STRATEGIC ENFORCEMENT AND THE EC EQUAL TREATMENT DIRECTIVES

TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION:
THE ROLE OF SPECIALISED BODIES
REPORT OF THE SIXTH EXPERTS' MEETING, HOSTED BY THE IRISH EQUALITY AUTHORITY, 4-5 MARCH 2004

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PREFACE

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Co-operation between specialised equality bodies has never been more important. New specialised equality bodies are emerging across the European Union on foot of the requirements in EU equality Directives. Existing specialised equality bodies share common objectives but pursue them in a context of diverse histories, powers and functions and legislative contexts. At such a moment co-operation has much to offer these bodies in effectively implementing their mandates and in maximising the impact of their resources.

This publication reports on a conference on 'Strategic Enforcement and the EC Equal Treatment Directives'. The conference was organised in Dublin by the Equality Authority. This was part of an ongoing series of exchanges between a network of specialised equality bodies on legal issues, which has been funded by the European Community Action Programme to Combat Discrimination. These exchanges of insights, practices and expertise between the bodies have been important in building a new co-operation between them. This process will need to continue and expand in ambition as the various specialised equality bodies further develop a common and shared purpose and seek to make a greater impact on policy formation and developments at EU level.

Strategic enforcement is a valuable theme around which to share insights, practices and expertise. It is a theme that is central to the effective deployment by specialised equality bodies of their various powers and functions. It is key in developing criteria to shape decision making on which powers and functions to deploy to address particular issues of discrimination and inequality. It is vital in defining how best to combine and integrate these powers and functions in pursuing the overall aims and objectives of the body.

The Dublin conference provided many insights for participants and highlighted a series of challenges posed in seeking to pursue a strategic enforcement approach. Particular insights are evident in the very broad approach suggested for pursuing strategic enforcement which combines both legal and non-legal powers and functions. Insights are also evident in seeking remedies for individuals alongside group justice and equality within groups.

Particular challenges are posed by the contexts within which some specialised equality bodies operate. The political context can be hostile to their mandates and objectives. Whatever the context, there is the challenge to shape the space available to specialised equality bodies in cultural and political terms and in terms of resources and powers and functions available. Strategic enforcement will be enhanced where powers and functions are available to address both individual and institutional discrimination and where the prohibition on discrimination is accompanied by a statutory duty on public and private sector organisations to promote equality.

This is a valuable publication and it will hopefully achieve a widespread dissemination. It includes a set of high quality papers on what is a complex topic. Strategic enforcement will be well served if this publication can become a focus for debate across the European Union. Ultimately of course it is equality, the accommodation of diversity and non discrimination that will be well served by such debate.

The Equality Authority looks forward to further engaging in debate and joint initiative with the specialised equality bodies on this important topic of strategic enforcement. This must happen as the range of bodies involved in this co-operation is broadened and as the ambition for this co-operation is deepened. It is an area of work that can only enhance the effectiveness and the further evolution of the specialised equality bodies and the successful implementation of their mandates.

The conference took place during the Irish presidency of the EU. It was identified as the Equality Authority's contribution to the focus on equality during this Presidency. As such, one session of the conference took the broader theme of promoting equality and combating discrimination at EU level. We are grateful to the Irish Minister for Justice, Equality and Law Reform Michael McDowell TD for his contribution to this debate. We are further grateful to Barbara Nolan, Head of the Anti-Discrimination, Fundamental Social Rights and Civil Society Unit in the European Commission, for her contribution to this debate.

STRATEGIC ENFORCEMENT– FROM CONCEPT TO PRACTICE

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1. INTRODUCTION

The implementation and enforcement of the range of mandatory and enabling provisions contained in the Directives require a number and range of mechanisms and strategies. I propose ascribing a broad meaning to strategic enforcement which encompasses voluntary compliance and proactive action to eliminate discriminatory practices as well as traditional enforcement. Strategic enforcement recognises that the comprehensive implementation of the Directives will require more than the provision of assistance to individuals to bring individual claims. Strategic enforcement involves a focus on initiatives to achieve voluntary compliance as well as traditional enforcement through individual litigation. It requires specialised bodies to use a range of enforcement powers and development functions. Strategic enforcement involves the deployment of the functions and the powers of the specialised equality body behind objectives that are prioritised and strategic and in a combination that is most effective both in terms of impact and of resources used.

In this paper I will examine:
- what is being enforced, the three EU equality Directives
- the limitations of the individual enforcement model that informs the Directives and the need for strategic enforcement to go beyond this model
- the manner in which the EU Directives assist in approaches to strategic enforcement that go beyond the individual enforcement model
- the Irish experience of strategic enforcement

2. THE DIRECTIVES TO BE ENFORCED

Strategic Enforcement will focus on the provisions of the Racial Equality Directive and the Framework Directive and the Amended Second Equal Treatment Directive.[1]

The Racial Equality Directive has the broader material scope in that it prohibits discrimination on the basis of race and ethnic origin in access to employment, self employment, vocational training, employment and working conditions, membership of and involvement in unions and employer organisations, social protection including social security, and health care, 'social advantages', education, and goods and services including housing.
The Framework Directive prohibits discrimination on the basis of religion or belief, disability, age and sexual orientation but only in the employment context.
The Amended Second Equal Treatment Directive only applies in the employment and social security context. It codifies the jurisprudence on gender of the Court of Justice. The focus in all of the Directives is on the promotion of equal treatment.

All of the Directives have definitions of discrimination that encompass both direct and indirect discrimination, harassment (and sexual harassment in the Amended Second Equal Treatment Directive).[2] They all have exceptions based on occupational qualifications.[3] They all provide that the level of protection provided by Member States

[1] Council Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin [2000] OJL180/22, (hereafter the Racial Equality Directive or RED); Council Directive 2000/78/EC establishing a general framework for Equal Treatment in employment and occupation [2000] OJL303/16 (hereafter the Framework Directive or FD); Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (hereafter the Amending Gender Equal Treatment Directive or Amending GETD).
[2] Article 2 of the RED; Article 2 of the FD and Article 1(2) of the Amending GETD.
[3] Article 4 of the RED; Article 4 of the FD and Article 2(6) of the Second Equal Treatment Directive inserted by Article 1(2) of the Amending GETD.

may be greater than that provided in the Directives.[4] Collective bargaining is a method of implementation in some circumstances.[5] Dialogue with non-governmental organisations is provided for in some contexts.[6] All have broad positive action provisions "with a view to ensuring full equality in practice".[7]

The Directives differ in material scope, date of implementation and the discriminatory grounds that are covered. The Framework Directive contains broader exemptions particularly in the areas of the grounds of age and disability.

One of the most striking features of the new Directives is the emphasis on enforcement. Victimisation is prohibited.[8] They all require that administrative or judicial remedies be provided.[9] They have provisions allowing associations and organisations to pursue claims for equal treatment.[10] The Racial Equality and amended Second Equal Treatment Directives provide for enforcement through bodies established for the promotion of equal treatment, (which is not the case in the Framework Directive).[11] The provisions on sanctions in the Directive reflect jurisprudence of the Court of Justice. While the provisions leave the detailed application of provisions to Member States, the Directives state explicitly "the sanctions, which may comprise the payment of compensation to the victim, must be effective proportionate and dissuasive".[12]

What are the most effective mechanisms for implementing the provisions of the Directives? Implementation and enforcement is defined broadly to include both voluntary compliance and involuntary compliance. How do the specialised bodies, Trade Unions, and NGOs support, stimulate, encourage, persuade and/or require individuals, small and large employers, service providers, institutions, public bodies and the State to comply with the mandatory provisions of the Directive and exploit the enabling provisions to best effect? What are the best ways of bringing about implementation or compliance (either voluntary or otherwise)?

These questions are being asked in the following context.

There is nearly 30 years of legislative provisions on the gender ground in the form of the original Treaty of Rome provisions, the Equal Pay and Equal Treatment Directives, the Social Security, Self-employed, Pregnancy, Parental Leave, Burden of Proof, Organisation of Working Time and Part-time Workers Directives[13] and a wealth of 'soft law' instruments at European level adopted by the Commission and Council in areas of equal pay, positive action, sexual harassment and women's representation.[14]

Despite these developments and the undoubted social changes to which these approaches appear to have contributed, there is no room for complacency. "The employment rate for women in the EU is still 18.2 percentage points below the male rate. The unemployment rate for women is on average three percentage points higher than the male rate. The labour market remains highly segregated by gender, with women concentrated in certain occupations and industries. Where women are employed, women's pay is still a percentage of men's across the community. Women account for 77 percent of low-income employees. Women are seriously under-represented in positions of responsibility in government, in policy-making and in the corporate sector".[15]

In examining the issue of strategic enforcement certain assumptions are being made.

- There will be a large demand for assistance by individuals who wish to bring claims. (When the Equal Status Act, 2000 was implemented in Ireland the Equality Authority was almost overwhelmed with requests for assistance.

[4] Article 6 RED; Article 8 FD and Article 8(e) of the Second Equal Treatment Directive as inserted by Article 1(7) of the Amending GETD.
[5] Article 11 RED, Article 13 FD and Article 8(b) of the Second Equal Treatment Directive as inserted by Article 1(7) of the Amending GETD.
[6] Article 12 RED, Article 14 FD and Article 8(c) of the Second Equal Treatment Directive as inserted by Article 1(7) of the Amending GETD.
[7] Article 5 RED; Article 7 FD and Article 2(8) of the Second Equal Treatment Directive as inserted by the Article 1(2) of the Amending GETD.
[8] Article 9 RED; Article 11 FD and Article 7 of the Second Equal Treatment Directive as inserted by Article 1(6) of the Amending GETD.
[9] Article 7 RED; Article 9 FD and Article 6 of the Second Equal Treatment Directive as inserted by Article 1(5) of the Amending GETD.
[10] Article 7 RED; Article 9 FD and Article 6(3) of the Second Equal Treatment Directive as inserted by Article 1(5) of the Amending GETD.
[11] Article 13 RED and Article 8(a) of the Second Equal Treatment Directive as inserted by Article 1(7) of the Amending GETD.
[12] Article 15 RED; Article 17 FD and Article 8(d) of the Second Equal Treatment Directive as inserted by Article 1(7) of the Amending GETD.
[13] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member Stated relating to the application of the principle of equal pay for men and women [1975] OJL45/198; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principal of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJL39/40; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJL6/24; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJL225/40; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal

The Equality Tribunal which is the quasi judicial body established to investigate, hear and decide claims in a speedy, accessible manner, quickly developed a large and continuing backlog.)
- The specialised bodies of the Member States do not have unlimited resources.
- The legal aid services of the Member States will not have the capacity or resources to cope with the extent of unmet legal need.
- The laws, functions and powers of the specialised bodies will vary from State to State. Different specialised bodies have a wealth of experience as to what works and what does not. The US also has a wealth of relevant experience particularly in fields of race and gender.

3. THE BENEFITS AND LIMITS OF THE INDIVIDUAL ENFORCEMENT MODEL

The provisions of the Directives reflect the various preferred model(s) of equality, and in turn, determine the extent to which the preferred model(s) are merely aspirational, or actually realisable.

A number of models of equality have been suggested. Professor Christopher McCrudden has suggested five models of equality
(a) equality as rationality
(b) equality as individual justice
(c) equality as group justice
(d) equality as recognition of cultural diversity
(e) equality as participation[16]

European measures have until recently tended to favour the individualised justice model. This involves legislation which sets out and requires compliance with a fixed legal standard of conduct which is often enforced by individuals (on occasion with assistance by equality commissions) bringing legal proceedings when that standard of conduct is violated which can result in the award of damages when evidence of a clear act of direct or indirect discrimination has been established (e.g. the negative prohibition of discrimination contained in all of the Directives).

The individual enforcement model has undoubtedly been successful in combating particular overt forms of discrimination. The Report of the independent Review of the enforcement of UK Anti-Discrimination Legislation states *"There can be no doubt that the third generation legislation in the UK has broken down many barriers for individuals in their search for jobs, housing and services, and that the SDA* [Sex Discrimination Act] *and RRA* [Race Relations Act] *have driven underground those overt expressions of discrimination which were current 25 years ago".*[17]

Individual enforcement can also have other benefits such as
- A single case can have extensive legal and social effects
- It establishes precedent that benefits future claimants
- It raises issues publicly
- It "tests" and clarifies the content of existing laws (this furthering government accountability by establishing the parameters within which government operate).

treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJL359/56; Council Directive 92/85/EC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding [1992] OJL348/1; Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [1993] OJL 307/18; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJL 145/11, eventually agreed to by the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EEC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1997] OJL 10/24; Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1997] OJL 14/13; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJL 14/6, eventually accepted by the United Kingdom in Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland [1998] OJL 205/66; Council Directive 97/891/EC of 15 December 1997 concerned the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJL 14/9.

[14] *For example, Commission Communication on a Code of Practice on the implementation of equal pay for men and women for work of equal value COM (1996) 336; Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women [1984] OJL 331/34; Council Resolution of 29 May 1990 on the protection of dignity of women and men and work [1990] OJC 157/3; Commission Recommendation 92/131/EEC of*

However the inadequacies of the individualised enforcement model are well documented.[18] If one is hoping to obtain a judicial ruling of which policy makers have to take account, there must already be in existence a legal principle, express or implied, which supports the claim. However the majority of the provisions in the Directives are comparator based. It is not enough to show that you have been unfairly treated because of your sexual orientation, gender, race etc., you have to show that you have been less favourably treated than someone who does not belong to the same sexual orientation, race etc. If a comparator cannot be found then there is no claim and no requirement on the employer to act.

The individual has to comply with procedural rules which reflect the individual enforcement model such as rules of standing. These rules on standing will determine:
- the extent NGOs and Trade Unions can take proceedings in defence of the interests of their members
- the extent to which (if at all) private individuals or groups can take legal action in defence of public interest
- and the extent to which an individual can take action on behalf of third parties.

A potential claimant faces evidential burdens such as gathering sufficient evidence to raise a prima facie case, or identifying the correct pool or comparator or requirement or practice in an indirect discrimination (in the absence of a meaningful right to information). Even if the claimant can get over these hurdles the remedy focuses on a post facto individual remedy in the context of retrospective fault-finding rather than encouraging proactive identification and elimination of discriminatory practices across an organisation.

The traditional focus in the individual enforcement is on remedying individual acts of discrimination after the event, not on the elimination of structures and patterns of behaviour that perpetuate discriminatory practices.[19]

The individual enforcement model is limited in how it combats deeply embedded patterns of institutional discrimination and prejudice.

There are attitudes, policies and practices within institutions which cause disadvantage. The Stephen Lawrence Inquiry highlighted this in its widely-quoted definition of "institutional racism":
"[Institutional racism is] *the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people. It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without the recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease*".[20]

The individual enforcement model tends to produce a culture of negative compliance, whereby emphasis is placed upon just taking the necessary steps to meet the legislative standard rather than upon taking proactive action to eliminate discriminatory practices and attitudes.

It also leads to a lack of participation and limited sensitivity to the needs of disadvantaged groups and the absence of a coherent approach to dealing with overlapping forms of discrimination. As Colm O'Cinneide has stated:
"*The individual enforcement model relies excessively on an approach that resembles sending fire engines to fight a fire rather than preventing that fire in the first place*".[21]

27 November 1991 on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment [1992] OJ L49/1; Commission Communication on the consultation of management and labour on the prevention of sexual harassment at work COM (1996) 378; Council Resolution of 27 March 1995 on the balanced participation of men and women in decision making [1995] OJ L168/3; Council Recommendation of 2 December 1996 on the balanced participation of women and men in the decision-making process [1996] OJ L319/11.

[15] McCrudden, Theorising European Equality Law, Equality in Diversity, ICL No29 p9.

[16] Ibid pages 19-33

[17] B. Hepple, Ms Coussey and T. Choudhury, Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Hart, 2000) para. 1-33.

[18] L. Waddington and C. O Cinnéide, chapters 2 and 4 of Equality in Diversity, ICEL no.29 and Taking Equal Opportunities Seriously, Equality and Diversity Forum, p.22.

[19] The US courts take five different approaches to the formulation of remedies in institutional reform litigation:
i. The judge may limit his/her role to the evaluation of the defendant's proposals essentially placing the onus on the defendant to formulate the remedy
ii. The Court may impose its own remedy
iii. The Court may select a remedy from suggestions made by all of the parties
iv. The matter may be referred to an expert non judicial person

4. NEW EQUALITY STRATEGIES – BEYOND INDIVIDUAL ENFORCEMENT.

In considering how best to implement in full the enabling and mandatory provisions of the Directives it is worthwhile to refer to strategies that go beyond the individual enforcement model, by supplementing it with effective mechanisms designed to bring about substantive equality and recognition of the needs of disadvantaged groups.
"An individual-oriented reactive complaint procedure needs to be reinforced (not replaced!) by proactive methods of removing group disadvantages and of breaking down institutional discrimination. Any attempt to achieve this has to encourage a culture of diversity rather than defensive compliance. Action against discrimination needs to be proactive rather than reactive. Rees has suggested that action needs to be both "internal" – within the organisation question as an employer – and "external", in the "business" of each organisation, especially in service delivery: achieving equality involves considering the equality dimension of a project or policy 'systematically, from inception to design, implementation and review…it is a new way of doing things, rather than an add-on or extra'." [22]

These strategies include mainstreaming, positive duties and contract compliance.

4.1 Mainstreaming

Two main components of effective mainstreaming have been identified – impact assessment, concentrating on the impact of policies on disadvantaged groups, and the participation of these groups in decision making processes.[23]
"By providing for participation by disadvantaged groups and for proactive policy making designed to identify and, if possible, eliminate discriminatory impact, mainstreaming as a strategy incorporates some of the key elements of a meaningful, substantive equality strategy".[24]

There are limits to mainstreaming as a substantive equality strategy.[25] Obligations often contain no requirement to eliminate existing discriminatory structures, just to integrate equality concerns into ongoing policy making.

4.2 Positive Duties

One of the most effective equality strategies is the positive duty.
"The aim of positive duties is twofold: to impose a requirement to promote equality via impact assessment and consulting, and to also impose an enforceable duty to eliminate discriminatory structures by proactive and anticipatory action, rather than waiting for retrospective-based, individual action by means of the individual enforcement model. The aim is to change practice rather than to provide compensation ex post facto. Positive duties require action to target and eliminate institutional discrimination that is not otherwise combatable by means of the individual enforcement model because it does not involve discrete, detectible acts of discrimination with direct consequences for individuals."[26]

The duty is directed at the bodies best capable of promoting equality rather than individual perpetrators of discriminatory acts. The duties must be flexible and adjustable to be effective. They require a constant process of assessing and monitoring the impact of policies and equality strategies. Positive duties emphasise consultation and the inclusion of the perspectives of different disadvantaged groups. Transparency requirements have to be introduced. The perspective of the bodies subject to the duties needs also to be taken on board.

