial Equality for Northern Ireland (CRENI) and the Disability Council. The Agreement also stated that, in the transition phase,[11] the British government would make rapid progress in various areas, including the employment equality measures in *Partnership for Equality* (Department of Economic Development, 1998) and, subject to consultation underway, the statutory duty on public authorities.

In fact, the consultation process revealed opposition to the creation of a single commission. Though supported by the FEC, the three other equality bodies opposed it for reasons similar to those that pertained in 1986-89 (a challenge that had to be faced by the new commission in its early days; Collins, 2005, p. 22). There was, in general, a range of 'differing views among the constituencies, with concerns expressed about the possible impact of a single equality body on the individual equality strands' *(ibid)*. Collins suggests, however, that even while a majority of them opposed the idea, 'there was clear enthusiasm for the introduction of a statutory

[11] Actual powers were not devolved for about a year, the institutions operating in 'shadow mode' until 1999-2000.

equality duty and, for some, the prize of such a duty was worth the price of merger of existing equality bodies' (Collins, 2004).[12]

The decision, outlined as a potential one in April 1998 in the Agreement, was enacted in November in the Northern Ireland Act 1998. In the same month, a Working Group on the New Equality Commission for Northern Ireland was set up. It was comprised of Chairs and Chief Executives of the existing agencies plus an official from the recognized public service trade union. It was judged important that this group be led by an independent chair and this role was taken on by Dr Joan Stringer, Principal of Queen Margaret University College Edinburgh and member of the Equality Commission of Great Britain. In embarking on its enquiries into how the existing equality bodies might be merged to best effect, it took into account forthcoming changes (2000) in disability law and the statutory equality duty adumbrated in *Partnership for Equality* (Department of Economic Development, 1998), now enacted as two duties (equality and good relations) in the Northern Ireland Act 1998. It reported in March 1999, by which time Commissioners, to be appointed by the Northern Ireland Office, were being sought. They were appointed in August 1999 and the transfer from four bodies to one Equality Commission and of all staff from the former to the latter took effect on 1 October 1999.

I now turn to the three of the key questions that need to be asked to judge whether earlier fears in Northern Ireland and current fears in Great Britain of a single equality agency were or are justified.

3. Key Questions

(i) To what extent were equality constituencies involved in the reform process and are so in the implementation?

[12] The Northern Ireland Women's Coalition, which supported the Equality Coalition campaign to get the best possible statutory duty, is one body which, therefore, backed the idea of a single commission, even while some of its members were opposed to this position.

In (i) of this section, the paper takes key stages from the above history to outline evidence of involvement at each of them. It should also be noted that the reviews (conducted by independent researchers for public authorities) of implementation referred to here and in (ii) and (iii) were based on consultation as well as desk-top research and they were guided by advisory groups drawn from community and voluntary groups and public agencies.

Major review of the fair employment legislation in the 1990s

As noted, this review was undertaken by SACHR. The government had originally proposed that it be carried out by a public agency, the Central Community Relations Council. But, as a result of lobbying by justice and equality groups that such a task should be carried out by an independent body and, indeed, fell within SACHR's remit, the government changed its mind. SACHR, while set up as an advisory body to government in 1976, was independent of it and its Commissioners were specialists or advocates in the field of civil rights and equality, with close links to the community. The research for it was directed by QUB Professor of Social Policy, Eithne McLaughlin, and the Commission was regularly advised by Oxford Professor Christopher McCrudden, a leading academic lawyer and specialist on discrimination and rights in Northern Ireland. These two also had close links with the equality communities. I now turn to inclusion of affected groups in the merging the commissions, one part of the government's response to the SACHR review, before moving on to the other - the statutory duty.

Proposal to merge the commissions

The Equality Commission Working Group identified 'a high degree of commonality of work in key areas across the organizations', from which it was able to

highlight 'six major strategic areas' (Equality Commission Working Group, 1999, pp.16-25):

> Employment and Employability;
> Goods, Facilities, Services and Housing/Premises;
> Combating Discrimination;
> Mainstreaming Equality in Legislative, Economic and Social Policy;
> Public Sector Statutory Duty; and
> Building an Effective and Efficient Commission.

Much of the focus was on the detail of the structures and functions. Thus, on the face of it, the Group's work might be thought to be of only indirect interest to constituencies concerned with policies and outcomes. However, the Group and its Chair were concerned that the tight timetable for their deliberations made it difficult to consult as widely as they would have wished (*ibid*, Chair's Foreword, ch. 10 and throughout). Despite this hindrance, those who responded to the Group's consultation[13] supported the strategic priorities identified by the Group. Specific points about reviewing and harmonizing legislation and operationalizing the broad objectives were incorporated into the Report. Moreover, while there was some dissent, the Group's recommendations for the internal structure of the Commission (see next section) were 'endorsed by the vast majority of respondents, both at the public seminar and in the written submissions to [the] consultative paper' (Equality Commission Working Group, 1999, p.12).

Bringing abut a statutory basis for the duties on public authorities.

Long before carrying out its review of employment legislation, SACHR had drawn on Section 71 of the Race Relations Act 1976, which placed a statutory duty on

[13] 74 organizations and individuals submitted written comments on the consultative paper. Leaving aside umbrella groups, public agencies and parties, those groups involving people with a direct interest in strengthened protections included some 9 minority ethnic or faith groups, 12 health or disability groups, 11 women's groups, 1 men's group and 1 sexual orientation group. In addition to these, all the key social partners – churches, employers, trades unions – all responded. A major consultation conference was held, involving over 126 people from a diverse array of backgrounds and interests (Equality Commission Working Group Report, 1999, pp. iii, 62-4, 72-5)

local authorities in Great Britain to eliminate discrimination and promote equality. They used this as part of a call for something comparable in Northern Ireland, a call that was repeated in its 1998 review of employment legislation (Hinds and O'Kelly, 2005, 19-20). The boards of existing equality bodies included people similar to those on SACHR – trades unionists, employers, voluntary and community bodies, specialists – committed to elimination of discrimination and promotion of equality. An NGO, the Committee on the Administration of Justice,[14] led the support for the SACHR recommendation for a statutory duty - joined by members of the equality agencies. This call, like the proposal for a single commission, became embedded in the negotiations in and around the drafting of the Agreement and Northern Ireland Act.

The prime goal of the most powerful architects of the new institutions had been to end violence between communities with different national aspirations. Nevertheless, a strong base of community activism brought into being new parties, including the Northern Ireland Women's Coalition (NIWC), for which the absence of violent conflict over the constitution was not the same as peace and an inclusive political culture. Thus, the Agreement includes a much broader conception of equality (of participation as well as treatment in policy) than 'parity of esteem' as between Catholics and Protestants or Unionists and Nationalists. The Agreement also requires all legislation passed in the Assembly (introduced by the Executive or, in theory, arising from Assembly Committees) to be 'equality proofed' and to comply with international human rights standards (Agreement, 1998, pp. 5-6, 8).

These parties supported the work of an Equality Coalition, led by the CAJ (see above) and the trade union, UNISON, which 'had undertaken a number of initiatives

[14] Northern Ireland's equivalent of Liberty - formerly National Council for Civil Liberties.

to see PAFT better implemented' (Donaghy, 2003, p. 5). The Equality Coalition intervened throughout the twin processes of developing the approach to mainstreaming and of enacting devolution to ensure that what was considered appropriate was present in the Northern Ireland Act. As Donaghy points out, McCrudden (1999, p. 1725) refers to this as the 'parallel peace process'. She notes that the Equality Coalition and the equality agencies 'constructed the equality agenda' and, in so doing, were seen by both the British and Irish governments as the main actors with which 'they had to deal because of their influence on this issue'.

Implementing the statutory duties

The very process, itself, of mainstreaming is meant to encourage participation in policy-making. Among other advantages (more rational and evidence-based policy-making), it should encourage openness and transparency because it requires consultation among affected interests at an early stage in the policy cycle. Properly done, this encourages a 'crucial link between government and civil society' through greater participation and should lead to greater governmental accountability (Equality Commission Working Party Report, 199, p. 82). To this can be added the argument by O'Cinneide that: 'it is necessary to involve and empower these groups to participate in the decision-making process, and commit to including their perspectives' (made at an Equality Authority conference, cited by Mehlman, 2005).