The single most extensive positive duty imposed in the UK is that provided by S.75 of the Northern Ireland Act 1998, which imposes a duty on specified local authorities to have due regard to the need to promote equality

v. The Court may approve a settlement negotiated by the parties outside the Courtroom.
[20] W. Macpherson et al, The Stephen Lawrence Inquiry (Stationery Office, 1999), available at http://www.officialdocuments.co.uk/document/cm42/4262/4262.htm
[21] Colm O Cinnéide: Taking Equal Opportunities Seriously, Equality and Diversity Forum, p.23.
[22] ibid, p.30.

of opportunity across all the protected grounds in carrying out their public functions. The British Race Relations (Amendment) Act, 2000 imposes a general positive duty on an extensive list of specific public authorities which combines a negative obligation to eliminate racial discrimination with complementary positive obligations to promote equality of opportunity and good relations between people of different ethnic groups.

4.3 Contract Compliance and Public Procurement

Another effective tool to combat structural discrimination is contract compliance. The rationale for it is that the beneficiaries of public money should not be implementing discriminatory policies. Contract compliance can foster fair competition by removing short-term unfair advantages rooted in exploitative or unequal practices. It can improve corporate management by requiring the implementation of equal opportunities best practice. With contract compliance private bodies awarded public sector procurement contracts are expected to take proactive steps to promote equality and eliminate unlawful discrimination. Private contractors bidding for government contracts have to introduce and implement effective equal opportunity policies, including appropriate pay auditing, best equal opportunity practice and monitoring of their workforce.

5. THE DIRECTIVES – BEYOND THE INDIVIDUAL ENFORCEMENT MODEL

There are a number of provisions in the new Directives that recognise the weakness in the individual enforcement model and point to these or other mechanisms for bringing about implementation. They are provisions on measures to protect complainants against victimisation; burden of proof; establishing bodies to promote equal treatment; dialogue with civil society and improved rules on standing; and positive action / positive duties.

5.1 Protection against Victimisation

Fear of victimisation, the isolation and hostility experienced by those who do use the judicial process to enforce their rights, is universally perceived as being a very real deterrent to litigation. The Directives offer differing levels of protection in this regard. The Racial Equality Directive requires Member States to introduce measures to protect individuals from 'any adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment'.[27] The Racial Equality Directive provides greater protection against victimisation than the other Directives, even in the field of employment. Article 1(6) of the Amending Gender Equal Treatment Directive and Article 11 of the Framework Directive protect only against dismissal or other adverse treatment by the employer.

5.2 Burden of Proof

The Racial Equality Directive and the Framework Directive have almost identical provisions to those contained in the Burden of Proof Directive, which provides that once the complaint has established a prima facie case of discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment.[28] While the shifting of the burden of proof should make it easier for the individual complainant, there are still significant hurdles in establishing a prima facie case of discrimination, particularly in areas where people have long been denied access and therefore will not have easy access to knowledge as to how potential comparators are treated. The Report on the Utilisation of Sex Equality Litigation Procedures in the Member States of the

[23] C. McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland' (1999) Fordham IntLJ22.

[24] See Colm O Cinnéide, Taking Equal Opportunities Seriously, Equality and Diversity Forum p.34, M. Pollack and E. Hafner-Burton, 'Mainstreaming Gender in the European Union' (2000) 7 Journal of European Public Policy 3, 432-437, and T. Rees, Mainstreaming Equality in the European Union, (London: Routledge, 1998)

[25] Mainstreaming policies are not given detailed shape by means of legislation. Equality initiatives have little or no real impact without strong enforcement provision. The nature and extent of participation and the key issue of who should be consulted often receives a vague response. The extent of obligations imposed on public authorities is not always clear. See Colm O Cinnéide 'Taking Equal Opportunity Seriously, Equality and Diversity Forum p.39.

[26] Colm O'Cinnéide, Chapter 4, Equality in Diversity, ICEL No29 P.90.

[27] Article 9 RED.

[28] Article 8 RED; Article 10 FD.

European Community notes that, *'a persistent theme in the research findings concerns the difficulties encountered in gaining access to the information and evidence necessary to start legal proceedings'.*[29] The provisions in relation to the burden of proof would be far more effective for the enforcement of rights if there were a meaningful entitlement to relevant information.

5.3 Bodies for the Promotion of Equal Treatment

There are important new provisions in the Racial Equality Directive and the Amended Second Equal Treatment Directive requiring Member States to designate a body or bodies for the promotion of equal treatment.[30] The bodies must have competence to provide independent assistance to the victims of discrimination in pursuing their complaints about discrimination. They must also be in a position to conduct independent surveys and publish independent reports on any issues relating to discrimination. The repeated emphasis on independence is significant. The mandatory and broad based nature of the obligations suggests that Member States must ensure that the bodies have sufficient resources to carry out their functions. However, in other respects, these provisions lack specificity. For example, the nature and extent of assistance to be provided to victims is unclear. In addition, there is no requirement on Member States to allow class/group actions. Of grave concern is the fact that there are no obligations under the Framework Directive to empower independent enforcement bodies. This suggests new hierarchies between the various grounds of discrimination, and raises issues in relation to effective implementation of the legislation at Member State level.

In implementing these provisions, it is useful to also have regard to the recommendation of the European Commission against Racism and Intolerance ('ECRI') on specialised bodies.[31] ECRI is a Council of Europe body that seeks to combat racism and intolerance through knowledge sharing and cooperation. Although the Recommendation is non-binding, it reflects a thoughtful attempt to codify current best practice on enforcement bodies, and as such provides a useful benchmark to inform the implementation of the Directives. The Recommendation recognises that effective equality strategies depend to a large extent on awareness-raising, information and education of the public, as well as the vindication of individual rights. It sets out the recommended functions and responsibilities.[32]

The independence and accountability of the specialised body is also set out.[33] In this respect, the recommendation provides that:

- *Specialised bodies should be provided with sufficient funds to carry out their functions and responsibilities effectively, and the funding should be subject annually to the approval of parliament.*
- *Specialised bodies should independently provide reports of their actions on the basis of clear and where possible measurable objectives for debate in parliament.*

It also recommends that specialised bodies should ensure that they operate in a politically independent manner. Thus, they should operate in such a way as to maximise the quality of their research and advice and thereby their credibility both with national authorities and the communities whose rights they seek to preserve and enhance. In setting up specialised bodies, Member States should ensure that they have appropriate access to governments, are provided by governments with sufficient information to enable them to carry out their functions and are fully consulted on matters of concern to them.

[29] J. Blom, B. Fizpatrick, J. Gregory, R. Knegt and U. O'Hare, The Utilisation of Sex Equality Litigation Procedures in the Member States of the European Community, A Comparative Study (1995).

[30] Article 13 RED and Article 8(a) of the Second Equal Treatment Directive as inserted by Article 1(7) of the Amending GETD.

[31] ECRI general policy recommendation No.2: Specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level. CRI (97) 36, 13 June 1997.

[32] These are: to work towards the elimination of the various forms of discrimination and to promote equality of opportunity and good relations between persons belonging to all the different groups in society; to monitor the content and effect of legislation and executive acts with respect to the relevance to the aim of combating racism, xenophobia, anti-Semitism and intolerance, proposals and to make if necessary possible modification to such legislation; to advise the legislative and executive authorities with a view to improving regulations and practice in the relevant fields; to provide aid and assistance to victims, including legal aid, in order to secure their rights before institutions and the courts; subject to the legal framework of the country concerned, to have recourse to the courts or other judicial authorities as appropriate if and when necessary; to hear and consider complaints and petitions concerning specific cases and to seek settlements either though amicable conciliation or, within the limits prescribed by the law, through binding and enforceable decisions; to have appropriate powers to obtain evidence and information in pursuance of its functions under the preceding paragraph; to provide information and advice to relevant bodies and institutions, including State bodies and institutions; to issue advice on standards of anti-discriminatory practice in specific areas which might either have the force of law or be voluntary in their application; to promote and contribute to the training of certain key groups without prejudice to the primary training role of the professional organisations

5.4 Dialogue with Civil Society

The three new Directives oblige Member States to encourage dialogue with social partners and with appropriate non-governmental organisations with a legitimate interest in contributing to the fight against discrimination with a view to promoting the principle of equal treatment.[34] The Directives also contain provisions requiring Member States to 'encourage' the social partners to conclude collective agreements laying down anti-discrimination rules.

Dr. Anna Sporrer argues that the best way for Member States to promote social dialogue with the non-governmental organisations and the social partners is to institutionalise this dialogue by way of legislation. She recommends giving social partners (including NGOs) a more formal role in the planning, and drafting of legislation and in monitoring practice after legislation has been implemented. She also recommends that they be represented on the specialised bodies and the specialised bodies play a role in encouraging social partners to conclude agreements by providing advice and for example by designing models for positive action.[35]

5.5 Improved rules on standing

The weakness of the individual enforcement model is also acknowledged in that all three directives contain provisions requiring Member States to ensure that associations, organisations, or other legal entities which have a legitimate interest in ensuring that the provisions of the Directives are complied with, may engage either on behalf of or in support of the complainant with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations.[36] It is up to the Member States to lay down criteria to determine whether an organisation has a legitimate interest. These criteria will have to comply with the EC law principles of equivalence and effectiveness. While this is a major development in relation to the rules of standing, the focus is still very much on the individual enforcement model as there is no obligation to ensure that such bodies could take group or class actions.

5.6 Positive Action / Positive Duties

Among the most striking provisions in the Directives are those on positive action. These measures permit rather than require positive action. However the aim of the measures is noteworthy; "With a view to ensuring full equality in practice".[37]

The promotion of gender equality is now among the tasks of the EC (Article 2 EC Treaty). The amendment to the Second Equal Treatment Directive reflects this in that mainstreaming is provided for in that there is a general obligation on Member States to *"actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas* [covered by the Directive]", namely employment and vocational training.

The Racial Equality and Framework Directives do not have provisions requiring mainstreaming. However the broad provisions on positive actions enable Member States to introduce positive duties. These measures allow Member States to go beyond individual enforcement and allow for strategic enforcement.

involved; to promote the awareness of the general public to issues of discrimination and to produce and publish pertinent information and documents; to support and encourage organisations with similar objectives to those of the specialised body; to take account of and reflect as appropriate the concerns of such organisations.

[33] Specialised bodies should function without interference from the State and with all the guarantees necessary for their independence including the freedom to appoint their own staff, to manage their resources as they think fit and to express their views publicly. The terms of reference of specialised bodies should set out clearly the provisions for the appointment of their members and should contain appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment where renewal would be the norm.

[34] Articles 11 and 12 RED; Articles 13 and 14 FD; Articles 8(b) and 8(c) of the Second Equal Treatment Directive as inserted by Article 1(7) of the Amending GETD.

[35] Anna Sporrer, How to Implement EU Law on Protection Against Discrimination and Gender Equality in National Law, Protection Against Discrimination and Gender Equality, How to meet both requirements (second publication in the present series) ISBN No.2-9 600266-9-1

[36] Article 7 RED, Article 9 FD and Article 6(3) of the Second Equal Treatment Directive as inserted by Article 1(5) of the Amending GETD.

[37] Article 5 RED, Article 7 FD and Article 2(8) of the Second Equal Treatment Directive as inserted by Article 1(2) of the Amending GETD.

6. STRATEGIC ENFORCEMENT – THE IRISH EXPERIENCE

The Equality Authority has a multilayered approach to enforcement/compliance. A number of strategic enforcement tools are required and are present in the legislation which gives the Equality Authority the broad dual mandate of working towards the elimination of discrimination and promoting equality of opportunity in employment and in matters covered by the Equal Status Act, 2000 (ESA).[38] It is also given a public information function in regard to a number of Acts[39] and the functions of keeping under review and making proposals for reform in relation to the Employment Equality Act, 1998 (EEA), the Equal Status Act, 2000 and a number of other Acts. There is no statutory duty equivalent to section 75 of the Northern Ireland Act. The Equality Authority has a number of powers, which have a far broader focus than the individual enforcement model.

The Equality Authority may prepare Codes of Practice which, if approved by the Minister, are admissible in evidence and if relevant may be taken into account in proceedings.[40] The Equality Authority has issued a Code of Practice on Sexual Harassment and Harassment at Work that has been relied on in cases brought to the Equality Tribunal.[41] The Equality Authority also has a broad power to undertake or sponsor such research as it considers necessary and as appears expedient for the performance of any of its functions.[42] The Equality Authority has a very broad power to conduct an inquiry for any purposes connected with the performance of its functions (and if required to do so by the Minister).[43] The carrying out of an inquiry would require substantial resources. It is a particularly useful power in situations where potential claimants may be very vulnerable or where there is a dearth of information.

A further novel power is that to conduct equality reviews and action plans.[44] The Equality Authority may invite particular businesses to voluntarily carry out an equality review and prepare an action plan or may itself carry out an equality review and prepare action plans (in relation to businesses with more than 50 employees). An equality review is an audit of the level of equality of opportunity and an examination of the policies, practices and procedures to determine whether these are conducive to the promotion of equality. An action plan is a programme of actions to be undertaken to further the promotion of equality of opportunity. There are enforcement powers in respect of equality reviews and action plans. A number of equality reviews have been commenced on a voluntary basis and interest has been expressed by employers in relation to this mechanism. It has great potential as a non adversarial fault finding mechanism which moves beyond the individual enforcement model.

6.1 Strategic Litigation

Strategic litigation is a key element of any strategic enforcement scheme. Consultation is an important point of any decision making process around what cases to assist. It builds credibility with stakeholders. It raises awareness as to what are the relevant issues. Consultation will also assist a specialised body handle and manage expectations as to what can be achieved through litigation.

Any person who considers that s/he has been discriminated against can apply to the Equality Authority for assistance in bringing proceedings under the EEA and/or the ESA.[45] The Equality Authority has a broad discretion to grant assistance if it is satisfied that the case raises an important point of principle or it appears to the Equality Authority that it is not reasonable to expect the person to adequately present the case without assistance. (There is no explicit provision for providing assistance to employers or other potential respondents). The Equality

[38] *Section 39 of the Employment Equality Act, 1998 and Section 39 of the Equal Status Act, 2000*
[39] *The Employment Equality Act, 1998, the Equal Status Act, 2000, the Maternity Protection Act, 1994, the Adoptive Leave Act, 1995 and the Parental Leave Act, 1998.*
[40] *Section 56 of the Employment Equality Act, 1998 as amended by paragraph (g) of the Schedule to the Equal Status Act, 2000.*
[41] *S.I. No. 78 of 2002*
[42] *Section 57 of the Employment Equality Act, 1998*
[43] *Section 58 of the Employment Equality Act, 1998*
[44] *Sections 68 and 69 of the Employment Equality Act, 1998 as amended by paragraph (n) of the Schedule to the Equal Status Act, 2000.*
[45] *Section 67 of the Employment Equality Act, 1998 as amended by paragraph (l) of the Schedule to the Equal Status Act, 2000. There is an equivalent provision in section 19 of the Intoxicating Liquor Act 2003.*

Authority sets out criteria against which applications for assistance will be measured. These criteria include
i. the capacity of the individual to represent himself/herself
ii. the complexity of the issues involved
iii. the availability of material which would assist the individual in bringing the case
iv. the availability of trade union, legal or advocacy assistance
v. the possibility of alternative remedies
vi. the extent to which serious injustice has been perpetrated
vii. the impact/effect of the discrimination on the individual
viii. the potential beneficial impact
- For others
- Change in practice by employers or service providers
- Development of equality practices

ix. the geographical spread of claims
x. whether the issue applies to
- areas such as health, education, welfare, accommodation and transport
- multiple discrimination

xi. whether a substantial body of precedent has been developed
xii. whether the claim is reasonably likely to succeed
xiii. the resources available to the Equality Authority

The Equality Authority targeted pregnancy discrimination as an issue and achieved five successful outcomes which established high levels of awards. An information pack on pregnancy discrimination is being prepared.

6.2 Advocacy – As part of strategic litigation

The Equality Authority has initiated a pilot scheme of community advocacy with the Irish Traveller Movement as a response to an overwhelming demand on its services particularly in relation to claims concerning access to licensed premises. A pilot scheme was initiated only after substantial case precedents had been established.[46] The aim of these programmes is to train people to represent others before the specialist court. It is also working with a trade union on a trade union advocacy pack.

The Equality Authority can also institute proceedings in a number of instances with a claimant – for example where there is a general practice of discrimination or where an individual has not referred a complaint and where it is not reasonable to expect the person to refer a claim. The Equality Authority can institute proceedings where there is discriminatory advertising. However, it (unlike the Human Rights Commission) does not have an explicit power to bring *amicus curiae* applications.

The Equality Authority established a development section to assist it in promoting equality of opportunity and eliminating discrimination and to devise proactive measures to achieve this.

6.3 Development Function

The Equality Authority has deployed a development function as part of its strategic enforcement model. This development function:

[46] Precedents had been established which dealt with the issue of use by publicans of 'regulars only' policies, quotas and the issue of the identification of Travellers.

- has a capacity to support, stimulate and encourage people to change what they do or how they do it so that discrimination can be prevented, diversity can be accommodated and equality promoted.
- has an ability to reach beyond what legislation obliges employers and service providers to do so that the pursuit of equality can be characterised by ambition and innovation.
- assists employers and service providers to know what to do and how to do it to secure an equality focus in their employment practices and in the provision of goods and services.
- can create a partnership context where employment / human resource expertise and expertise in providing particular goods and services is combined to best effect with an expertise in equality strategies and issues.
- will establish
  - a case for change
  - an agenda for change
  - a consensus around change
  - a demand for change
- will respond to the need to generate new ideas, new practices and new support materials to disseminate these so that employers and service providers create an ability within their organisation to promote equality, combat discrimination and accommodate diversity and so that commitment and good will can be turned into good practice.
- establish standards for workplaces and services to be characterised by equality and diversity.
- shape the debate about equality and diversity and how these are to be realised.

The development section which leads the work on our development function has been involved in a wide range of equality proofing initiatives – designed to place an equality focus in public sector planning, policy making and programme design. Templates were developed to establish a methodology. Partnerships were created to build a practice of equality proofing in the public sector – in essence a voluntary roll out of statutory duty.