The methods promoted from the bottom-up, notably by the Equality Coalition, were critical in the form of mainstreaming that came to be adopted. As Hinds (2003, p. 191-2) points out, public authorities are required by the ECNI directions to consult 'representatives of persons likely to be affected by the [equality] scheme; and such other persons as may be specified in the directions'. She goes on to say that 'consultation and engagement [over the schemes themselves, identifying policies to

be subject to impact assessment and throughout the impact assessment process] with the widest range of groups affected by the legislation … is at the core of the Northern Ireland approach to mainstreaming'. It is this that leads Donaghy (2003) to categorize the approach as 'participative-democratic' (in contrast to the 'Executive-bureaucratic' approach).[15]

However, she also notes that there are resource and capacity issues for ill-funded groups to be able to respond to consultation. In the first year of the implementation of Section 75, the Equality Commission was able to provide a Consultation Development Grant but that is no longer available. In the last two years, reviews have been undertaken of consulting under Section 75 and its operation.

Reviewing Section 75

The review of the processes and quality of consultation over the implementation of Section 75 was carried out for the OFMDFM by Dr John Kremer (OFMDFM, 2003). Public involvement is summarized in the footnote.[16] His report covered too many important issues relating to the quality and form of consultation to be discussed fully here. But one of them relates to Donaghy's point; the costs and benefits, as it were, to an ill-resourced organization and predicted outcomes of consultation. Dr Kremer (OFMDFM, 2003, pp. 28-9) noted that to ignore this would be 'disastrous, not only for the groups in question but for the process as a whole …'. He recommended that 'procedures for ensuring the long term viability of these groups should continue to be explored'. Following the Kremer report and that of a Task

[15] Nott (2000), cited by Donaghy, coined the terms participative-democratic and expert-bureaucratic to describe competing approaches to mainstreaming. The first focuses primarily upon consultation and the second focuses primarily upon in-house expertise and technical instruments. In reality, most approaches combine elements of both.

[16] 60 questionnaires were returned, 15% percent of which were from consultee groups and the rest public authorities. Focus groups and interviews were also held.

Force on the Community and Voluntary Sector, *Investing Together*, 2004), additional funding was provided by the OFMDFM for purposes of consultation.

This issue was taken up again in an operational review of Section 75, the first stage of which was published in November 2004. This was a report for the Northern Ireland Office, carried out by Professor McLaughlin and Mr Faris. Their consultation group included some sixty representatives of voluntary and community groups, many of them from the equality groups affected by the legislation. Over one hundred people attended a consultative conference while more than one hundred written submissions were received. Both categories included people and/or submissions from public agencies but the majority represented the views of social partners and equality groups. Again, confining my remarks to what was said about resourcing equality groups for effective consultation, I simply note that McLaughlin and Faris do not believe that the government's response to *Investing Together* 'will significantly alter the policy development and partnership capacity of the sector' (2004, 32, see also p. 45).

Thus, current levels of support appear to be at odds with what the Equality Commission working Group had indicated in 1999 would be necessary to bring about the implementation, through consultation, of the statutory duty (see footnote 21).

(ii) Is there any evidence that one constituency has done better than another out of the changes? [17]

Part of this is about institutional structure and part is about policy outcomes. In the beginning, there was a twofold concern. On the one hand, moving immediately to a

[17] Much academic commentary on the consequences of the equality agenda emerging from the Belfast Agreement is not about the different grounds but about whether it has helped to facilitate consensus, as intended, between the communities in conflict and it has been argued that measures to bring about 'parity of esteem' have not worked because the 'ideal of equality was presented differently by party elites' (Hayward and Mitchell, 2003, p.293); in effect, reducing it from a 'win-win' upshot to a 'zero-sum game'. See also Wilson (2000).

unified structure ran the risk of loss of continuities of expertise and put at risk capacities to respond to issues arising in the different equality constituencies. On the other hand, a long-term existence of separate directorates for each of the equality groups would obviate the advantages for policy impact of the development of a single ethos (Equality Commission Working Group Report, 1999, p.27).

Institutional considerations

The *5 Year Review of the Equality Commission for Northern Ireland* (OFMDFM. 2005, p. 27) reports a perception amongst voluntary and community groups that religion and gender have a higher profile[18] than disability and race and that respondents *did* attribute this to the merger of the previous Commissions and the Disability Council. Those with this concern would prefer that the Commission's structure be 'grounds-based' rather than according to functions.[19] However, the desk-top analysis carried out for the Review 'confirmed that the Commission is vigilant about such concerns and acts to ensure that all statutory duties as required by the legislation relating to each ground are fully met' (*ibid,* p.32). That the OFMDFM could reach its conclusion and that there is overall public satisfaction (see conclusion) can be attributed to the care with which the merger was designed and operationalized.

The Equality Commission Working Group focused on the 'practical implications of bringing functions together while still ensuring that advances made in particular areas are protected and that no aspect of equality predominates over others' (*ibid*). As a result, both transitional and longer-term proposals were made in which, in the former period, units corresponding to the equality strands[20] would continue

[18] In particular in respect of the first function listed in the next footnote.
[19] These now are: Information, education and promotion; Investigation and enforcement; Advising and assisting complainants; Advising and assisting business; Research; Reviewing the equality legislation.
[20] In addition, there were cross-cutting divisions on Policy and Public Affairs; Legal and Operations; and Corporate Services.

temporarily, as did occur at the start (Collins, 2005, p. 23) and which, seemingly, some groups would have wished to continue (see above).

The Working Group was clear, however, that, from the beginning, the new Commissioners should be generalists so that the new Commission would 'be able to operate as a single, powerful and collective voice on all equality matters' and would 'demonstrate a continuing commitment to the promotion of equality across' all current and new 'equality of opportunity obligations'. The possibility of appointing Commissioners as 'specialists' (possibly, 'advocates') in any particular equality strand was rejected precisely to minimize the risk of incorporating a hierarchy of equalities through the potential development of a two tier Commission in which some members were more important than others because of their specialism (Equality Commission Working Group, 1999, pp. 11, 14). An additional concern amongst some members of the original agencies was that a 'grounds-based' structure would incorporate into the heart of the Commission itself the likelihood of a debilitating resource competition – which would *not* be to the advantage of each group (personal information).

In devising the first corporate plan for 2000-03, the Equality Commission developed four corporate priorities (ECNI, 2000). These were:

mainstreaming equality of opportunity and promoting inclusion;

combating discrimination and promoting equality of opportunity;

developing partnerships for change; and

building organizational effectiveness,

These priorities and related objectives demonstrated that that the Equality Commission was intending to achieve tasks that were 'spread over all the equality areas' enabling 'people interested in particular strands [to] see their issue being

brought forward' (Collins, 2005, p. 23). At the same time, in her view, the first plan was perhaps too broad, a fault that was corrected in the second corporate plan for 2003-06 (ECNI, 2003) – without losing its clarity about the range of its remit.

Even so, both well designed structures and good corporate plans exist in a context in Northern Ireland of demanding external expectations – covering a wide spectrum of opinion and groups. On the one hand, the NGO sector is strong and vibrant, with high expectations of equality and rights standards. On the other hand 'the range of [party] political interest can mean that developing the equality agenda is much contested' (Collins, 2005, p. 23). The Equality Commission has to maintain its political independence by working hard 'to ensure that [it] brings objective analysis to the arena, and works on priorities according to identified need' (*ibid*). In the long run, it is the maintenance of this integrity that will guard against one equality constituency prevailing over another.

Policy outcomes – or one means of bringing them about

The new statutory duties, according to the Equality Commission Working Group (1999, p. 81):

> are designed to make equality central to the whole range of public policy decision-making. … Questions of equality may easily become sidelined in organizations. Mainstreaming attempts to address this problem, by requiring all public authorities to engage directly with equality issues at an early stage in policy development. This is complementary to making more effective those measures adopted specifically to tackle discrimination, such as anti-discrimination law.

This quote assumes that public authorities will be equally vigilant over each of the sets of people for whom they are to have regard but it is certain that each set will be anxious that more attention may be paid to another. In Northern Ireland, the duty is twofold. Section 75, subsection (1), of the Northern Ireland Act places a duty on

public authorities 'to have due regard to the need to promote equality of opportunity' as:

(i) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

(ii) between men and women generally;

(iii) between persons with a disability and persons without, and

(iv) between persons with dependants and persons without.

Section 75 goes on to state in subsection (2) that, 'without prejudice to [their] obligations under subsection (1)', there is a duty on public authorities 'to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group'.

It is not possible in a single paper to review the experiences of all the groups protected by the statutory duty outlined in subsection (1),[21] though one review suggests 'there has been some levelling up of awareness and targeting across previously less visible dimensions of inequality' (McLaughlin and Faris, 2004, p. 30).

The challenge was and is great. As Hinds (2003, p. 194) points out, in developing its guidance for public authorities, the ECNI could not draw on experience elsewhere; practice in other jurisdictions is generally confined to singular *foci* (environment, gender), whereas, in Northern Ireland, guidance has to be about applying the duty across 'a broad and inclusive range of categories'.[22] Moreover, there was an equally 'broad and inclusive' range of groups to be consulted. In meeting these challenges, 'considerable effort and resources were put into the consultation process' which, 'facilitated the development of an advanced exchange of expertise between non-

[21] In general, it should be noted that both the Equality Commission Working Party (1999, p. 59) and the groups that responded to its consultation agreed that full implementation would incur considerable resources and that government should provide the new commission with them. Lack of resources has since been identified as a problem; see later in the paper.