Equality and diversity were put forward and accepted as principles to govern quality customer service in the public sector. Work was done in partnership with customer service officials to develop a pack of materials to support the development of a service provision practice with an equality focus.

Partnership was developed with the main employer and trade union organisations. This tripartite arrangement agreed a shared commitment to the need for planned and systematic approaches to equality in the workplace and support materials were developed to assist in developing and implementing equality policies and equality training. A funding scheme was developed to support small and medium enterprises to apply these support materials in practice.

A partnership was developed with the Department of Education and Science to disseminate information on equality legislation to schools. This was done in a manner that
- communicated a shared commitment to the inclusive school
- established the need for school planning, codes of behaviour, admission policies and school evaluation.

A partnership was developed with a range of networks of local service providers – Library Council, Irish Bankers Federation, An Post, RGDATA and Irish Pharmaceutical Union to support an awareness among their members of the requirement to reasonably accommodate people with disabilities and to develop guidance materials on agreed best practice in this regard and to pilot the implementation.

6.4 Specialist Court

The specialist court in this context is the Equality Tribunal. This provides a valuable context for strategic enforcement.

The Equality Tribunal (formerly the ODEI) was also established by the Employment Equality Act, 1998.[47] Specialist tribunals are established in recognition of the difficulties faced by individual claimants before traditional courts. In traditional adversarial court settings a judge hears and decides a claim based on the evidence and legal arguments presented by both sides. In contrast the Equality Tribunal is given the specific duty to investigate the case.[48]

Equality Officers play a much more proactive and inquisitorial role than traditional judges in adversarial hearings, in that they have the inquisitorial function of seeking the facts, as well as determining the legal issues. The inquisitorial role is a cornerstone of the legislation. However it is a much-misunderstood role and the Equality Tribunal has been subject to unfair levels of criticism as a result. The inquisitorial model means that the pursuit and defence of a claim is not wholly dependent on the ability and capacity of the individual litigant to marshal relevant evidence and present complex legal arguments. It is particularly important for litigants who do not have legal representation, or who are represented by groups without legal training. It is also vital for individuals who have low levels of literacy or who lack the capacity to articulate their claims, including people with certain disabilities.

The Director is given a number of powers to assist in the investigation.[49] There are a number of other features of the Equality Tribunal which seek to deal with the flaws of the individual enforcement model. Investigations are held in private. This provision is particularly important for claimants who wish to bring claims in relation to disability, sexual orientation and sexual harassment.

The Director has no power to make an order for costs. This obviates a major disincentive to litigation. (However appeals of claims from the Equality Tribunal are heard by the Circuit Court. While no rules of procedure have been made as yet, it is open to a successful party in an appeal to seek their costs).

The Equality Tribunal allows claimants and respondents to be represented by community or representative groups or trade associations. In addition there is an interesting requirement obliging the Director to hear all persons appearing to the Director to be interested and desiring to be heard.[50] This allows for bodies like the Equality Authority or the National Disability Authority or other interested groups to make submissions in cases which have a group or public relevance.

Another distinctive feature of the Equality Tribunal is the option for mediation which allows the Director, if it appears that the case is one which could be resolved by mediation, to refer the case for mediation.[51] In practice every claimant and respondent are offered mediation. This is a flexible, speedy, low cost manner of dispute resolution of the parties.[52]

[47] Section 75 of the Employment Equality Act, 1998
[48] Section 75 of the Employment Equality Act, 1998
[49] These include powers to enter premises, require a person to produce records, books, documents which contain material information, inspect work in progress, apply to the District Court for a search warrant, and require a person to attend before the Director to answer fully and truthfully any questions.
[50] Section 79 of the Employment Equality Act, 1998
[51] Section 78 of the Employment Equality Act, 1998
[52] It is significant that the EEA allows the Labour Court in cases which come within the jurisdictions of the Labour Court to provide mediation itself or to refer the case to the Equality Tribunal for mediation.

CONCLUSION

There is a need for a broad view to be taken in any approach to strategic enforcement. This should involve equality bodies displaying an integrated mix of enforcement and development functions.

Strategic enforcement will need to go beyond the individual enforcement model established in the EU Directives. It will need to mobilise those provisions of the Directives that go beyond individual enforcement – in particular those elements that focus on positive action.

Specialised bodies will need to commit to developing a context favourable to effective strategic enforcement. In part this will involve taking initiatives to improve the individual enforcement model. These will need to look at the issue of costs, improving rules on standing and addressing what issues can be litigated and by whom. Advocacy and mediation can also be deployed to improve the individual enforcement model.

Strategic litigation is an important element of strategic enforcement. The criteria established for prioritising casework is crucial in this regard. The establishment of effective criteria requires consultation with relevant parties. A comprehensive implementation of the Directives will require a flexible approach to strategic litigation.

Strategic enforcement comprises
- an improved individual enforcement model
- reinforced by positive duties, mainstreaming and contract compliance
- independent and well resourced specialised equality bodies with broad functions and adequate powers alongside quasi judicial bodies with investigative functions.

POSITIVE DUTIES AND STRATEGIC ENFORCEMENT

PAUL O'NEILL, SENIOR LEGAL OFFICER*, EQUALITY COMMISSION FOR NORTHERN IRELAND

* *I would like to thank Barry Fitzpatrick, Head of Legal Policy and Advice within the Commission, for working on this paper with me.*

1. INTRODUCTION

By virtue of the Northern Ireland Act 1998, the Equality Commission for Northern Ireland ("the Commission") has extensive powers in relation to anti-discrimination legislation in Northern Ireland, covering all the functions previously exercisable by the pre-existing Statutory Equality Bodies covering Fair Employment (which in Northern Ireland refers to the grounds Religion and Politics, in other words, fair employment between Catholics and Protestants), Gender, Race, and Disability. In 2003 the Equality Commission's powers were extended to cover discrimination on the grounds of Sexual Orientation. The main enforcement powers currently available to the Equality Commission are:

1. The provision of legal advice and assistance to individuals pursuing discrimination complaints
2. Formal investigations
3. Investigations under the Statutory Equality Duty

The purpose of this presentation is to examine how specialised equality bodies can utilise such powers of enforcement in a strategic way, with specific reference to the Commission's strategies in relation to its own powers of enforcement, and how such powers can be used in a holistic way to achieve strategic equality objectives. There is also a brief discussion of the types of powers that might strengthen the Commission's enforcement strategies.

2. THE COMMISSION'S ENFORCEMENT POWERS

2.1. Legal Assistance to Individuals

The Commission can advise and assist individuals to bring cases to the Tribunal system (employment) and to the County Court (provision of goods, facilities and services) across all five sets of grounds within its jurisdiction, i.e. Religion and Politics, Gender, Disability, Race and Sexual Orientation.[53]

The Commission cannot bring any discrimination cases in its own name, nor assist individuals outside its statutory regimes. The Commission therefore uses its power to assist individual complainants strategically to further its objectives of promoting equality of opportunity and eliminating discrimination. In July 2002 it adopted a refined legal assistance strategy, which not only takes the merits of the case and the circumstances of the individual into account, but also specifically considers the strategic value of providing assistance to the application.

Certain statutory criteria must be satisfied before the Commission can provide assistance to an individual complainant, namely;

- Does the case raise a question of principle?
- Would it be unreasonable, having regard to the complexity of the case or the applicant's position, to expect the applicant to deal with the case unaided?
- Is there any other special consideration?

[53] *The provision of goods, facilities and services are not covered by the current Sexual Orientation Regulations.*

Where the Commission considers that an application for assistance comes within any of these statutory grounds, it will then consider whether such assistance should be granted in accordance with its refined legal assistance strategy. In reaching its decision, the Commission assesses the strength of each of the statutory grounds. In relation to the statutory ground concerning "a question of principle", the Commission has regard to the following:

2.1.1. Legal uncertainty

The extent to which the matter raises an issue of legal uncertainty. Obviously it may be more difficult to establish such "legal uncertainty" in the more well-established regimes such as Religion and Politics or Gender vis-à-vis areas such as Disability which is relatively new and differs in its approach and legislative basis from the other types of anti-discrimination legislation. The significance of "legal uncertainty" has of course altered radically as a result of the Framework Directive and the Racial Equality Directive, and the consequent amendments in Northern Ireland in the Fair Employment and Race regimes, the introduction of Sexual Orientation Discrimination Law in Employment and the impending amendment to the Disability Discrimination Act in October 2004. This is particularly so in relation to the definition of indirect discrimination, and the more objective formulation of the test of whether actions complained of constitute harassment contained in the Directives.

2.1.2. Ripple Effect

The Commission also gives significant weight to what are described as 'ripple effect' issues, that is the extent to which assistance in a particular case will:

a) raise public awareness of the Commission's role regarding individual complaints and the protection afforded by Equality Legislation
b) be likely to have a significant impact, either in terms of bringing about changes in discriminatory practice or procedures, or otherwise
c) have potential for follow-up by the Commission

The Commission's emphasis is on maintaining and developing a portfolio of strategic cases. It operates within a capped legal budget, and therefore cannot be a monopolous provider and must ensure that the likely cost of assistance is commensurate with the strategic benefits to be obtained. The Commission will therefore take into consideration the extent of assistance already granted to an individual complainant who is making a second or subsequent application. In terms of achieving strategic benefit by supporting cases, the Commission would obviously consider the extent to which it has supported similar cases, and clearly would be less likely to assist a particular application if it is currently assisting similar applications.

If the Commission is satisfied that the application for assistance meets the statutory criteria for assistance and that support of the case is strategic in accordance with its legal assistance strategy, it may grant assistance provided that it is also satisfied, depending on the stage of the proceedings, that there are reasonable grounds for believing that an act of unlawful discrimination may have been committed as alleged (for initial grant of assistance), or that the case enjoys reasonable prospects of success (for assistance including representation at hearing). A staged and capped approach to assistance is adopted with cases supported to identified stages such as initial investigation, opinion, full hearing, with capped financial limits applied to each stage, and further review taking place when that stage is reached.

Clearly, therefore, the Commission wishes to identify, via its Legal Enforcement Strategy, applications for assistance that are strategic in terms of clarifying the law, or have potential for ripple effect. It can of course be difficult to anticipate in advance whether a case will be likely to bring about strategic benefit. However in general terms the following principles may apply:

- Cases involving direct discrimination, harassment and victimisation in employment, although well established, may still create potential "ripple effect", if the alleged discrimination is particularly serious, or if they take place in a new area such as sexual orientation.
- It may also be necessary to maintain the Commission's profile in well established areas.
- Assistance may become strategic to clarify the law in a well established area as a result of a new judicial precedent, or because of a legislative amendment.
- The ripple effect of discrimination cases that affect large numbers of persons, particularly but not exclusively indirect discrimination cases, is likely to be significantly higher. Indirect discrimination involves apparently neutral practices and procedures which are frequently applied across a workforce(s), which may create a particular disadvantage to those protected by the legislation. It is (even under the EU definition) a complicated concept, requires significant evidence to support such a case, and is subject to a relatively modest objective justification test. Obviously, if successful, an indirect discrimination case is likely to bring about more significant and widespread impact in terms of changing discriminatory practices.
- The provision of goods, facilities and services is an area of potentially high "ripple effect", partly because relatively few cases have been taken in these areas compared to employment.

The strategic value of assisting an individual case may be reduced by factors such as:

- There may be weaknesses in the case which may not have been apparent when assistance was granted.
- The emphasis is often on individual compensation, and Tribunals and Courts cannot order changes in practices. In many cases, however, the Commission has achieved settlement of assisted applications which both secure compensation for the individual complainant, and settlement terms which promote equality of opportunity and eliminate discriminatory practices.

Clearly, the Commission's Legal Enforcement Strategy has to be fluid in response to changes in the external environment. For example new Tribunal regulations introduced in April 2004, which include the concept of Overriding Objective and more proactive case management by the Tribunal, may necessitate refinement of the Legal Enforcement Strategy in terms of the staged and capped approach to assistance.

2.2. Formal Investigations

The disadvantages of assistance of individual cases can be alleviated through the use of the Commission's formal investigation powers. Such investigations are initiated by the Commission itself. Their objective is to identify patterns of discrimination and significant changes in practice can be ordered and enforced as a result of such investigations by way of legally enforceable directions.

Under the Gender, Disability and Race regimes, the Commission can conduct a general investigation across employment or goods, facilities and services into sectors or general practices. It can also conduct an individual

investigation where it has a "belief" that there may have been an act of discrimination. Such "belief" investigations are subject to significant procedural requirements; there must be evidence upon which the "belief" can be based, the investigation must keep pre-defined terms of reference, and the investigated party can make written and oral representations.

Such formal investigations are relatively rare both in Northern Ireland and in Great Britain, as they require significant resources on the part of the Enforcement body and the adversarial nature of "belief" investigations encourages significant resistance on the part of the investigated party.

A different model of investigation is adopted by the Fair Employment Legislation. The purpose of such investigations in relation to Religion and Politics (but only in employment) are "to promote equality of opportunity". There is no need for the Commission to identify a belief that there may have been an act of discrimination prior to initiating a full Investigation. However, despite the obvious advantages of this more co-operative investigation model, such investigations have rarely been used given the level of monitoring and reporting in the Northern Irish Fair Employment regime.

2.3. Investigations under Statutory Equality Duty

Under Section 75 of the Northern Ireland Act 1998, designated public authorities in carrying out their functions in Northern Ireland are required to have due regard to the need to promote equality of opportunity between: persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.

Without prejudice to these obligations, public authorities are also required in carrying out their functions to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

Each designated public authority is required to put in place an equality scheme to be approved by the Equality Commission as a statement of its commitment to these duties and a plan for their performance. Schedule 9 of the Northern Ireland Act allows the Commission to carry out investigations of complaints made by directly affected individuals, or to itself initiate such an investigation, of alleged failure by the public authority to comply with its approved equality scheme.

These investigation procedures are essentially 'name and shame' procedures. If, following an investigation, the Commission considers that the public authority has failed to comply with its approved equality scheme, it will issue a report which can include recommendations for action by the public authority concerned. The Commission cannot however enforce its recommendations, and in the event that the public authority fails to follow such recommendations it has the option of referring the matter to the Secretary of State, who in turn may issue directions to the public authority in respect of the matter referred.[54]

Paragraph 10 of Schedule 9 provides that the Commission shall investigate an individual complaint that a public authority has failed to comply with its approved scheme, or give the complainant reasons for not so investigating. The paragraph sets out certain procedural requirements that must be satisfied before such an investigation is

[54] *Reference to the Secretary of State is not available in respect of Government Departments.*

authorised. A complainant who claims to have been directly affected by the failure must initially bring the complaint to the notice of the public authority, and allow it reasonable opportunity to respond. If, following such action, the complaint is not resolved to the complainant's satisfaction, then (s)he must submit a complaint in writing to the Commission. Such complaint must be sent to the Commission during the period of twelve months starting with the day the complainant first knew of the matters alleged.

This is clearly a qualitively different role for the Commission than either legal assistance or formal investigation. Firstly it is an adjudicatory role and in determining whether or not a breach of approved equality scheme has been established the Commission must act impartially between the complainant and the public authority. There is also less opportunity to act strategically as the Commission must investigate a complaint by a person who claims to be directly affected unless it has reasons not to do so.

Possible reasons for not investigating such a complaint would be;

- Has the public authority agreed to conduct a full equality impact assessment or consult as part of the existing equality impact assessment?
- Could the matter of which a complaint is being made be properly considered to be affirmative action, or promoting social inclusion, targeting disadvantage or tackling social need?
- Is the policy due to be reviewed, discontinued or superseded?
- Will the individual complainant derive any material benefit from an investigation?
- Is there a more appropriate form of address available to the complainant?

As well as being able to investigate complaints by those who claim to be directly affected by an alleged failure to comply with an approved equality scheme, the Commission also has the power, by virtue of paragraph 11 of the Schedule, to carry out an investigation where it believes that a public authority may have failed to comply with an approved equality scheme. This is somewhat similar to the belief investigations in terms of the formal investigations powers available to the Commission under Race, Gender and Disability, in that the Commission must believe that there may have been a failure to comply with a scheme before it initiates a full investigation. This power allows the Commission to itself generate complaints and to investigate matters brought to its attention by interested third parties which do not meet the formal thresholds for investigations set out in paragraph 10. For example it would allow the Commission to investigate a "complaint" made by an interested third party which lacked a sufficient nexus with the alleged failure to comply with scheme to argue that it was directly affected by it.

Clearly this power allows the Commission a wide discretion to initiate investigations where it believes that the public authority may have yet to comply with its approved scheme. The Commission is currently in the process of developing strategic criteria for Commission generated procedure investigations. Factors for consideration would include:

- The significance of the public authority in Northern Irish society.
- Patterns of alleged failure to comply by that public authority or in a particular sector.
- "Ripple Effect" issues where compliance with schemes will be encouraged.
- The potential to raise public awareness of the statutory duty.
- Ensuring compliance with particularly important aspects of schemes where there is apparent misunderstanding or uncertainty.

3. FUTURE ENFORCEMENT POWERS

In 2006 a potentially far-reaching review of anti-discrimination law in Northern Ireland will result in a new Single Equality Act. The Commission firmly believes that its own enforcement powers should be harmonised across the various anti-discrimination grounds and developed so as to maximise the ability of the Commission to enforce and apply equality law across the range of grounds in the Single Equality Act. The following is a list of matters that could be considered as part of the debate on the Single Equality Act in terms of the strengthening the Commission's strategic enforcement powers.

3.1 Commission standing in the judicial process

The Commission does not currently have the power to bring cases in its own name. The Commission already has a firm stance on the interpretation of Article 7 of the Racial Equality Directive and Article 9 of the Framework Directive, namely that the provision whereby associations, organisations or other legal entities may act "on behalf of" named complainants must be taken to mean that the Commission should have standing in the Tribunals and courts to bring cases in its own name "on behalf of" named complainants. The Commission has also taken up a position whereby it is also proposing that it should have more general standing to bring cases of strategic importance without having to name a complainant. Such an autonomous power to litigate would greatly strengthen the Commission's litigation strategy, particularly in the context of unlawful acts of discrimination for which individuals are unlikely to lodge proceedings, or institutionalised discrimination.