[22] Though a paper prepared by T Rees and P. Chaney for a review of Section 75 does suggest that practices in Sweden and Canada might be instructive (McLaughlin and Faris, 2004, p. 51, 55).

government groups and the policy administration' (Donaghy (2003, pp. 8-9). Donaghy also suggests there was considerable potential, arising from the rigour of the Equality Commission, for the new duty to have a transformative effect.

However, in noting that many groups were well organized (women, people with disabilities, religious denominations), Donaghy also points out that in some categories there were – at the time - no or few groups to consult (transgendered persons, gay men and lesbians). However, this has changed in that there now is a Coalition on Sexual Orientation which 'prepared a well received guide for public bodies on how to involve and consult the lesbian, gay, bisexual and trans gender community' (Hinds, 2003, p. 196).

In outlining the strengths and weaknesses of implementation of Section 75 (subsection (1) only), McLaughlin and Faris did not refer to any systematic evidence that one equality strand had benefited more than another. However, they did suggest that public authorities 'found it difficult to address religious belief and political opinion beyond the established "community background" criteria' and that 'sexual orientation … present[ed] difficulties because of the sensitivities and privacy issues involved' (*ibid*, p.33).

Their readers might also be able to infer that, if there were claims of lack of attention to a particular strand, they may be overstated. Their report suggests that some public officials feel they had been unfairly targeted when they had been acting in good faith. McLaughlin and Faris (2004, pp. 35-6, 59-9) draw attention to the risk of Section 75 being 'treated as a weapon with which to attack those within government and the public sector' for 'not going far enough'. This might lead to 'a retreat to defensiveness and an overly bureaucratic approach'. The 'promotion of

section 75' requires that: 'The process of mainstreaming should be a safe place for all who are committed to the principles of section 75'.

While it is understandable that constituencies which previously had their 'own' institutions and legislation might worry about becoming precarious in a single agency or public authority implementing multi-stranded laws, handling different forms of inequality together has potential benefits. There are examples of this even in situations where there *were* hierarchies of inequality. This first example was proposed in the 1970s by Robinson (1974). Gender had been inserted into Title VII of the 1964 Civil Rights Act in the USA largely to discredit it by making it look ridiculous (by the standards of the time!). But Robinson suggests that intense pressure from women's groups, the Equal Employment Opportunities Commission and the courts enabled one movement on the 'coat-tails' of another to make Title VII into a 'magna carta' for working women. By 1997, according to a Department of Labor official, if the laws worked for anyone, they worked for women because they were making them do so (Meehan, 1983, p. 128). A second example lies in the presence in Northern Ireland of the uniquely demanding requirement to monitor the composition of workforces on the basis of religious opinion and political belief – which provided a 'coat-tail' for comparable gender monitoring.

Moreover, there is growing acknowledgement of that the successful promotion of equality is not just a matter of bi-polar competition between rather crudely defined groups. Collins' (2005, p. 24) observes that there are 'considerable benefits from developing the multi-strand approach to equality'. There are three aspects to this. First, people do not fit neatly into one or other of the categories of person protected by equality law. When asked about themselves, 'people offer explanations that

encompass multiple identities'.[23] Aspects of how they see themselves may be 'fluid', 'context dependent', or embodying 'contradiction' (Zappone, ed., 2003, ch. 8).[24] That these forms of identity are associated with 'interlocking structures of exclusion' vindicates Collins' (2005, p. 24) view that 'looking at the whole picture of social inclusion and equality' will facilitate holistic solutions. Secondly, as indicated in the above reference to gender monitoring in Northern Ireland, 'lessons from one area of work' can be learned 'to the advantage of the other equality strands' (*ibid*). And, thirdly, a single agency may be harder to ignore than a multiplicity of smaller ones and, at the same time, be a more visible 'one stop shop' for 'customers and stakeholders' *(ibid*).

As a codicil to this section and before returning to the relationship between multi-stranded work and specific measures for specific circumstances, let me mention one more feature of the statutory duties. It is not really relevant to this conference but may have a resonance in the proposals for Great Britain as they apply to race relations and other equality strands. This is the potential for an imputed tension in understandings of the relationship between the two parts of the Section 75 Duty.[25] The fact that the first refers to '*due regard* to the *need* to promote equality' and the second merely to '*regard* to the *desirability* to promote good relations' (and, moreover, 'without prejudice to the obligations' of the other duty) appears to some to suggest that the first is a higher obligation than the second.

[23] For example, 'women have multiple experiences in terms of age, sexuality, disability, religious and cultural differences' (Zappone, ed., 2003, pp. 27, 132).
[24] It is worth noting that this publication was commissioned by the Joint Equality and Human Rights Forum, a body that brings together the Equality Authority (Ireland), Human Rights Commission (Ireland), Equality Commission for Northern Ireland, Northern Ireland Human Rights Commission, Disability Rights Commission (Great Britain), Commission for Racial Equality (Great Britain) and Equal Opportunities Commission (Great Britain).
[25] 'Imputed' in order to promote particular political viewpoints and discourses (Goldie, 2005)

The relationship between the two has become a pretext for rivalry between 'the two communities'. As Goldie (2005, pp. 3-5) points out, advocates for protestants/unionists perceive a new inequality in the labour market for 'their' community, perceive equality law to be more beneficial to the 'other' and posit this as having an adverse impact on good relations (see also footnote 17). Conversely, advocates for catholics/nationalists/ republicans perceive that attaching importance to good relations is an excuse for inaction on inequality. Both the Equality Commission and the Community Relations Council (CRC)[26] have addressed the issue.

The ECNI has stated that 'the good relations duty cannot be invoked to justify a failure or refusal to comply with the equality duty' (ECNI, 2000, p.12) and that 'recognition of the interdependence of equality and good relations is crucial' (ECNO, 2003, p. 33). According to the CRC, 'good relations and equality go hand in hand' (cited by Goldie, 2005). As Hinds 2003, p. 191) points out, such statements repeat the point made by the Secretary of State, Dr Mo Mowlam, MP, in 1998 when she said that:

> We regard equality of opportunity and good relations as complementary. There should be no conflict between the two objectives. Good relations cannot be based on inequality between different religious or ethnic groups. Social cohesion requires equality to be reinforced by good community relations. … I repeat that we see no conflict between these two objectives.
>
> (House of Commons, Official report, 27 July 1998, col 109)

Having added this codicil, it is necessary now to return to the main topic of the paper and the third key question; whether the advantages of a multi-strand approach

[26] The ECNI has a good relationship with the Community Relations Council and the two bodies agreed upon a memorandum of Understanding in June 2004, though there is a view that there needs to be greater clarity over their roles, 'particularly in connection with issues of racism and racist attacks' (OFMDFM. 2005, p.22).

put at risk the capacity of public policy to use specific measures to address the specific situations of specific groups.

(iii) Does the presence of a combined agency and single legislation jeopardize the possibility of specific measures tailored to the specific circumstances of one of the constituencies?

Concern was expressed in the House of Commons about the potential of the new legislation to undermine provision for affirmative and positive action. In replying, the Secretary of State, Mr Paul Murphy, MP, observed that Section 75:

> in no way calls into question the ability of public authorities to take affirmative action in appropriate cases to correct disadvantage. Affirmative action in appropriate circumstance is an important method of combating inequality, and it is our firm intention that that should remain so. The clause does not call that into question, and does not render unlawful what would be lawful affirmative action under current anti-discrimination legislation. Furthermore, [Section 75] means that public authorities are bound to have regard to the need for affirmative action when considering their duty under the clause.
> (House of Commons, Official Report, 18 November 1998, cols 1069-1070)

Since then, others have interpreted the equality duty as ruling out affirmative action, either on the ground that it 'merely prohibits discrimination' or that 'it entails absolutely equal treatment' (Hinds and O'Kelly, 2005, p. 23). This gave rise to some 'misunderstanding' on the part of some public authorities which was 'harmful to the availability of resources for some types of provision; for example, "women only" and language provision' (McLaughlin and Ferris, 2004, 31-2). One of the points of keeping legislation under review is to catch such problems and rectify them.

Hinds and O'Kelly (2005, p. 2-3) dispute the assumption behind the question to the Secretary of State and the ongoing interpretation of the equality duty that mainstreaming across a broad spectrum and affirmative action for one particular strand are antithetical to one another. Rather, they 'lie in a continuous relation to each other, differing in emphasis and degree rather than being categorically distinctive'.