3.2 Formal investigations

Consideration of the potential strategic value of adopting a more co-operative investigation model such as that found in the religion and politics regime across the full range and scope of the Single Equality Act grounds. The benefits of such a model would include a low threshold entitling the Commission to initiate an investigation "for the purpose of assisting it in considering what, if any, measures for promoting equality of opportunity ought to be taken". The adoption of this type of approach across other equality regimes would necessitate reconsideration of the enforcement powers under the Fair Employment model and the consideration of its future applicability to goods, facilities and services cases. Given that different formal investigation powers apply across the scope of the relevant statutes, the Commission is of the view that a suitably reformed investigation power of this type should apply across the full scope of the Single Equality Act.

3.3 Statutory Duty

The Commission has not yet addressed the issue as to whether it should enjoy stronger powers to enforce any recommendations made by the Commission that the public authority take action in light of a determination that a failure to comply with scheme has been established. The statutory equality duty will be subject to review in 2006 and that would provide an opportunity for the Commission to review its powers, particularly when the full range of its powers have been put to use.

4. FUTURE STRATEGY

A Single Equality Body, with or without enhanced powers, must be able to take a holistic view of using its powers to achieve its objectives and make the most effective use of its powers to do so. The Commission will continue to use the range of powers available to it in a co-ordinated way to promote equality of opportunity and eliminate discrimination. The following is a list of matters that may have to be considered as part of the Commission's future strategy in this area:

- Establishing pre-determined priority issues as a "guide" particularly to discrimination cases pursued in the Commission's own name, formal investigations and Commission generated investigations under the Statutory Equality Duty.
- Achieving a balance between allowing strategic issues to emerge and pre-determining what they should be.
- Priority areas can be influenced by wider corporate objectives, e.g. in 3 year Corporate Plan or 1 year Business Plan.
- Acknowledging that priorities in the Commission's wider promotional role may not always be appropriate priorities in legal enforcement or investigation.
- Accepting that the Commission's adjudicatory role in relation to the statutory equality duty may be less susceptible to a strategic approach.
- Nonetheless necessary that Commission is proactive in identifying potential investigations as well as being reactive to complaints made to it.

5. CONCLUSION

The Commission's approach to strategic enforcement is therefore both 'micro' and 'macro'. It is 'micro' in the sense that cases are assisted or investigations launched on the basis of strategic criteria whereby the Commission's resources can be put to best effect. It is 'macro' in the sense that the Commission is developing a wider set of priorities against which it can judge which enforcement mechanisms are best suited to tackling differing aspects of discrimination and inequality.

A LEGAL STRATEGY TO COMBINE AND COORDINATE DIFFERENT TOOLS AVAILABLE

RAZIA KARIM, HEAD OF LEGAL POLICY, COMMISSION FOR RACIAL EQUALITY

1. INTRODUCTION

The Race Relations Act 1976 sets out the Commission's statutory remit. It is
- to work towards the elimination of racial discrimination
- to promote equality of opportunity and good relations between persons of different racial groups generally
- to keep under review the workings of the Race Relations Act 1976

The 1976 Act also sets out the Commission's powers and duties in relation to our enforcement function. We have a variety of law enforcement tools at our disposal and they include:
- the power to provide financial, legal and other assistance to individual victims of racial discrimination;
- law enforcement powers in relation to pressure and instructions to discriminate and discriminatory advertisements;
- the conduct of formal investigations; and
- the enforcement of the racial equality duty on public authorities.

After 26 years we have a clearer idea of how to combine and co-ordinate our legal powers in a strategic way. This presentation will look at:
- Where the Commission for Racial Equality has come from
- What we mean by strategic law enforcement
- The Commission's new approach
- How we use our powers strategically

2. WHERE HAVE WE COME FROM?

The right to individual redress has been high on the Commission's agenda for many years, not just as a matter of principle but also to contribute to the maintenance of good race relations across Britain. It is therefore not surprising that, over the years, our law enforcement strategy has been driven largely by the duty to consider applications from victims for advice, assistance and representation. In this area our aims have been threefold:

- to provide people with access to justice
- to provide assistance in the absence of Legal Aid for discrimination complaints
- to test and clarify the law and establish legal precedents

As a result the CRE has come to be viewed as a source of expertise on race discrimination, a body that can offer low cost, in-house specialist advice and representation free of charge and without means testing for entitlement.

Alongside individual litigation we have carried out a large number of formal investigations, which have had a significant impact across a range of key sectors in Britain including housing, health, employment and education. In the early years these investigations were useful in discovering hidden discriminatory practices and in exposing discriminatory patterns in sectors and geographical areas. However, a series of court judgments in the 1980s narrowed the interpretation of our investigation powers resulting in a reduction of formal investigations. Since then our law enforcement work has been focused mainly on providing assistance to individuals. Also, we developed

an area of work which we call 'legal follow up'. This involves working with organisations on the practices and procedures following an adverse decision against them in the courts or tribunals. Such work can result in similar outcomes to those of an investigation, i.e. improved policies and cultural change.

In respect of our other powers, we have undertaken only a limited amount of work on instructions and pressure to discriminate and advertising, and work is just now beginning in relation to compliance with the public duties.

In 2001/2002 the Commission celebrated its 25th anniversary and, looking ahead, we know that there are important issues that will dramatically affect the legal landscape in which we work:
- The new racial equality duty on public bodies
- Government proposals for a single equality body
- Growing evidence of institutional discrimination and continuing inequality (in recent weeks a report on the National Health Service referred to institutional racism within the service)
- The impact of the EU Racial Equality and Framework Directives and particularly the new laws on religious and belief discrimination, sexual orientation and age discrimination
- The incorporation of the European Convention on Human Rights

In 2002 we completed a trend analysis of enquiries for the previous three-year period. This showed the level of legal enquiries remaining fairly constant at around 11,000 annually with numbers rising slightly in 2003. We found that, not only are cases increasing in complexity and length, but that discrimination is endemic within organisations and sectors and that the support of individual victims as a law enforcement tool may be inadequate for tackling institutional racism and discrimination.

We concluded that there was a need to operate more strategically and to adopt a more proactive approach to law enforcement.

3. WHAT DOES STRATEGIC LAW ENFORCEMENT MEAN?

Put simply, the Commission's strategic law enforcement represents a shift from the individual justice model to the group justice model. During the last 25 years almost every individual complaint, which satisfied the merits test, received funding for advice, assistance and representation before the courts or tribunals. This had a major impact on the corporate budget and on human resources: it can be difficult to justify such expenditure where cases do not lead to sustainable change in an organisation or in a sector or for the wider public benefit.

The Commission's proposal now is to fund only cases which will have a wider impact. This is not to say that the pursuit of individual justice is not itself a strategic priority: in the first 10 –15 years of the enactment of the race relations legislation the right of individual redress and the right of access to the courts were important strategic objectives because these rights were new and the availability of legal aid or other public funding for cases was, and still is, restricted.

In addition, it was important to promote and establish the new race discrimination law: this is of particular importance in common law jurisdictions, such as the British one, where the law is developed by legal challenges in courts and tribunals to test the law, to clarify it and establish legal precedents.

For example, the Race Relations Act 1976 defines 'racial group' as a group of persons defined by reference to race, colour, nationality, ethnic or national origins. The House of Lords judgment in the case of Mandla v Dowell Lee 1983 2 A. C. (in which the CRE provided assistance to the applicant) construed the meaning of ethnic widely in a broad, cultural historic sense and set out the criteria for determining whether a particular group was an 'ethnic'group. In that case Sikhs were held to constitute an ethnic group. It was followed by Seide v Gillette Industries Ltd (1980) I.R.L.R. 427 which held that Jews were an ethnic group, and CRE v Dutton (1989) 2 W.L.R. 17 where Romany Gypsies were held to constitute an ethnic group.

This is an important point: where the legislation is new then the focus of law enforcement may need to be on providing assistance to individual victims in order to establish and promote new rights.

4. THE NEW APPROACH

So what is the new approach? The process for developing a new strategic law enforcement policy started with our Mission Statement which commits us to:
promote good relations between and within all communities and prevent racial discrimination in all its forms using the power of persuasion where possible and the power of the law where necessary; we will work in partnership with other public agencies as well as the private and voluntary sector and focus our resources to achieve maximum impact.

For the 2003 - 2008 period we have identified five corporate strategic objectives. These are:
- to lead the delivery of good race relations for the benefit of all communities
- to advance racial equality in the private sector
- to ensure the delivery of the public duty to promote racial equality
- to use the full range of legal powers strategically to challenge discrimination
- to improve the CRE continuously

The corporate strategic priorities are further broken down into targeted sectors, issues or projects. For example for the year 2003 – 2004 we have identified Gypsy and Traveller and asylum and immigration issues, criminal justice and education as priority issues and will seek to deliver the corporate strategic objectives in those areas.

A question which is frequently asked but seldom answered satisfactorily is to what extent is the use of law enforcement powers a corporate objective in itself? Should the use of law enforcement powers simply be one of the means by which the corporate objectives are achieved? Or, should we use our law enforcement powers to achieve an outcome which is not included as a corporate objective? I believe that in practice we do – since it is very difficult to resist taking up a strong case of discrimination - but decisions to use our powers are strongly influenced by the corporate objectives. The consequence is that we are now less likely to use our law enforcement powers to tackle routine cases of discrimination by a small organisation.

The risk of turning away 'routine' cases is that, by limiting the use of our powers to fixed priorities, we may lose information on other developing concerns or problems which we might wish to prioritise in the future e.g. housing or employment discrimination.

As mentioned above, in developing a strategic approach we aim to shift the emphasis from an individual to a group justice model by:
- targeting assistance to individual victims whose cases will achieve an impact across groups and sectors or establish a legal precedent
- using other law enforcement powers to deliver our broader strategic priorities e.g. to deliver the public duty, address a priority area such as Gypsies and Travellers
- ensuring a greater knowledge of rights and a multi-strand approach
- promoting alternative dispute resolution approaches.

5. HOW DO WE COMBINE AND CO-ORDINATE OUR POWERS STRATEGICALLY?

In working to achieve our objectives there are 4 main tools at our disposal:
- Litigation by supporting individual victims
- Litigation by judicial review
- Formal Investigations
- Compliance notices for breach of the racial equality duty
- Interventions.

It is important not to position one against the other but to assess each new case or problem and ask what do we want to achieve and which is the most appropriate law enforcement tool for achieving our desired aim.

5.1 Litigation: Support for individuals

The Race Relations Act 1976 gives us the discretion to provide assistance to individual complainants where:
- the case raises a question of principle
- the complexity of the case, and the applicant's position in respect of the discriminator or another person, is such that it would be unreasonable to expect the applicant to deal with the case unaided
- by reason of any other special consideration.

A major barrier to moving to more strategic law enforcement work has been the absence of other providers of effective, low cost casework and advice providers to whom we could refer individuals.

While the CRE was endeavouring to fill these gaps it proved difficult to move away from the notion of providing assistance to large numbers of unaided applicants; this resulted in an emphasis on employment related complaints to the exclusion of work in important non-employment areas like education, health, prisons, the judiciary and judicial system and the police and immigration services. And while we were focusing on those who found their way to us for help we were unable to pay attention to those who did not.

Since December 2002, in order to ensure the fairest distribution of resources when exercising our discretion we usually take into account:
- if the applicant has previously had assistance and the extent of that support

- whether the new matter relates to or concerns the same subject as before
- whether alternative sources of support or funding are available to the applicant and
- if other persons will benefit from a favourable decision in the court or tribunal.

In an effort to adopt a more strategic approach to individual casework we now apply an expanded test: we are likely to fund a case only if it is likely that a case will meet some or all of the following criteria:
- clarify important points of law
- affect large numbers of people
- have a significant impact on one or more work or social sectors
- necessitate legislative change
- test the racial equality duty and clarify the law in this area
- have a strong likelihood of success
- merit special consideration by reason of geographical considerations

In every case the Commission will have regard to the financial resources at its disposal.

Working with our partners and networks, we will then actively seek out strategic cases and pursue legal remedies in the targeted areas e.g. criminal justice and Gypsies and Travellers, rather than simply wait for them to come to us.

In determining whether to support an individual case we need to balance the possible advantages with the disadvantages, which means being clear about the desired aims and outcomes.

Our experience tells us that litigation by supporting an individual victim is an appropriate tool where the desired outcome is:
- To secure financial compensation for the victim and/or reinstatement in job. Clearly, this is important where the victim has lost his or her job and salary.

Or, since court judgments are authoritative:
- **To clarify the law.** The 3 equality commissions in Great Britain intervened in a case before the Court of Appeal, Essa v Laing. Mr. Essa worked on a building site where he suffered an incident of racial abuse. He suffered distress and psychological injury. The employment tribunal said that Laing were only liable for loss and injury which were reasonably foreseeable. The Court of Appeal concluded that the proper test was causation. If the loss or injury can be linked to the act of discrimination then the discriminator will be liable.
- **To secure a judgment which will affect large numbers of people or have a significant impact on one or more sectors.** For example, we supported the case of D'Souza v London Borough of Lambeth. The central issue was whether the 1976 Act extended protection when the employment relationship had come to an end. (Proceedings commenced before the Racial Equality Directive was incorporated into national law). The House of Lords found in favour of the applicant on this point.
- **To necessitate legislative change.**

A formal investigation will not achieve these aims since recommendations have no binding effect.
Other indirect benefits of litigation are that it makes sound business sense for organisations to avoid litigation since the decisions of the court may involve payment of compensation and the decisions of the court attract wide negative publicity for the organisation which may result in positive changes.

The disadvantages are that:
- Individual cases can be expensive – we can end up having to pay the legal fees for the other side.
- Unless cases are selected carefully, litigation can fail to bring about a strategic outcome and may even set a bad precedent.
- There are strict time limits in which to issue proceedings.
- It may not be appropriate where there are concerns about the credibility of witnesses or the evidence generally.
- Importantly, the courts and tribunals do not have the power to make recommendations regarding the future conduct of the discriminator. Currently, their powers are limited to a recommendation that the discriminator take steps to remove or reduce the effect on the victim of the discrimination which formed the basis of the complaint. For this reason litigation is an inappropriate tool for challenging institutional racism and discrimination since the problems may rest with practices, procedures and the internal culture more generally.

For the routine discrimination case which does not fall within our corporate strategic priorities or meet our 'merits' criteria, we intend to do more to encourage agencies and institutions that provide information services to incorporate racial discrimination casework as part of their core service so that we can be confident when sign-posting individuals to third party providers that they will receive an effective and appropriate service.

We also wish to engage with initiatives, which promote the use of alternative dispute resolution (ADR) mechanisms and mediation as part of or as an alternative to the legal process. We currently have a limited involvement in conciliation where we act as the complainant's representative.

5.2 Litigation by Judicial Review

Judicial review is an action in administrative law by which the High Court reviews the lawfulness or reasonableness of a decision or omission of a public body or of its decision making process. It is not used to seek individual redress under the Race Relations Act 1976 but to argue for example that a decision was unreasonable or unlawful because it was discriminatory.

The Commission has the power to provide assistance to an individual who wishes to issue judicial review proceedings or it may bring proceedings in its own name where it can demonstrate it has a sufficient interest. Judicial review can provide a quick route to achieving clarification of the law and can grab the media's attention but it is adversarial, process driven and can be costly.

So, where the desired aim is to clarify the law or decision-making procedures – in particular to improve poor decision making procedures or to secure a decision which may have an impact on a class of people rather than an individual, then judicial review may be a useful tool.

The Commission considers that judicial review may prove to be a useful tool in seeking compliance with the racial equality duty. For example, if a health authority fails to take into account the race equality implications of a new policy on health services then it may be possible to argue that the decision to implement the policy was unreasonable or unlawful because it did not take into account the racial equality duty. If successful, the health authority may be directed by the court to look again at the policy and take race equality into account. This may mean that the case will have an impact on all those who have been affected or potentially affected by the policy in its original form.

The drawbacks to judicial review are that:
- It is costly – especially if we lose. We predict that losing a case might cost us £50 000.

- There are strict time limits – proceedings must be issued as soon as possible and no later than 3 months from the date of the decision which is challenged.
- There is no power to grant financial compensation or other individual remedies such as reinstatement. The power of the High Court is to grant for example, orders to quash a decision, injunctions and declaratory orders.

5.3 Formal Investigations

The Commission can, if it thinks fit, or if directed by the Secretary of State, carry out a formal investigation for any purpose connected with its duties to eliminate racial discrimination or promote equality of opportunity or good race relations.

These can be general investigations, where a sector or a geographical area is covered, or a named investigation, where a particular body is targeted. The objective of launching an investigation is to probe into complaints or knowledge of racially discriminatory policies, practices and actions and to make findings.

Sometimes seen as the jewel in the law enforcement crown, investigations can be a powerful force for change because of their ability to tackle endemic and systemic problems within organisations that have been resistant to change. While investigations may not immediately benefit individuals who have suffered racial discrimination, they can ensure that lasting beneficial changes are brought about in the long run. A formal investigation may lead the Commission to take further action such as:

- recommending a change in policies and procedures in order to avoid unlawful discrimination
- issuing a non-discrimination notice requiring a person or organisation not to commit unlawful discrimination, to make changes to practices and other arrangements to avoid unlawful discrimination and to tell the Commission once these actions have been completed.

In formal investigations the Commission does not take legal action in a court of law but acts in effect as an investigative agency and makes findings. There is no risk of losing a case and no risk of having to pay costs of the other side. The final decision as to whether or not a body has behaved unlawfully remains with the CRE and not an outside judge or the judicial process. This means that we have control of the process from beginning to end.

In addition there are no time limitations on when we can begin or conclude an investigation although we cannot be unreasonably slow.

Thus, formal investigations may be more appropriate where:
- the discriminator is a repeat offender and litigation before the courts or tribunals has not resulted in a change in practice or procedures. For example, the CRE embarked on an investigation into the prison service in 2000 following findings of discrimination at an employment tribunal in a case taken by prison officer Claude Johnson against the prisoner service in relation to his treatment at Brixton Prison, the murder of Zahid Mubarek in Her Majesty's Young Offender Institution Feltham and a report from the Chief Inspector of Prisons about incidents of discrimination at another prison.

- There is evidence of institutional and systemic racism and discrimination within an organisation or sector. Usually, the evidence of institutional and systemic discrimination will come out during a case brought by a victim but in the case of the Household Cavalry it was remarks by Prince Charles that there were no Black guards which caused the Commission to consider an investigation into the Household Cavalry which subsequently developed into partnership work with the Ministry of Defence.

- A public authority has failed or is failing to comply with the racial equality duty (since there is no other means of enforcement other than judicial review). We have not yet embarked on such an investigation but it is part of the strategy around the racial equality duty.

- There is evidence of discriminatory practices but no 'victim' to bring proceedings. Examples of this are the early investigations into estate agents who were directing Black and Asian house buyers to areas of poorer quality houses. The evidence was obtained largely from discrimination testing by CRE officers.

The drawbacks to an investigation are:

- They can be overly complex. Investigations into a named body are governed by strict legal procedures which require terms of references and the opportunity for the organisation to make representations.
- The CRE can be challenged in court, particularly if we have not followed procedures. Challenges may also be made to the evidence to support the decision to embark on an investigation.
- A duty of confidentiality is owed to individuals and care is needed to maintain confidentiality where appropriate and relevant.
- Investigations are seen as confrontational. The business sector frequently allege that it is difficult to work in partnership with us knowing that we could use our powers against them. In reality this has never arisen as a problem.
- Investigations can be resource intensive but again experience shows this be so with investigations into large public or national bodies or into sectors.
- Investigations do not clarify the law nor provide compensation for victims.

There is no moratorium on litigation during a formal investigation: we can provide assistance to an individual victim and carry out a formal investigation into the same discriminator but in practice we do not. I could not think of any examples where this was done. Usually a political decision is taken by Commissioners not to pursue litigation. However, if it is necessary to clarify the law or seek a declaration as to whether a policy is discriminatory or not then we may resort to litigation.

Formal investigations tend to follow an adverse finding by a court or tribunal: for example the investigation into Ford Motor Company followed a couple of cases brought by employees who had suffered discrimination. This approach is largely the result of the narrow judicial interpretation of our powers to conduct investigations into named organisations.

An illustration of the links between litigation and other law enforcement powers is the work we have done on Gypsies and Travellers issues. Having supported two cases which established Romany Gypsies and Irish Travellers as ethnic groups protected by the Race Relations Act 1976, CRE v Dutton and O'Leary v Allied Domecq and others respectively, we are now moving away from providing individual support in such cases. Instead, we are now considering a formal investigation in to local authority accommodation and site provision for Gypsies and Travellers. We are only able to be in this position as a result of the earlier cases and it was necessary to pursue litigation to establish these groups as protected groups under the 1976 Act.

We have also been approached by external lawyers to intervene in cases where their clients are seeking to challenge planning decisions. In one particular case, the planning laws conflict with the 1976 Act and the Racial Equality Directive and so the intervention may focus on how to resolve the conflict of laws, the legitimate aims being pursued and the whether the planning laws are a proportionate response to achieving those aims. Such conflicts raise interesting political and constitutional issues and really are the essence of a strategic law enforcement policy.

5.4 Compliance Notices for breach of the racial equality duty

The Home Secretary has also placed specific duties on public authorities to help them meet the racial equality duty.

The racial equality duty is enforceable by judicial review proceedings in the High Court and the Commission can either assist individuals in taking such proceedings or may be able to take action in its own name to enforce the duty. Or the Commission may decide that, instead of judicial review it should mount an investigation.

The Commission's power to serve a compliance notice may only be used to enforce the specific duties specifically for failure to prepare and publish a race equality scheme or failure to comply with employment monitoring duties.

Compliance notices can only be used in these restricted circumstances but where they do arise the procedure will be a quicker one. Service of a compliance notice might alert the Commission to widespread breaches of the racial equality duty which in turn might lead to a formal investigation.

5.5 Interventions

In support of our strategic approach to casework we propose to intervene or offer expert evidence in proceedings to which we are not formally a party but where the case raises important legal principles or strategic issues. This might happen in a number of ways including:

- applying to the Tribunal or court to provide an 'amicus brief' where we appear as a friend of the court
- seeking permission to present expert evidence, including expert legal evidence
- using the Civil Procedure Rules for judicial review to assert that the Commission has standing, or sufficient interest in any proceedings that justifies us being formally recorded as a party to proceedings

Interventions provide a focus on legal principles and require fewer resources but they limit the role of the Commission and, thus, its opportunity to influence the outcome.

6. CONCLUSION

After 26 years, we envisage that our law enforcement strategy will shift the emphasis from the individual justice model to the group justice model. Already we are funding fewer cases and only selecting those which raise issues of public interest or which will have a wider impact.

In relation to formal investigations we are also seeing a move away from investigations into small organisations such as membership clubs, estate agents etc., such as we did in the 1970s and 80s, to investigations into bigger corporations and public bodies where our recommendations can be incorporated into the rules, regulations and codes produced by the regulatory bodies or Government departments which govern such organisations.

Also the priority which we now give to the racial equality duty gives new impetus to the investigation function as in most cases it will be the most appropriate tool for assessing breach and securing compliance with the duty.

INQUIRIES WITHIN A WIDER FUNCTIONAL STRATEGY

DES HOGAN, SENIOR CASEWORKER, IRISH HUMAN RIGHTS COMMISSION

This presentation will address five areas:
1. background and context
2. functions of a human rights commission
3. the process of the inquiry
4. how other functions interrelate to the inquiry
5. some comments on integration

I am here today to speak to you about inquiries within a wider functional strategy. As the Irish Human Rights Commission has not yet decided to conduct an inquiry under section 8(f) of its legislation, the Human Rights Commission Act, my comments are by definition personal comments.

1.BACKGROUND AND CONTEXT

The usefulness of comparisons
Clearly national and specialised human rights institutions have different functions and powers. Institutions will operate under different legal and constitutional systems and different local contexts, for example, Komnas Ham in Indonesia and the South African Human Rights Commission will both operate in a different system and context to a commission in western Europe.

Institutions will have varying degrees of independence. Institutions will have varying resources and capacity. Institutions will have different legislative bases and subsequent amendments to the parent statute may change core functions and see assumptions about the institution questioned and challenged. So comparing powers and functions between institutions cannot be a precise science.

Institutions may be amalgamated structures, merging the old with the new. To my mind, the public inquiry function cannot operate without the support of other functions. If this is so, then structural integration across functions is key to allowing the inquiry function to flourish.

It seems to me that for evolving institutions, there is an opportunity here because, insofar as some institutions have core non-discretionary functions which eat up staff and resources and which limit the institution's ability for strategic planning, priority setting and discretionary spending, flexible approaches to integrating new functions into the operational protocols of older duties may provide a way forward in ensuring operational clarity within a strategic framework which aims for integration of multiple functions.

The Irish Human Rights Commission (HRC)
First a word on the Irish HRC. The history many of you will undoubtedly know. Set up under the Belfast or Good Friday Agreement in 1998, it has had a slower start than its counterpart in Northern Ireland. It is a commission of 15 members, among them notable experts in the field of human rights. Under the able leadership of its President, Dr Maurice Manning, and Chief Executive, Dr Alpha Connelly, the Commission now has permanent premises and eleven staff, albeit with a limited budget so there are clear capacity issues. However, the Commission now exists, an independent human rights commission keen to get its teeth into things.

The Commission is in the fortunate position of having robust functions (these are outlined in Appendix A) and having a wide scope for discretionary decision-making and priority setting. Its remit is wide - all human rights found in either the Irish Constitution or in any agreement, treaty or convention to which the State is a party under section 2 of the legislation. The drawback is that, apart from Constitutional rights and the limited ECHR Act 2003, human rights standards have been incorporated into Irish law in an *ad hoc* manner. The Irish HRC decided early in 2003 that it would choose a strategic approach to its functions and it produced a Strategic Plan - copies of which are available on request.

Purpose
Coming as we do from different institutions and different contexts, we share the same purpose – the pursuit of a human rights reality in law and practice in our respective societies. As the specialised statutory bodies on human rights protection and promotion, other organs of State, the public, the media, civil society, non-governmental and community-based organisations and not least those individuals unconnected with any of the above (including the public) look to us for vindication and at least inspiration. It is our task to tap into the idealism and optimism which comprise part of the human condition and to make and demonstrate the connection between the idea and the law when we speak of the respect and dignity towards each other which is the bedrock of all human rights principles.

Some of the ideas I hope to share with you today may be helpful to you. Many of these ideas will be known to you already but I hope to draw on the experiences of the Australian, New Zealand and South African human rights commissions. And I do this noting that there appears to be a growing belief within national and specialised human rights institutions that strategic investigations or inquiries can and should form an integral component of an institution's core work, being inter-related with its other functions, including those relating to promotional and advice activities.

In particular I have borrowed from a number of the ideas in the Australian Human Rights and Equal Opportunity Commission (HREOC) paper 'Public Inquiry Planning Guidelines' which was delivered at the Commonwealth National Human Rights Commissions Project in Kampala, Uganda in February 2003. Many of the principles in that paper draw on the experience of that commission.

2. FUNCTIONS OF A HUMAN RIGHTS COMMISSION

The functions of the Irish HRC and other like commissions can be grouped under the following general headings:

a. promotion of human rights – this function should be the prism through which much of the commission's work proceeds. Where are the limits to education, to consultation and training, to public and institutional awareness raising in a field such as human rights where standards are constantly evolving and where the environment is itself in constant flux and subject to media and political pressures? Most commissions have at their core the promotion of human rights.
b. legislative, policy or practice reviews – on request or own volition reviews – the range of this function covers existing and proposed legislation, policy and practice reviews and includes submitting reports and recommendations to government, parliament, international bodies (such as shadow reports to UN committees), target audiences and the general public.

c. institution of legal proceedings – this refers to legal assistance or intervention functions. Where a commission possesses these functions in addition to inquiry or investigation functions, a clear choice is presented in respect of which route the commission should choose.[55]
d. public inquiries (or investigations) - a public inquiry is an inquisitorial rather than an adversarial process. A public inquiry into a human rights issue is what I would call process-driven and result-ambivalent. Insofar as a human rights commission, generally speaking, cannot enforce its findings or recommendations in a strict legal sense as a specialised equality body may, it may be argued that its public inquiries lack teeth. But paradoxically, this restriction can force the commission to utilise its other functions and in doing so places as much emphasis on the process of the inquiry as its result. In providing oxygen to this part of the operation, respondent bodies and the public can be taken on a journey from outright denial that a right exists, through anger, bargaining and finally, one hopes, recognition and acceptance! The key thing is not to speak only to the converted.

So why the inquiry function to tackle a human rights issue when other easier, cheaper functional methodologies are available? The answer should be self-evident: inquiries should almost be a last resort, when other functional responses are deemed inadequate. A risk assessment through the application of agreed criteria prior to launching an inquiry will have considered each of these other functional routes prior to deciding on an inquiry. Let us now consider why other functional responses may be inadequate.

Why promotion of human rights may be inappropriate
From this starting point, ideally the right in issue in the inquiry will have been previously raised by the commission in promotional terms. Either the commission will have publicly commented on the right either in the context of legislative or policy proposals, or where an incident appeared to disclose a violation of the right and the commission voiced general concern, or in the context of commissioned or other research undertaken by either the commission or another body which the commission considers to be authoritative.

Equally the commission may have promoted the right in question through an education and training programme for a target group (perhaps the state authority with responsibility in the area - whether it be police or care workers), through curricular or other education programmes in a target area, or through public media fora, perhaps in conjunction with other agencies. The commission, through its outreach and consultative processes may also have identified and promoted the right in question.

It may be that on the basis of its promotional activities the commission identifies a systemic issue, one incapable of being tackled through promotional activities alone. It is from this direction that an inquiry area may recommend itself to the commission. This may reflect the fact that whereas promotion of a right can highlight what a human right is through various media, it may be that people are not listening.

Why legislative, policy or practice reviews may be inappropriate
We have already touched on how the commission may have publicly commented on the right either in the context of legislative or policy proposals.

The legislative, policy or practice review function may result in well-measured research, reports and recommendations, but people may again not be listening and moreover, it may be that such reports and recommendations do not correspond to experiential processes or catch the imagination. There are so many reports flying around in the ether of public policy - some too often appearing as pre-determined conclusions in human rights lawyer speak - that another report by another commission may make a page seven column before sinking untraceably.

[55] *Where the institution does not possess legal assistance/ intervention functions (which include amicus curiae assistance to a court), it may be a matter of referring the person who is seeking an investigation to either the relevant authorities (e.g. police) or to a firm of solicitors or statutory body which provides legal assistance where a legal route is more appropriate.*

Why institution of legal proceedings may be inappropriate
Institution of legal proceedings, which refers to a strategic litigation function, may result in structural challenge, recognition or change, but equally it may not (depending on the facts of the case, behaviour of the parties, the extent to which domestic law reflects international standards, the composition of and those imprecise terms, the 'liberalism' or 'conservatism' of the court). Further, strategic litigation may result in counter-legislative or counter-policy reaction. Even if the litigation is successful, people may not be listening. Policy makers may resent judges trying to again tell 'the People' what to do. A counter-reaction could place a significant number of people in a worse situation. So clearly, before considering whether to take the strategic litigation route, a risk assessment should be made similar to the one made in respect of an inquiry proposal.

Why a public inquiry may be the appropriate route
Careful analysis of agreed criteria and planning protocols, as outlined in Appendix B should be first undertaken. The following positives and pitfalls are included in this analysis.

Positives
- addresses a systemic human rights problem that may not be capable of other resolution by other means (whether through the courts or not) - in fact this should be a pre-requisite (see below)
- allows public to engage and participate in the inquiry and to 'own' the inquiry outcome
- illuminates the human rights issues involved and puts an international light on what may have been seen as a local political issue
- allows the media to follow the process of the inquiry and work through the various stages – educates the media
- educates the commission and the public
- where the recommendations in the report benchmark human rights law and reflect the evidence received, the transparent process of the report should help in gaining political traction which is a pre-requisite to the desired change
- government changes policy or law in response to inquiry – either during (claims going to happen anyway) or afterwards.

Possible Pitfalls
- depend to a degree on a) the subject matter of the inquiry, b) how the process of the inquiry proceeds and c) the political traction for change
- of these 3 elements, the commission can seek to shape but can never fully control the process of the inquiry and it can seek to soften any inflexible political traction. However any assessment to proceed with an inquiry should have identified whether the inquiry will invite a counter-reaction to the issue
- costs and time
- difficulty in limiting inquiry remit to concise terms of reference and not diving down interesting side-alleys
- co-operation of witnesses
- potential judicial review challenges
- natural justice requirements
- heightened expectations in key stakeholders
- the issue has 'moved on' by the time of the final report.

3. THE PROCESS OF THE INQUIRY

When examining what constitutes a public human rights inquiry, there appear to be the following components:
- clear understanding of how the inquiry interrelates with other functions
- application of criteria for an inquiry
- clear planning: scope/ timelines/ project management/ staff/ budget/ target date
- concise terms of reference and transparent guidelines as to its processes
- consultation and engagement with stakeholders and relevant bodies
- research – whether in-house or commissioned
- at least one site visit
- public hearings possibly preceded by submissions from interested parties. Submissions should address the terms of reference. Public hearings may be supported by private hearings of confidential or sensitive matters, by public 'town hall' meetings or by focus group meetings
- if necessary, the production of documents or things to the commission and the questioning of persons
- public relations, media, publications and web strategy
- a report with recommendations
- follow-up strategies to measure extent recommendations are implemented.

Earlier I spoke about a public inquiry as a process. In this respect, it is closely linked to promotional activities, which focus on process as much as result. It clearly interlinks with legislative, policy and practice review and analysis which will form the basis of the final report. It is less clearly linked to strategic litigation, but there are links which I will return to later.

4. HOW OTHER FUNCTIONS INTERRELATE TO THE INQUIRY

If a commission is properly integrated across its functions, its other functions will inform, assist and enforce an inquiry process. To my mind, these other functions have respective roles before, during and after the inquiry. Before considering this in greater detail, let us take an example of two public inquiry processes, recalling the importance of being creative and tailoring an inquiry's scope to meet its aims.

There are two generic models below, the first based loosely on the Australian HREOC Inquiry into Children in Immigration Detention 2001-2004, the second based loosely on the New Zealand Human Rights Commission Inquiry into Accessible Public Land Transport 2003-2004. I will draw on these models to illustrate how other commission functions can interrelate with the inquiry.

Australian HREOC Inquiry into Children in Immigration Detention 2001-2004

Pre-Inquiry
- Research & identify
- Rationale: including on basis of complaints received, periodic monitoring of detention centres
- Apply criteria
- Consult
- Agree budget, project management
- Agree scope, terms of reference and procedures
- Prepare background/ issue papers[56]

⌄

Phase 1 – Launch
- Launch
- Background/ issue papers presented
- Submissions requested
- Research/ literature review commissioned
- Focus groups commence
- Site visit(s) commence

⌄

Phase 2 – Public hearings
- Submissions analysed and posted on web
- Public hearings scheduled
- Persons invited to attend
- Public hearings occur
- Private hearings scheduled
- Private hearings occur

⌄

Phase 3 - Completion of Inquiry report
- Draft report – parties/ any persons to be criticised notified and views requested[57]
- Final Report

⌄

Post Inquiry phase
- Dissemination of Inquiry report
- Follow-up

[56] The purpose of these papers is to identify the areas the Commission wishes submissions to focus on.
[57] A notice setting out the findings, the reasons for those findings and any recommendations.

New Zealand Inquiry into the accessibility of public land transport for people with disabilities 2003-2004

Pre-Inquiry
- Research & identify
- Rationale: Including on basis of complaints received and representations from transport fora by disability groups in 2002 and request for inquiry
- Apply criteria
- Consult
- Agree budget, project management
- Agree scope, terms of reference and procedures

⌄

Phase One
- Consultation
- Research into international best practice
- Identification of the issues
- Publication of a summary report and discussion document based on the consultations and research

⌄

Phase Two
- Invite submissions
- Conduct public hearings
- Publish a draft report on the submissions and hearings, together with any recommendations, inviting further comments

⌄

Phase Three
- Publish a final report

⌄

Post Inquiry phase
- Dissemination of report
- Follow-up and monitoring of recommendations implementation

Before the inquiry
Examining these two inquiries, it is clear that both commissions had prior experience of the issue in question and this informed the rationale for both inquiries.

If we take the above examples, the decision for the HREOC inquiry was based partly on the interrelationship with the commission's other functions, namely complaints received (legal function), inspections of detention centres (review of practice), consultation with and representations by NGOs.

A similar rationale was given for the New Zealand inquiry – the decision to proceed was on the basis of complaints received and representations from transport fora by disability groups in 2002 which set up a Transport Working Party and which itself requested an inquiry.

In terms of structuring the inquiry, the Australian inquiry team availed of the services of its Public Relations Unit and its Legal Unit in the inquiry. The South African Human Rights Commission in its Inquiry into Sexual Offences against Children availed of the services of its Legal Services Department and Advocacy Department.