Affirmative action may, they point out, be intended to rectify past injustices against particular groups and mainstreaming may be about making society in general more fundamentally fair. On the other hand, mainstreaming may have more of an impact on groups that have been more unjustly treated in the past than others (as potentially in the case of the programme, Targeting Social Need, *ibid*, p. 26). And, also on the other hand, some forms of affirmative action are societal in intent – as in the case of new procedures in police recruitment in Northern Ireland.[27]

Hinds and O'Kelly (*ibid*, p. 21-2, 24) point out that, in carrying out Equality Impact Assessments, public authorities must, among other things, 'determine whether there is evidence that different groups have different needs, experiences, issues and priorities'. And they note that affirmative action is accommodated in the view of the ECNI that 'the promotion of equality of opportunity entails more than the elimination of discrimination [and] it requires proactive measures …'. Indeed, in its corporate planning process, the Commission seeks to use its resources effectively to address both 'enduring inequalities' and 'emerging' ones (Collins, 2005, p. 23), both of which include problems which have specific features requiring specific responses; for example, harassment, pregnancy, the conditions of migrant workers, racially motivated attacks and access and accommodation for people with disabilities.

Moreover, the ECNI is arguing that the still-to-be-agreed Single Equality Bill 'should build on the good practice of affirmative action in fair employment' (Hinds and O'Kelly, 2005, p. 27).[28] This would include extending key elements of it to other equality groups; setting goals and timetables, monitoring, reviewing policies,

[27] Originally to attract more Catholics (via 50:50 recruitment) and women (Hinds and O'Kelly, 2005, pp. 14-5; not part of the Northern Ireland Act 1998 but separate legislation in 2000). The ECNI and others lobbied to secure the application of Section 75 in its entirety to the Police Service of Northern Ireland and special measures for gender and minority ethnic people.

[28] They are drawing on the ECNI's *Working Draft Response to OFMDFM Consultation Paper, 'A Single Equality Bill for Northern Ireland*. The referenced page number here is to Hinds and O'Kelly, not the Draft Response.

practices and procedures and reporting to an oversight body'. At the same time, this should be 'married with the consultative approach that brings those affected by inequality into the debate, as developed under Section 75'. This, the Commission argues, 'recognizes that each ground of inequality brings with it its own practical issues' and would enable 'some degree of variation on grounds of diversity'. In making such proposals, according to Hinds and O'Kelly, 'the Commission is pressing the OFMDFM to shift its thinking on affirmative action from a "narrow exception to non-discrimination principles" towards a "major vehicle for promoting equality of opportunity"'.

4. Conclusion

There are some difficulties arising from the introduction of single equality legislation in the form of Section 75 to which I have alluded; issues relating to capacity and inclusive consultation. There are others which I have not mentioned: questions about compliance; the risk of 'tick box' responses; and what should happen if public authorities fail to comply even nominally. The latter would require legislative change. The former can be resolved through practice and familiarization, informed by the expertise available through an even further consolidated partnership amongst experts, groups and agencies. As McLaughlin and Faris (2004, p. 30) put it: 'There are signs of the development of a skilled and professional equality community beginning to emerge within both the public and non-governmental sectors'. The statutory duty 'is proving effective in moving authorities towards compliance and mainstreaming of equality within the public sector'. The "single" equality" approach … has proved helpful, exemplified in 'the role of the Equality Commission as the provider of a single central point for equality advice.

In final conclusion, let me concentrate on the single equality agency itself. In conducting the OFMDFM *5 Year Review of the Equality Commission for Northern Ireland* (OFMDFM, 2005), interviews were held with public officials, members of the voluntary and community sectors, representatives of the private sector and political parties. There were some criticisms, though, to judge from the wording of the Review, these were sometimes based on perceptions rather than hard evidence. For example (*ibid*, pp. 17-8, emphasis added): 'the Commission may be *perceived* as an extension of Government, thereby limiting its role in contributing to setting the equality agenda'; 'the Commission *appeared* to be more concerned about processes than outcomes'; '*concerns* about the tension in the Commission's dual role in respect of providing information and advice while also being required to pursue enforcement action'; 'a *perceived* lower public profile when compared to former Commissions'. Some views were expressed about the limitations on its remit with respect to, for example, Anti-Social Behaviour Orders, Public Private Partnerships and Neighbourhood Renewal. It was also felt that the Commission and/or a re-devolved Assembly should play more 'influential role[s] in setting the agenda for the delivery of OFMDFM's equality objectives' and, indeed, it is likely that there will be more systematic meetings between the Commission, OFMDFM officials and Ministers *(ibid*, p. 25).