During the inquiry

You will notice how both inquiries introduced background papers or a summary report against which submissions and public hearings could be positioned. This helped interested parties frame their submissions and was aimed at allowing the inquiry to then move towards a draft and final report. The Australian papers were researched in the pre-inquiry stage, while the New Zealand summary report was researched in Phase One.

During the inquiry, other functions will be incidental to the inquiry function. So parts of the promotional function will be subsumed into the methodology of the inquiry, particularly the aspects around media and public relations and consultations. If the aim is a transparent, accessible inquiry, which builds ownership and support for its recommendations and outcomes, then submissions and public hearings will be key.

Consultation and partnership with NGOs and community groups will assist in publicising the inquiry's aims and in enlisting support and enthusiasm around the public hearings. The HREOC Inquiry benefited from widespread NGO and state government support. NGOs held meetings at which to decide on how to present joint submissions to the Inquiry.

A media and public relations strategy will take the public hearings beyond those people present in the room and bring it to print, radio, television and internet media, thereby reaching many more people. A public hearing, where the witnesses are interesting and the presentations substantive, will encourage coverage. Media strategy should flow from the planning stage through to the inquiry's launch (distributing media kits, preparing speakers etc.). An example of a simple but effective launch of an inquiry would be the current New Zealand inquiry which cleverly followed up its announcement of the inquiry in September 2003 with coverage of statements of congratulation from the relevant Minister on the same day. At its launch, disability rights groups and managers from the commercial field spoke along with the commission. It is important that people outside the commission welcome the inquiry.

Similarly, parts of the legislative, policy or practice review will be subsumed into the methodology of the inquiry, particularly the aspects pertaining to research and a review of the legislation and policy in the area and which international standards to benchmark.

Legal functions will be those incidental to the inquiry power such as requiring the production of documents or things (e.g. the perusing of dockets in police stations in the South African Inquiry), private or *in camera* hearings of witnesses (accompanied by Counsel where necessary) and ancillary functions ensuring the procedures of the enquiry are fair and continue to be monitored.

After the inquiry
The other functions of the commission should be actively pursued after the inquiry. There should be a continuum between the report, its dissemination and the follow-up to its recommendations through the commission's other functions. The commission can be creative and shape different functional responses to address the current context. For example, a government commitment to change a law may require associated training and education to ensure that the purpose behind the legislation is reflected in practice and to guard against old institutional habits creeping back in.

The commission can offer its assistance to the relevant government authority in developing appropriate staff training programmes.

Here is a list of components of a possible follow-up strategy to an Inquiry.
- launch report to coincide with an event (e.g. independent film on issue)
- negotiate with a sympathetic government to launch its response to the inquiry's report at the same time as the report is launched
- dissemination of Inquiry report
- follow-up consultation meeting with stakeholders
- decide on which other commission functions should form basis of a commission action plan
- follow-up with relevant functions on quarterly basis
- after a period of time decide whether the Inquiry's recommendations can be parked or whether there is a need to retrigger parts of the Inquiry.
- consider reopening the Inquiry after a year to examine government witnesses on how they have implemented the recommendations.
- consider employing strategic litigation to use human rights benchmarks established in Inquiry to challenge ongoing breaches of rights in the courts, being careful to separate Inquiry process from any litigation process.

There will be clear overlap between the different phases, for example, report writing can and should occur well before the end of public hearings. In fact, it may be an idea to have a shell of the final report drafted before the inquiry begins. The report's recommendations should mirror its findings closely and be seen to represent the evidence presented to the inquiry. Each of those recommendations should be capable of follow-up in the post-inquiry phase.

5. SOME COMMENTS ON INTEGRATION

If a commission is to strive for integration across functions, it might ask itself the following questions:
- how do its different functions currently inter-relate?
- how do relevant staff cross-fertilise work across functions?
- how is information shared internally - do cross-team meetings exist and work?
- what communication tools should be employed to enhance cross-sectoral work and to dismantle barriers to the same?
- how does the commission balance institutional knowledge against the formulation of new ideas?
- if key staff left during an inquiry, are processes in place to allow new incumbents to hit the job running (succession planning)?

Appendix A

The Human Rights Commission has a wide range of powers and functions including the following
- to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights;
- to consult with relevant national and international bodies;
- to make recommendations to Government on measures to strengthen, protect and uphold human rights in the State;
- to promote understanding and awareness of the importance of human rights and, for these purposes, to undertake or sponsor research and educational activities in the field;
- to conduct enquiries. For this purpose the Commission will have the means to obtain information, with recourse to the courts, if necessary;
- to offer its expertise in human rights law to the courts in suitable cases as amicus curiae, or friend of the court, in cases involving human rights issues;
- to take legal proceedings to vindicate human rights in the State or provide legal assistance to persons in this regard;
- to participate in the Joint Committee of Representatives of members of the Commission and members of the Northern Ireland Human Rights Commission.

Appendix B

Assessing whether to conduct an inquiry
Strategic (risk) assessment tools should be employed. There are many such models. Those which appeal to me involve the use of
1. agreed criteria
2. a practical assessment and
3. proper planning guidelines

The commission should have key criteria for making a decision whether to conduct an inquiry or not.

1. Criteria might include:
- **procedural**: whether the subject matter of the inquiry falls within the Commission's remit or whether the commission is obliged to defer to another mechanism
- **procedural**: whether an inquiry is the best route to the desired result or whether the issue could be adequately tackled through another commission function - through other (cheaper) methodologies - in house or commissioned research (whether qualitative or quantitative)/ literature or legislative reviews or through promotional tools such as targeted surveys – more on this below
- **procedural**: whether an inquiry is the best route to the desired result or whether there are more appropriate external avenues to tackle the issue (e.g. either through legal proceedings, a complaint to another statutory body, or where another statutory body plans to examine the issue soon and adequately)
- **systemic, structural or serious**: whether the human right in issue is adequately protected or whether urgent, long-standing or systemic or structural human rights issues are raised
- **systemic, structural or serious**: whether a clear and serious human rights abuse appears to be substantiated and law enforcement or other relevant bodies are not capable of tackling or addressing the abuse

- **recognition and priority**: is there any consensus that a human right is in issue?
- **recognition and priority**: whether the subject matter for the inquiry is a priority area in the commission's strategic plan
- **capacity and competence**: could the commission effectively conduct an inquiry to the benefit of the persons involved and a wider demography of persons – whether in a similar situation or in wider society?
- **capacity and competence**: can the core evidence be given in public and is sufficient data available for writing the report?
- **capacity and competence**: does this strategy gel with the commission's strategic priorities and its capacity to deliver on same? Can it commit to following up on the inquiry's recommendations over time including through employing its other functions?

2. Practical assessment

The last two criteria lead into the following practical assessment that should follow. On the basis that the answer to the above questions points towards an inquiry being an appropriate and strategic route to take, the following questions arise:

a. What are the aims of the inquiry? Are these aims realistic? What would an inquiry realistically achieve?
b. Can the commission do it? Does it have the powers and the expertise to conduct the inquiry?
c. What are the predicted costs and timelines of the inquiry? Does the commission have the capacity to conduct and manage the inquiry effectively and yet maintain core functions? Is the inquiry a good use of the commission's resources (financial and human)?
d. Would an inquiry be timely - do external opportunities or threats present themselves in the time span of the inquiry?
e. Will the inquiry sustain public and media interest and even sympathy?
f. Will the inquiry advance the protection of human rights or is there a risk that an inquiry could result in further restrictions to the right in question (the reaction scenario) or in key stakeholders feeling let down?
g. Can the inquiry commit resources to follow-up?

3. Proper planning

A public inquiry is a process which begins long before the inquiry is announced and the inquiry's Terms of Reference are made known to the headlights of the media. A public inquiry starts anything up to several months beforehand and involves careful analysis of and background research into the human rights at issue, consultation with stakeholders (including so-called respondent statutory bodies). It will involve looking at other mechanisms which may have competence in the area and making the strategic assessment whether the matter is indeed best handled by a public inquiry and by the institution in question. The agreed criteria can help in making this choice. It is a good idea to seek outside expertise where it may be lacking in the Commission.

After making a provisional decision to proceed, the Commission should map out an Inquiry timescale and process (including the size and methodology of the Inquiry) and agree a Budget. It should agree on an Inquiry Project Team, identify and recruit or transfer necessary staff, draft Terms of Reference, procedures and guidelines, draft a Public Relations Strategy, agree a target date for report publication and agree on an evaluation and follow-up strategy to the Inquiry, possibly through the prism of different Commission functions. The Commission should also consider an exit-strategy from the inquiry in case of the government either agreeing to implement a particular law or policy or in the unfortunate event of losing judicial review proceedings. Integration of functions should allow research or promotional functions to wind down the inquiry in either scenario.

THE RACIAL EQUALITY DIRECTIVE AS A BASIS FOR STRATEGIC ENFORCEMENT

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Article 13 of the Racial Equality Directive requires EU member states to establish independent bodies to promote compliance with race equality legislation, to carry out research and to "provide independent assistance" to victims of racial discrimination. The Amending Gender Equal Treatment Directive (2002/73/EC) and the recent proposal for a Gender Directive in the field of goods and services make similar provision. These provisions are of considerable importance, as they provide a firm foundation in EC law for the equality bodies that are already established or being set up in the various European states. Compliance with the Directives requires that the independence of these bodies be respected. It also requires that these bodies be given the formal powers to perform the range of functions that the Directive identifies as within their role, and also that they be given the necessary resources to ensure that they can carry out these functions.

The language and wording of the Directive is vague in outlining these functions: for example, does "providing assistance to individuals" include representing them in court or before tribunals, or will the provision of advice be sufficient to satisfy the terms of the Directives? What exactly is required from states to ensure the independence of equality bodies? Also, the Directives' requirements are confined to the scope of their provisions: equality bodies established in line with the Directives may be given a role in combating other forms of discrimination, especially the types of discrimination in employment prohibited by the Framework Equality Directive, but cannot rely upon the terms of the Race and Gender Directives to argue that they should be given particular functions to deal with these other types of discrimination. (The Directives' requirement of independence may however continue to be of considerable importance.) Nevertheless, the Race and Gender Directives' provisions do provide to some degree a firm basis for equality bodies to take action against discrimination and prejudice, and also provide a formal guarantee of independence from government interference.

How then should equality bodies set about fulfilling their functions under the Directives? It should be recognised that complex questions of tactics and strategy arise in trying to combat discrimination, especially when it is deep-rooted and systemic in nature. Equality bodies will inevitably have to struggle with limited resources and questions of how best to deploy these resources. They will also have to identify what areas and issues deserve priority treatment in their work, and how to use their finite resources to best effect to achieve the maximum return. Comparative experience from different countries as to which strategies work will be of great value in identifying appropriate approaches to combating inequality. Different approaches will inevitably have to be adopted in different national contexts: there is no single model of how an equality body should perform its functions. However, it is possible to identify several examples of good practice in strategic enforcement that are of relevance to any equality body in Europe.

Firstly, strategic approaches to combating discrimination that emphasise the common principle of equality of treatment often are more effective than those that focus only upon one type of discrimination. It may often be the case that a particular type of discrimination, such as for example prejudice against Roma, needs a specific response that concentrates upon that particular problem. However, the more a combined, cross-ground equality approach can be used, the more often will gains in one area be duplicated in other areas. In Europe, progress in gender equality has not always been matched by equivalent progress in race equality, because the link between the importance of recognising equality in the gender context and in the race context has often not been emphasised. Similarly, in the UK, steps have been taken to strengthen the legislation prohibiting race discrimination which has not lead to similar strengthening of the gender discrimination legislation, because of the existence of different equality bodies, different legislation and different approaches between the two different equality grounds.

Adopting a cross-ground approach will mean that good practice in one area will be carried over into other areas. It also will educate people at large as to the common principle of equality that underlies all forms of equality legislation, and may increase popular support and understanding. A common approach will also make sure that multiple forms of discrimination – prejudice against a Muslim woman, for example, that arises from a combination of beliefs about her gender and religious/cultural identity – will be easier to address. The Irish, Canadian and Australian commissions, which deal with all the anti-discrimination grounds, have found such issues easier to address than the UK commissions, which each focus upon a specific type of discrimination. In the Republic of Ireland, for example, the Equality Authority in devising equality schemes in conjunction with businesses and public authorities has found that the ability to address discriminatory structures across all the grounds has been invaluable. Also, by engaging with multiple forms of discrimination, the Authority has uncovered particular needs of groups with overlapping identities that have been relatively underplayed. The Northern Irish and Australian bodies have had similar experiences, and New Zealand has recently merged its existing separate equality units in order to achieve the same goal.[58] All have also found that emphasising a common equality approach has proved invaluable in educating the population at large: a group that may be antagonistic or sceptical to one strand may be open to another, and through engagement with a broad equality approach become aware of the compelling case for diversity across all the strands. This confirms the educational potential of a common cross-ground approach, as argued here.[59]

Secondly, equality bodies need to be able to combine the enforcement of anti-discrimination law with the promotion of equality. A consensus exists among existing equality bodies that enforcement and promotion mutually reinforce and are inseparable. Both roles can be combined in education, the provision of advice and in developing strategies that draw upon the lessons learnt in both fields. Employers, public authorities and disadvantaged groups are generally happy to have a single body which can provide both promotional and legal advice. It appears essential for maximum effectiveness that a single commission balance the two goals of enforcement and promotion, as well as achieving a balance in the use of different enforcement and promotional tools. Enforcement action alone will not be adequate to produce change, as it will only have impact in individual cases where clear breaches of the legislation exist and victims are willing to challenge discrimination. Similarly, promotional and support work without parallel legal enforcement will lack bite.

Enforcement and promotional work will also have to be carried out to target effectively the different forms discrimination takes in a particular society or state. Overt forms of prejudice and discrimination will have to be challenged, while covert, institutional and structural forms should not be neglected. Different tools will have to be used in different ways and different combinations at different times, as the equality context shifts and changes. This requires the development of a strategic enforcement and promotional approach that is designed to maximise the impact of the equality body's work upon the various forms of discrimination.

Without such a strategic approach based upon adequate research, there is a real risk that only certain forms of prejudice will be challenged. In particular, there is a danger that overt forms of discrimination in employment will dominate the workload of the equality body, while less obvious forms of structural discrimination in the field of goods and services provision or in the nature of the labour market may be neglected, as they will not always give rise to clear-cut individual cases of discrimination. Similarly, discrimination suffered by very disadvantaged groups that lack the necessary confidence, networks, resources or ability to access the equality body may be overlooked if the body is not strategic and proactive in identifying the patterns of discrimination it wishes to concentrate upon. Resources and effort could be wasted if largely deployed in a manner that does not produce wide social change, or which does not have considerable impact. Effective targeting of the work of equality bodies is therefore essential.

[58] See C. O'Cinneide, Single Equality Bodies: Lessons from Aboard (Manchester: EOC, 2003).

[59] Disability, gender and age have been described as especially effective "icebreakers" in this context, reaching as they do vast amounts of the population that may otherwise be comparatively disengaged from other equality grounds.

In implementing this strategic approach, there are particular dilemmas and policy choices that equality bodies need to confront. Such bodies, even with their guarantee of independence in the Race and Gender Directives, are state bodies and are funded by public funds. Should an equality body therefore see its role as acting as a regulatory state body, using its powers to enforce anti-discrimination law and to promote equality, but not as representing any particular group? Or should it see its role as a voice for disadvantaged groups and equality NGOs, who often lack a champion in public life? Often both these roles will overlap, and no tension will arise between them. However, there may be circumstances when a real tension can exist. Acting as a voice for disadvantaged groups may lead an equality body to take positions on particular issues that may conflict with its regulatory role as a public body. It may also result in a body being slower to address issues of discrimination within disadvantaged groups, and a danger that it could be marginalised in general public opinion as a partisan voice. It could also hinder the development of NGOs and organisational involvement within the disadvantaged groups themselves.

In the UK, for example, the existence of the Commission for Racial Equality (CRE) has perhaps slowed the development of non-governmental organisations in ethnic minority communities, due to the perception that the CRE should be "their" voice. This perception has also resulted in the CRE often being criticised for being too close to the particular interests of particular ethnic groups in the UK, and also criticised as not being sufficiently representative of the perspectives of these groups, demonstrating that equality bodies will often be attacked by both sides! It is clear however that an equality body must be independent both from government and also from special interests: ultimately, it is more effective if they concentrate upon fighting inequality, and let representative organisations and NGOs act as the voice of their communities. However, equality bodies do need to be open to the perspectives of the disadvantaged groups, especially in developing their anti-discrimination strategies. They also need to be aware of (and highlight in their promotional work) the impact of socio-economic deprivation upon disadvantaged groups.

Another issue of considerable importance relates to how an equality body should prioritise its work. Should it give greater priority to achieving justice for individual victims of discrimination, or should it focus instead on "group justice", i.e. concentrate upon achieving social change in how disadvantaged groups are treated? Again, both possible priorities will often overlap and combine together in effect: if an equality body supports an individual case, it will often generate change for the disadvantaged group in question. However, where resources are limited, then a choice may have to be made between concentrating upon individual assistance, or allocating resources to particular initiatives that are strategically designed to achieve maximum change, but which may to be implemented require that individual victims are denied support. This is a hard choice. However, there may be circumstances where delivering adequate support for every individual victim will become impossible, or else will divert attention and resources away from the equality body's main strategic goal of achieving broad social change.

Comparative experience illustrates this dilemma. The federal Canadian Human Rights Commission was required until recently to investigate every individual case referred to it. Even in the politically favourable environment for equality issues prevalent in Canada, this resulted in huge delays. Between 1988 and 1997, the Commission took from 23 to 27 months to decide whether to send a complaint forward for conciliation or to a tribunal (these further stages also involved considerable delays), causing intense discontent across the stakeholder groups.[60] A high complaint rejection rate (two-thirds of all complaints were not proceeded with between 1988 and 1997) and a very low referral rate to the tribunal (only 6% of all cases) lead to the perception that the Commission's handling of complaints was driven by an administrative desire to reduce the considerable backlog, and gave rise to serious credibility issues and low staff morale. In response to this, critical reports by the Auditor-General in

[60] *S. Day and G. Brodsky, "Screening and Carriage: Reconsidering the Commission's Functions", Canadian Human Rights Act Review 2000.*

1998 and the 2000 Report of the Canadian Human Rights Act Review Panel emphasised that the focus of the Commission had to be on preventing discrimination rather than mopping up its aftermath, and called for less focus upon individual cases and more on strategic enforcement and promotion. Similar experiences in the UK in the 1960s resulted in the current position whereby the CRE and the other UK equality bodies can support individual cases as they see fit to achieve strategic goals, but will not support each and every individual case: the cases that are selected to receive support are those that have the potential to generate the most effective social impact, and are generally not selected on the basis of the extent of individual need at issue.

In the USA, the federal Equal Employment Opportunities Commission (EEOC) has also been pulled between the poles of an individual-centred approach and a strategic approach. Its strategy in the 1970s targeted systematic discrimination through a highly successful strategic approach directed towards achieving group justice and "cultural change", whereas under the chairmanship of the Republican nominee Clarence Thomas in the early 1980s, the EEOC adopted a much more individual-focused approach, redefining its role as providing effective remedies to individual victims of discrimination rather than targeting systematic patterns of group discrimination.[61] In the 1990s, the pendulum has swung slightly back the other way, but the EEOC remains committed to a considerable individual focus, due to the requirement that any employment equality case commenced under US federal law has to first be "filed" for investigation with the EEOC. This compulsory requirement to file suit initially with the EEOC was the product of the optimistic belief in 1964 that the vast majority of discrimination complaints could be rapidly dealt with through the EEOC, and only a trickle would require the attention of the courts. This proved erroneous: the EEOC currently receives 80,000 private sector complaints annually, and the process has become noted for excessive delay, hitting a backlog of 111,000 cases in 1995.

There fore, from comparative experience it appears that allowing enforcement strategy in particular to be dictated by the volume and nature of individual cases that come forward is problematic. It can result in the equality body becoming highly reactive to whatever cases it receives, rather than adopting a proactive strategy. "Ombudsman" style bodies designed to ensure compliance with good administration and with the law by assisting or investigating individual complaints also suffer from this problem: such bodies are essentially reactive in nature, and dependant upon who brings forward complaints. Equality bodies need ultimately to focus upon generating "cultural change" across society, which in turn will benefit individuals. Individual and group approaches need to be combined within an overall strategic policy thrust to achieve this cultural change.

This strategic approach needs to combine enforcement and promotion, as discussed above. Many of the major breakthroughs in UK, US and EC anti-discrimination law have stemmed from the use of litigation to expand and develop the scope of protection conferred by equality law. However, recent debates surrounding the proposed establishment of a combined single equalities and human rights commission in the UK have questioned whether litigation has reached its limits, and whether the new commission should focus on promotional work, with litigation playing a secondary role. This reflects views that formal compliance with anti-discrimination law is now commonplace, and that the real challenge is to address structural patterns of discrimination that are not so easy to challenge in courts and tribunals. This view appears to be exaggerated: enforcement will always be necessary. Enforcement and promotion tend to go hand-in-hand, and an equality body should be able to use both as necessary and appropriate to achieve cultural change. Often the choice of what tools to use will depend upon the particular social and political context in existence at the time in question.

[61] The appointment of a set of Republican-nominated commissioners played a major role in this shift, as they were critical of the perceived waste of resources devoted to systematic discrimination.

To implement such a strategic approach, it is necessary that equality bodies be given a wide set of functions and powers, to allow them to have the necessary degree of flexibility and the required legal tools to combat discrimination. The range of powers available to the Irish Equality Authority, in particular its ability to require private and public employers to carry out "equality audits", are very extensive and act as a good model for what powers equality bodies should aim to obtain. The Directives require that equality bodies be able to "assist" individuals: this should include the provision of legal assistance, and equality bodies should also have the ability to bring cases in their own name. The US EEOC, and the Belgian, Canadian, New Zealand and Australian bodies can all bring litigation in their own name, which is invaluable where no victim is willing or able to come forward.

Equality bodies also should have the ability to conduct general inquiries and specific investigations into particular private or public sector bodies (as the Irish and UK commissions can). They also should be able to intervene in relevant court cases where appropriate (although the extent to which this is appropriate or possible will vary according to the national legal system in question). They should also be able to make use of mediation and conciliation services in assisting individuals to resolve discrimination cases, although experience from Canada, Australia and New Zealand show that problems may arise if the equality body is too close to this process: employers may mistrust the fairness of the mediation process if it seen to be run by the equality body, while there is a danger that mediation without the provision of appropriate support for disadvantaged complainants will be unfair.

A central issue in developing a strategic enforcement policy is how to encourage private and public sector bodies to mainstream equality concerns in their work. Achieving a situation where proactive action to prevent discrimination is the norm is the "Holy Grail" of equality policy. Bridging the gap between "negative compliance" – formal adherence to the legislation – and "positive compliance" - such as mainstreaming - is what equality bodies need to try to achieve, once they have achieved general adherence to the legislation in the first place. Education, promotional guidance and advice, the use of investigatory functions and the supervisory role that the UK positive duties confer upon the equality commissions are all potential tools that can be utilised as part of this strategy.

Developing a policy of strategic enforcement and promotion requires good leadership, independence, research, a willingness to adjust to changing circumstances and an adequate set of tools, as well as a clear idea of what equality bodies should be attempting to achieve. The Race and Gender Directives provide a platform for equality bodies to begin to develop their own strategies: but strategic decision-making and prioritisation of resources will inevitably be difficult. Equality bodies need to be aware of the links between their work and wider issues of human rights, socio-economic exclusion and poverty, as well as being "clever" in assessing what is possible in existing political and cultural conditions. Good leadership and vision will always be necessary ingredients for success, and real commitment on the part of the staff of equality bodies to developing and implementing a coherent strategy.

IRISH EU PRESIDENCY EVENT

PROMOTING EQUALITY AND COMBATING DISCRIMINATION AT EU LEVEL

ADDRESS BY THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, MICHAEL MCDOWELL, T. D.

Ladies and Gentlemen,

I am pleased to have been invited here this afternoon to address the European network of equality bodies and its guests. I am particularly pleased that this event, hosted by the Equality Authority, marks the Irish Presidency of the European Union and its commitment to support equality and the fight against discrimination throughout the European Union.

The role of a network such as yours within the equality infrastructure cannot be overstated. Its existence allows for the exchange of information, concepts and strategies, and broadens the outlook and experience of each individual organisation. The experience and expertise of the collective network will also be an invaluable support to the ten new Member States joining the Union on 1 May this year.

The hugely positive influence of the European Union in the promotion and protection of the principles of equality and freedom from discrimination within the Member States is undeniable. Irish experience is testimony to the positive impact of EU membership on equality. The legislative and funding initiatives driven by the EU have facilitated the increased participation of women in the Irish workforce which is recognised as a key element on the road to greater gender equality.

The European Union has also been a source of considerable support in the development of childcare, which is an essential prerequisite to support the needs of women in employment, education and training. EU funding has assisted Government to significantly increase investment in childcare initiatives in recent years, with the objectives of supporting existing childcare places, increasing the number of childcare places and facilities and improving the quality of childcare services that meet the diverse childcare needs of parents in employment, education or training.

Equality legislation has a significant role to play in eliminating discrimination against people with disabilities in our society and supporting their equal participation. In Ireland, a mainstreaming approach to service provision for people with disabilities has been evolving. The National Disability Authority was here established to advise on standards in programmes and services for people with disabilities and a new agency Comhairle was established as an independent information and advice service with a special remit, including the development of advocacy services, for people with disabilities.

The Government is continuing to work on a Disability Bill to underpin the principle of mainstreaming and provide for positive action to remove barriers to equal participation for people with disabilities. The Bill is expected to form a key part of the framework being put in place by the Government to support people with disabilities in Irish society.

The equality infrastructure in place in Ireland recognises 9 discriminatory grounds. One of these, the race ground, is now also protected by EU equality legislation with the coming into effect of the EU Race Directive. The Race Directive recognises the valuable contribution of independent equality bodies. Article 13 of the Directive requires all Member States to designate a body or bodies for the promotion of equal treatment of all persons. I understand that it was under Article 13 that your Network was formed to encourage and support the setting-up of new independent equality bodies in Members States and to strengthen and improve existing bodies. Combating discrimination by reference to race is an essential and urgent priority across Europe.

While membership of the EU provided an influential impetus for the development of the equality agenda in Ireland in recent years, I am happy to say that the flow of positive influence has been a two-way process with Ireland contributing its own positive input into EU policies for equality. Ireland in now to the fore in the promotion and protection of the principles of equality and freedom from discrimination as a result of ground-breaking legislation enacted in this regard in 1998, with the Employment Equality Act, and in 2000, with the Equal Status Act. This legislation prohibits both direct and indirect discrimination in the areas of employment and access to goods and services on nine grounds, that is gender, marital, family status, sexual orientation, religion, age, disability, race or membership of the Traveller community. Victimisation is also prohibited.

This legislation is now being amended to implement the three new equality Directives. In implementing the Directives, the Irish Government has opted for a comprehensive approach in the Equality Bill 2004, to preserve coherence across all nine grounds. Thanks to the quality, effectiveness and far-sightedness of our existing equality legislation, transposition of these Directives into national law requires relatively minor and technical amendments to the existing legislation. However, by implementing the Directives by primary legislation across our nine discriminatory grounds, Ireland will continue to have one of the most far-reaching bodies of equality legislation in Europe. While this approach has meant some delay in meeting the transposition dates of the Race and Framework Employment Directives, the outcome will be to maintain the best approach possible by ensuring consistency across the nine discriminatory grounds thereby enhancing transparency.

Presidency programme
Ireland is now nearing the midpoint of its Presidency of the EU and is working effectively with the Member States and the institutions of the EU to build on our achievements at European level.

A key legislative proposal in the area of equality is the Article 13 Directive, or more properly the draft Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, which was published by the Commission on 14 November 2003. The objective of this proposal is to provide women and men across the European Union with a common set of minimum standards of protection against discrimination in access to goods and services and to provide a means to seek redress and compensation for loss. The Irish Presidency will advance work on the Directive at Council level to the greatest extent possible during our Presidency. In addition, the European Commission is considering bringing forward a proposal for a new Directive to consolidate and revise existing Directives in the area of equal treatment between men and women in employment. This proposal would be a co-decision dossier and, if published on time, I would hope to see progress made on it during our Presidency. The objective of the proposed Directive would be to facilitate the operation of gender equality measures by simplifying the rather intricate and complex legislative provisions in place, and making them more accessible to the citizens of Europe.

A range of other measures are also under consideration. These include working with the European Parliament in finalising two funding dossiers, the Daphne II programme on combating violence against women and children and the funding proposal for organisations involved in equality between women and men at European level.

The UN Commission on the Status of Women is presently in session in New York. This year's two themes are the role of men and boys in gender equality and women's equal participation in conflict prevention, conflict

management and conflict resolution and in post-conflict peace-building. The failure to agree conclusions on the issue of violence against women at last year's session places, I believe, an even greater responsibility on the European Union to do everything in its power to facilitate agreement on the issues before us this year. No more than last year, this will not be easy. However, Ireland will endeavour to agree and advocate a European Union position on the two themes. Later this month, on 25 and 26 March, the first Annual Report on Gender Equality in the EU will be presented by the Commission to the European Council when the Heads of State and Government meet in Brussels. Ireland sees this as a major development which will underpin the efforts being made across the Union to advance the cause of equality.

The promotion of equality and combating discrimination are key activities in government programmes across Europe. Equality legislation and a properly resourced equality infrastructure are essential pillars of the equality framework. We must seek to build on this framework through the work of equality bodies such as those participating in this event today and through the cohesive approach which the network of equality bodies brings to bear. In this way we can ensure that the principles of equality are planted and nourished at the level of the citizen. I commend the Equality Authority, and its Chief Executive Officer, Niall Crowley, who invited me here today. The Equality Authority, to my mind is a good model for the accession countries to follow in establishing their legal and infrastructural framework for equality. I wish you well in your continued work and I thank you for inviting me here today.

EU ANTI-DISCRIMINATION POLICY

BARBARA NOLAN, HEAD OF UNIT, ANTI-DISCRIMINATION,
FUNDAMENTAL SOCIAL RIGHTS AND CIVIL SOCIETY, EUROPEAN COMMISSION

Minister, Ladies and Gentlemen.
I am delighted to have been invited to speak to this conference on behalf of the European Commission. Particularly so as the trans-national project on exchanging experience and best practice among the independent specialised bodies is funded by the European Community Action Programme to combat discrimination.

I would like to thank The Equality Authority and Niall Crowley in particular for the taking the initiative to link the meeting of the network of independent bodies with this broader Irish Presidency event to highlight Europe's contribution to promoting equal treatment and fighting discrimination.

The European Commission is convinced that the independent bodies designated by the Member States to promote equal treatment will be the linchpin between EU anti-discrimination legislation and its effective implementation. There is no point in having strong and innovative laws on paper if they are not known about, understood and enforced on the ground.

I would briefly like to provide you with some information about what the European Union is doing to promote equality and combat discrimination. I will start off with a brief history of the fight against discrimination at the EU level, followed by an outline of the quantum leap in this area with the adoption of the Amsterdam Treaty and new powers it conferred. I will conclude with an indication of prospects for further action and the development of a new agenda in the non-discrimination field at the European level.

History
Action to promote equality between **women and men** dates back to the creation of the European Economic Community in 1957. This has resulted in the development of a solid, well established body of law in this area. The principle of equal treatment between **nationals** of the Member States was also established during this early period of European construction. Since the 1970s, the EU has developed a number of initiatives to promote the integration of different groups into the labour market and to combat social exclusion.

The European Social Fund, which currently accounts for around 10% of the EU budget, is one important instrument. Ireland has been a major beneficiary of this fund - more than 1.5 million people were trained in the last Structural Funds programming period 1994-99. These have particularly included women, young people and those with disabilities, the long-term unemployed and the low-qualified.

It was not until the mid 1990s, however, that a consensus emerged concerning the need for the European Union to promote equal treatment and to tackle discrimination on a wider range of grounds. The debate was largely driven by a broad coalition of civil society organisations representing different groups – women, ethnic minorities, older people and those with disabilities, gays and lesbians - as well as the European Parliament.

The result of this process was the inclusion of a new Article in the EC Treaty, following the entry into force of the 1997 Amsterdam Treaty. Article 13 empowers the Community to take action to deal with discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability and sexual orientation.

The adoption of Article 13 reflected a growing recognition of the need to develop a coherent and concerted approach at EU level towards the fight against discrimination. It has radically changed the way the EU looks at questions of equality and anti-discrimination.

Anti-discrimination package
At the end of 1999, the European Commission came forward with proposals to put into effect the new powers set out in Article 13. This led to the adoption by the Council in record time one year later of two pieces of legislation (Directives) and a Decision establishing a Community action programme to combat discrimination.

The first Directive – **Racial Equality Directive** - bans direct and indirect discrimination, as well as harassment, on grounds of racial or ethnic origin. It covers employment, training, education, social security, healthcare, housing and access to goods and services.

The second Directive – **Employment Equality Directive** - prohibits discrimination in employment and occupation. It deals with direct and indirect discrimination, as well as harassment, on the grounds of religion or belief, disability, age and sexual orientation. It also includes important provisions requiring employers to adapt their workplaces to accommodate the needs of people with disabilities.

The motivation or basic principle underlying the directives is quite simple: **people, whatever their personal characteristics, are entitled to be treated equally and fairly**. This applies, for example, when they apply for jobs, seek promotion etc. This is a fundamental right which must be respected in order to maintain equality of opportunity and ensure that everyone can realise his or her full potential.

These new rules were adopted unanimously by Member States three years ago – something which is quite difficult to believe in the current political climate in the EU. They are designed to ensure that everyone in the EU, wherever they live, should be guaranteed effective legal protection against discrimination. So we now have minimum standards Europe-wide and a legal framework which is one of the most advanced in the world. Of course, Member States are free to introduce or maintain legislation more favourable to the principle of equal treatment – but they cannot provide for less than the level of protection granted under the Directives.

The deadlines for putting these two pieces of Community legislation into national law have now passed (July and December 2003). It is worrying that despite having had three years to transpose the directives, many Member States (including Ireland which had only a few small though important adjustments to make to national legislation) have failed to meet the deadlines. The situation is not much better for the 10 accession countries due to join the EU on 1 May.

The European Commission is taking the necessary steps (including legal action) in order to ensure that all Member States (current and future) transpose and implement the Directives correctly.

But, it is clear that legislation alone is not sufficient to tackle discrimination. Take for example the experience from the gender equality field, where there is still a gender pay gap of some 20% despite legislation on equal pay since the 1970s.

Changes to attitudes and behaviour require sustained effort and action to back up the legislation with concrete measures. This is why the two anti-discrimination Directives are backed up by a €100 million Community action programme to combat discrimination.

The objectives of the programme reflect the horizontal integrated approach to anti-discrimination policy. This means that wherever possible, we have tried to look at discrimination on the basis of the various grounds together, rather than separately.

Three years after its launch in 2001, the programme has already made a valuable contribution to the efforts of the EU and Member States to tackle discrimination. It has allowed us to survey public opinion. In a poll carried out by the Commission last year, we were encouraged to find that over 80% of EU citizens think that it is "always wrong" to treat people differently on the basis of their racial or ethnic origin, religion or belief, age, disability or sexual orientation. Though this same survey showed us that most Europeans would not know what to do if they were faced with discrimination.

The programme has allowed us to study and compare policies and programmes in different Member States. For example, we have looked at the way that equality bodies work and tried to provide models for those Member States who have to set up such bodies from scratch or adapt existing bodies. We will shortly be publishing a study on the use of equality provisions in public procurement. We have also begun working with national authorities to see how we can improve data collection in this area – as the lack of data can, as many of you will be aware, severely hamper our efforts to measure the extent of discrimination and develop the right policy responses.

The action programme has allowed a range of actors to work together and to exchange experiences at the European level. These have included: national, regional and local authorities; NGOs; the project we have here today on equality bodies; trade unions; the media etc. These actors have been looking at themes such as access to public services (health care, education, housing), community policing and the portrayal of minority groups in the media.

And finally, the programme has helped to raise awareness of the requirements of anti-discrimination legislation and of the positive benefits of diversity. In particular, we have launched a 5-year awareness-raising campaign "For Diversity – Against Discrimination" targeted initially at employers and employees.

The two Directives and the action programme form part of the EU's broader strategy for combating discrimination and promoting the integration of disadvantaged groups. Other important elements of this strategy are the processes we have for coordinating Member States' policies on employment and social inclusion, where we have encouraged national authorities to step up their efforts and to set clear targets and indicators for people at a disadvantage.