None of these observations really indicates dissatisfaction with the move to a single agency. The criticism mentioned in the previous section that the ECNI accorded a higher profile to issues relating to gender and religion and political opinion was refuted in the Review. The just-noted observation made to the Review team that the public profile of the Commission was lower than that of its predecessors is assumed, rather than demonstrated, to be a consequence of the mergers. Indeed, 'a

majority of respondents from all sectors were generally supportive' and 'voluntary and community respondents praised the Commission's role in relation to changing public attitudes on equality issues' *(ibid*. pp. 17-8). Moreover, it is reported that there is a positive view of the Commission in terms of 'its engagement with the [equality] groups' *(ibid*, p. 23) and its consultation on the Single Equality Bill was 'widely recognised and … favourably commented upon by respondents from all sectors' (*ibid*, p. 30).

The fact that the first five years has been reviewed positively is a tribute to the care with which the Equality Commission Working Party and the Commission itself approached the task of ensuring, through design and corporate planning, that the transition took place in a way that would neither marginalize some groups nor introduce a hierarchy of equality concerns. So, experience in Northern Ireland shows that the reform now contemplated in Great Britain can work.

Annex 1

(A) Equality legislation applying to Northern Ireland before and after devolution

Year	Title	Summary of Coverage
1970	Equal Pay Act (NI) (as amended)	Women and men. Same work amended to work of equal value.
1976	(a) Sex Discrimination (NI) Order (as amended)	Employment, Goods, Facilities and Services (GFS). New enforcement Commission (EOCNI).
1976	Fair Employment	Religious belief and political opinion. Employment only. New enforcement Agency (FEA).
1989	Fair Employment (NI) Act	Religious belief and political opinion. Employment only. Duties on employers; monitoring, affirmative action. Agency becomes Commission (FEC).
1995	Disability Act (as amended) (UK-wide)	Employment; GFS; premises. New advisory council (NIDC) but without enforcement powers.
1997	(a) Race Relations (NI) Order	Colour, race, nationality, ethnic or national origin; Irish Traveller Community. Employment, education, property/land disposal, GFS. Defines segregation as discrimination. New enforcement Commission (CRENI)
1998	(a) Fair Employment and Treatment (NI) Order (as amended – re EU)	Religious belief and political opinion. Facilitates recruitment from the unemployed (higher amongst Catholics). Covers part-time workers. Adds GFS to employment.
1998	Northern Ireland Act; Sections 73, 74, Schedule 8	Establishes new Equality Commission (ECNI) to take over functions of all those above. Specifies structure, organizational parameters and main functions. Appointment of Commissioners to remain with S of S for NI in UK government.
1998	Northern Ireland Act; Section 75 and Schedule 9	Religious belief, political opinion, racial group, age, marital status, sexual orientation, gender, disability, persons with/without dependants. Duties on public authorities in carrying out their general functions to promote equality amongst all ('mainstream') and to promote good relations between person of different religious belief, political opinion or racial group. Enforcement placed on ECNI.
2000	Police (Northern Ireland) Act	Mainly about restructuring policing but also including new rules about recruitment,
2000	(a) Equality (Disability etc) (NI) Order	Expanded enforcement duties and powers; more promotion, voluntary and preparation of statutory codes, advice and formal assistance in legal cases.
2003	(b) Employment Equality (Sexual Orientation) Regulations (NI)	Employment, vocational training, further and higher education; some positive action. Not GFS.
2004	European Framework Directive on Equal Treatment	Sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation (plus nationality and a declaration on disability)
????	Single Equality Act (still at Bill stage)	To be agreed

Sources: ECNI (undated), Collins (2004), OFMDFM (2005).

Notes

(a) Direct Rule was introduced in 1972, after which legislation for Northern Ireland was usually made through Orders-in-Council, a process which extended to Northern Ireland, sometimes in modified form but without the opportunity to amend on the floor of the House, legislation made for Great Britain. Where Orders appear after 1998, the year of devolution, this is because of suspensions of the Executive and Assembly.

(b) Arising from EU obligations and implemented through Regulations under the European Communities Act 1972, a method also criticized for limiting the opportunities for debate and amendment that would have been possible under primary legislation (ECNI/Cross, 2003)

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