Future developments: Green Paper

European legislation has significantly raised the level of protection against discrimination across the EU and has contributed to the development of standards in other international fora such as the Council of Europe and the United Nations. It has acted as a catalyst for the development of a more coherent, rights-based approach to equality and non-discrimination. Support from the EU has also helped to raise awareness and to reinforce the capacity of public authorities and civil society to take action against discrimination.

However, further efforts will be needed to ensure that the principle of non-discrimination is implemented effectively across the EU. Discrimination continues to be a daily reality for millions of people who live and work in the EU.

In addition, new challenges have emerged since the adoption of the current instruments for combating discrimination at the European level. For example, the enlargement of the Union will bring a new dimension to the issue given the scale and degree of discrimination against the Roma population.

With this in mind, the European Commission considers that the time is right to take stock of what has been achieved over the past years to combat discrimination, and to examine new challenges that have emerged in recent years, including those linked to enlargement, with a view to developing a new agenda for future policy development in the field. So we will launch a major public consultation exercise this coming April to help shape the EU's future equal treatment and anti-discrimination agenda. This will be done by way of a Green Paper which will solicit responses from interested parties. We also intend to have an on-line questionnaire to facilitate reactions from a wider section of the population than that which usually has the capacity to provide input into Community policy. We intend to ask questions such as:
Has European anti-discrimination legislation made a real difference to people's lives? Is it being properly implemented and enforced? Do people know their rights? Do we need more European legislation? What other measures can the EU develop?
I am sure that many of you at this conference have views on these issues and I encourage you to participate in this consultation exercise.

Conclusion
Ladies and Gentlemen:
Equality is simple in theory but delivering it is complex in practice. I am sure that your discussions today will mark an important step forward as regards the strategic enforcement of the EU anti-discrimination directives. Please be assured of the European Commission's continuing support for your efforts. Thank you for your attention.

INDEPENDENT SPECIALISED EQUALITY BODIES CONTRIBUTING AT EUROPEAN UNION LEVEL

PRESENTATION BY NIALL CROWLEY, CHIEF EXECUTIVE OFFICER, EQUALITY AUTHORITY

INTRODUCTION

Making a contribution at European Union level poses significant challenges for independent specialised equality bodies. We are challenged in relation to:

- The roles that we define for ourselves and the extent to which we are willing and able to commit our resources in contributing to policy formation.
- The co-operation that we commit to across the Member States of the European Union. Contributing at European Union level cannot be done effectively without pooling agendas, mandates and resources in a co-operative endeavour.
- The engagement that we develop with the institutions of the European Union and the resources that we commit to ensure a quality of engagement with a capacity for successful outcomes.

The Equality Authority is a relatively new organisation. We were established in late 1999 to implement new and ambitious equality legislation. Inevitably our initial priorities lay in working at national, regional and local level here in Ireland. However, with time, our focus on making a contribution at European Union Level has grown.

We have from the start included a focus on policy formation in our work. This was established in our first Strategic Plan where we committed ourselves to "resource an equality focus within policy formation". In this commitment we identified a range of policy arenas at national and at EU level within which we would seek to support this equality focus.

We have been concerned to develop a co-operation with similar equality bodies. This began with strong links and joint work with the Equality Commission for Northern Ireland. It involved developing the Joint Equality and Human Rights Forum which brings together the human rights and equality bodies in Ireland, Northern Ireland and Britain. It now includes involvement in this network of specialised equality bodies that is meeting here today and tomorrow.

We have committed resources to an engagement with the European Union institutions. This engagement has included membership of the Advisory Committee on Equal Opportunities between Women and Men, participation as the National Focal Point for the RAXEN network of the European Union Monitoring Centre on Racism and Xenophobia in a joint venture with the National Consultative Committee on Racism and Interculturalism, and making presentations at various European Union conferences on equality issues across the various member states and accession states.

This work is resource intensive. It is carried out in context of significant demand on our resources at national level. Yet we were able to define this work as one of our priorities right from the time of our establishment. This reflects an analysis of the importance of this work given:

- The capacity demonstrated by European Union legislation to influence, shape and develop our equality legislation at member state level.
- The role the European Union funding has played and will continue to play in our development strategies as a society.

- The contribution European Union policy making and target setting has made to policy priorities established in Ireland and to the equality dimension to these policy priorities.
- The capacity of the European Union context to influence and shape administrative styles and practices in the public sector.
- The exchange of ideas, of understandings and of good practice that is possible between organisations with similar functions operating in different jurisdictions across the European Union.

The rationale for this work also rests in the broad mandate we have been accorded under our equality legislation. This mandate is to combat discrimination and to promote equality in the areas covered by the legislation. Policy formation provides the key context within which we seek to fulfil our mandate - both at EU and at national level. Policy formation without an equality focus means that significant barriers emerge to block the exercise of our mandate. An integral part of promoting equality across the nine grounds is this work of supporting an equality focus in policy formation.

In this paper I will explore some starting points for a debate on making a contribution at European Union level. I will describe some of our current experiences. Finally I will seek to establish guiding principles and future ambitions for enhancing and further developing this contribution.

Starting Points

Three key starting points for this debate need to be the nature of the contribution we seek to make, the type of co-operation required for this contribution and the type of engagement needed with European Union institutions.

Policy formation will inevitably be the focus for our contribution at European Union level. In this focus policy encompasses legislation, policies and funding programmes. This is an area that we have a contribution to make out of our experience in:
- Implementing equality legislation.
- Building a knowledge base on equality issues.
- Developing guidance on good practice in promoting equality, accommodating diversity and preventing discrimination.

It is a contribution that is not based on the representation of interests but on the accumulation of an expertise that is often unique and a source of particular insight.

Contributing to policy formation requires a focus on the full policy cycle which encompasses:
- Policy thinking or the ideas, analysis and experience that shapes policy and how policy is developed.
- Policy making which is the more traditional focus for those seeking to support policy formation.
- Policy implementation which is the most neglected dimension to policy formation and which, in the Irish context, is where many of the most difficult barriers to policies achieving their objectives can be found.

Policy thinking focuses attention on the understanding of equality that needs to be at the heart of policy making. This is an area that requires significant work and consensus building.

In an Irish context the social partners have engaged in wide ranging consensus building on this issue. The social partners include business interests, trade unions, farming interests and the community and voluntary sector. In two separate reports agreed by the social partners they highlighted "that equality objectives should focus on:

- Seeking to achieve equality of access, participation and outcomes in relation to employment and non employment areas".

They contrasted this with a focus on equality of opportunity which, while "a vital first step that advances the notion of equal rights", was limited in that the "removal of legal and quasi-legal barriers will not of itself guarantee any more substantive form of equality for the target group".

In a second report they highlighted the need for a holistic focus on equality embracing interlinked objectives of:
- "Redistribution whereby the objective is to maximise human welfare and share benefits equality.
- Recognition whereby the objective is to maximise visibility, (and to) value and accommodate diversity.
- Representation whereby the objective is to maximise participation in decision making.
- Respect whereby the objective is to assign merit and reinforce the values that underpin the interdependence and mutual support aspects of human welfare".

This framework has been adopted and developed by the Equality Authority in our work on policy formation. It is a framework that could usefully become central to all policy thinking.

Policy implementation focuses attention on the fact that contributing to policy formation at European level also requires work and initiative at national level. Policy implementation happens at member state level. The quality of policy made at European Union level is only as good as the quality of implementation of that policy at member state level. Independent specialised equality bodies are well placed to contribute to an effective equality focus in policy formation in their capacity to contribute to policy thinking and policy making at European Union level and to policy implementation and new policy thinking out of this experience at member state level.

The second key starting point is that of co-operation. Transnational co-operation is a significant feature of much European Union funding at member state level. There has been a growing focus on the content and output of this co-operation but less on the nature of this co-operation. Yet it is in looking to the nature of the co-operation that we can identify what ambition is involved, what challenges might be faced and ultimately what can be achieved.

Three levels of co-operation can be identified. The most basic is ad hoc co-operation where organisations network, get to know each other and exchange information. At a more advanced level is instrumental co-operation where organisations work together for a common purpose but where the co-operation is funding led and remains ad hoc and short term. At a more ambitious level is strategic co-operation. This is characterised by shared vision, continuity and long term direction. Different organisational identities merge and intersect and mutually agreed agendas are developed and progressed.

Making a contribution at European Union level challenges us to raise the level and quality of our co-operation arrangements. Lasting frameworks for co-operation require that we move from ad hoc or instrumental arrangements to a more strategic approach. This will need new structures and resources alongside a more developed consensus around shared vision and direction.

A final key starting point is in relation to the engagement with European Institutions. In the Irish context the model of engagement developed with the statutory sector in policy formation rests on partnership and participation. This model has evolved out of our approach to social partnership through which a variety of structures for engagement have been developed many of which have included the Equality Authority.

This focus on engagement poses challenges to the institutions at European Union level. An effective engagement with the equality bodies needs to be formal and structured rather than ad hoc and left to chance encounter. New structures will be required to respond to the growth in the number of equality bodies across an enlarged European Union, to secure their contribution to European Union policy formation and to respond to the potential to be gained from the enhanced co-operation between these bodies.

Current Experience
I want to turn now to our current experience of seeking to contribute at European Union level and to highlight some issues in relation to engagement, co-operation and policy formation.

In terms of engagement with the European Union our most significant involvement to date has been with the Advisory Committee on Equal Opportunities between Women and Men. The Advisory Committee was set up in 1982 and given an amended mandate in 1995. Its mandate is to assist the Commission in formulating and implementing the activity of the European Union aimed at promoting equal opportunities for women and men. It involves representatives of relevant government Departments and of relevant specialised equality bodies from each member state.

The Advisory Committee works principally through the preparation of opinions to the Commission on issues of relevance to current policy formation. Recent opinions address the:

- European Employment Strategy.
- Gender dimension to social inclusion.
- Gender mainstreaming in EU policies.
- Gender budgeting.
- Convention on the Future of Europe.
- Gender dimension in the European Structural Funds.
- New Directive on Sex Discrimination.
- Recasting of the Gender equality Directives.

This body of work reflects the breadth of the field of policy formation at EU level where an equality focus has been prioritised. The opinions offer an opportunity to contribute to the content of policy making alongside putting forward a consistent and coherent set of ideas to assist and inform new policy thinking. The work has been to a high quality and its impact is evident. The advisory committee does face new challenges with enlargement in terms of managing the increased numbers and building an effective co-operation across a wider range of traditions. It also faces new challenges as the Commission works to streamline its structures.

At another level we are engaged with the European Union Monitoring Centre on Racism and Xenophobia. This is a very different experience and highlights the hierarchy and fragmentation that exists between the different grounds covered by the new Directives. The Monitoring Centre has created a network called RAXEN to assist

it in gathering data on racism and its impact across the member states. There is a national focal point to collate information to agreed themes in each member state - a role we play here in Ireland jointly with the National Consultative Committee on Racism and Interculturalism.

Finally there are European Union conferences on equality issues. These can be valuable opportunities to contribute to policy thinking. We have been afforded good platforms to put forward some of ideas that we have developed out of our work here.

Turning them into the issue of co-operation I would highlight the model we have been developing in our co-operation with the Equality Commission for Northern Ireland. In this co-operation we have sought to move beyond ad hoc and instrumental to more strategic forms of co-operation.

A starting point in our co-operation related to our shared vision as specialised equality bodies with a mandate covering a broad range of grounds. We jointly developed a research project entitled "Charting the Equality Agenda - A Coherent Framework for Equality Strategies in Ireland North and South". This usefully established:

- The roots of each organisation in the Belfast Multi Party Peace Agreement.
- The nature of the equality we might seek as organisations.
- Methodologies and approaches to managing a multi-ground equality agenda.

This has provided a template for our ongoing co-operation and indeed for our work together within the wider co-operation with equality and human rights bodies in Britain, Northern Ireland and Ireland.

The strategic nature of our co-operation is also evident in structures. We convene a joint Board Meeting on an annual basis. This meeting explores equality issues and strategies of shared concern and initiates a series of joint ventures. A working group to progress this co-operation involves the chairpersons and chief executives of both organisations.

The network that is meeting here today and tomorrow is another important current experience of co-operation. It is the key foundation stone for specialised equality bodies to make their contribution at European Union level.

Participation in the network has been an important and positive experience. It provides a space to develop necessary contacts and links, to share ideas and approaches and to build a common purpose around the transposition of the 'Race' Directive. We are challenged of course to build on this foundation and to develop a shared vision, a broader agenda and a wider membership so that our co-operation can be more at a strategic level.

Finally in relation to policy formation at European Union level our most significant current experiences relate to the policy implementation point in the policy cycle. Implementation of policy made at the European Union level has provided valuable opportunities to promote equality and to combat discrimination. These include work on

- The investment of Structural Funds in Ireland. The Structural Fund regulations contain an important obligation in relation to gender mainstreaming. In Ireland a further horizontal principle has been established in relation to including people with disabilities, Travellers, refugees/minority ethnic people and older people. We have played a specific role resourcing this new horizontal principle in human resources and employment development measures through research, data initiatives and developing resources for programme providers. We participate

on all monitoring committees providing an equality perspective on productive investment, economic and social infrastructure, human resource development and regional development. We also co-chair the National Development Plan/Community Support Framework (NDP/CSF) Equal Opportunities and Social Inclusion Co-ordinating Committee.

- The National Employment Action Plan which forms part of the European Employment Strategy. The Strategy makes important reference to gender mainstreaming, immigration, active ageing and people with disabilities. It specifically seeks to support integration and combat discrimination in the labour market focusing on disability, ethnicity, age and family situation issues.

  We supported an equality perspective in the current Plan providing input on how the measures set out in the Plan could include a focus on diversity. We are currently working with the Department of Enterprise, Trade and Employment on developing an approach to equality proofing the Plan for its capacity to benefit the nine grounds covered under our equality legislation.

- The National Action Plan on Social Inclusion which forms part of the European social inclusion strategy. The European Union Guidelines include a valuable focus on men and women, people with disabilities and migrants. We developed an innovative approach to equality proofing the Plan in partnership with the Office of Social Inclusion which was responsible for the Plan and with organisations from across the nine grounds. This found favourable mention in the Joint Inclusion Report and we are currently working to further develop this approach.

- The EQUAL Community Initiative is another key area of policy implementation that we have been involved in. EQUAL funds development partnerships across the European Union to identify and address fundamental forms of inequality and discrimination in the labour market and to develop new and innovative policies and practices on these issues.

  Mainstreaming is a key challenge for the EQUAL Community Initiative so that the policy and practice learning can be identified and applied out of the innovation of the pilot projects. In Ireland the Equality Authority has played a mainstreaming role through supporting:

- a dialogue on the learning among policy makers;
- an awareness of the learning among decision makers;
- a capacity within organisations to build an equality focus into their work so that they are in a position to learn from EQUAL.

Principles and Ambitions for the Future

It is out of this experience that we seek to further develop our contribution at European Union level to promoting equality and combating discrimination. In establishing and realising such an ambition we need to learn from experience and to establish guiding principles to enable this contribution and to identify key developments around which to build an enhanced contribution.

Four guiding principles can be identified - principles of integration, being strategic, mainstreaming and partnership.

1. Integration refers to the need for a multiground approach to co-operation, engagement with European Union institutions and policy formation. Article 13 already establishes the grounds in terms of gender, disability, age, sexual orientation, race and religion. An integrated approach means removing hierarchies between the grounds. It does not preclude a focus on individual grounds but prioritises strategies with a capacity to bring forward all grounds simultaneously. It allows a focus on the many people present at the intersections between the grounds, such as minority ethnic people with disabilities, older women and so on. Finally it ensures an administrative simplicity in the combat of discrimination and the promotion of equality.
2. Strategic refers to the nature of the co-operation needed between specialised equality bodies for an effective contribution to be made at European Union level. To build a strategic level of co-operation will require significant work in expanding the network we are building across all member states and all the grounds. It challenges us to establish a shared vision and to identify where our common purpose at the European Union level lies.
3. Mainstreaming refers to an engagement with European Union institutions across the policy spectrum where an equality focus needs to be prioritised. It refers to an approach to policy formation that could usefully learn from and be modelled on the experience in seeking equal opportunities between women and men. As such an equality focus seeks change in institutional practices, resource allocations and the content of policy so that a new experience and situation can emerge for those seeking equality.
4. Partnership refers to the process of engagement with the European Institutions. This is not a process of lobbying or negotiation. It is a process of dialogue and bringing a shared expertise to a problem solving context.

Future ambitions can be based on these four guiding principles. They will require a number of practical developments including:

1. The creation of new structures at European Union level to facilitate this partnership dialogue. At the heart of these could usefully stand an Advisory Committee to the Commission on Promoting Equality and Combating Discrimination.
2. The emergence of new resources for co-operation at European Union level. This would allow an approach to co-operation between specialised equality bodies to be characterised by continuity, commitment and sense of direction.
3. The development of a new basis for policy making based on a multi-ground equality mainstreaming strategy. This could usefully emerge in new regulations to govern the Structural Funds and in the Road Map to a streamlined process of co-ordination in the area of social protection and inclusion policies which is currently being developed.

This is an important moment of change for the European Union with enlargement, with the work on a new constitution and with new Equality Directives. It is a moment to further enhance a multi-ground equality focus at the heart of the European project. We all have a contribution to make to this and I look forward to working on this new agenda.

COMMENTS AND DISCUSSION

POINTS RAISED BY PARTICIPANTS AT THE DUBLIN MEETING

- It is important that a specialised body with powers to assist claimants can set its own case selection criteria so that it can select cases strategically.

- Selection criteria for supporting a case may have to include that the case has high chances of success. To determine this is a challenge for specialised bodies, and considerable investigation into the case is required even to be able to get to the point at which this assessment can be made. There is always a risk that cases that appear to be strategically good to develop the law end up the subject of bad decisions.

- Refusing legal assistance to complainants has a very human dimension which can be extremely difficult for equality bodies. Bodies normally encourage refused complainants to take their case to another competent organisation or even pursue the case themselves if no formal legal representation is required for the proceedings in question.

- The Commission for Racial Equality (CRE) intends to develop its policy on alternate dispute resolution (ADR) and consider referring complainants to such procedures if they have to refuse the case. The CRE is also working with trade unions in Great Britain, which have accepted cases referred to them by the CRE. The CRE is also looking at setting up an interactive website for complainants to refer to.

- The CRE has the power to bring cases in its own name in the case of discriminatory advertisements and in the case of instruction to discriminate. It would like to see an extension of this power to allow any cases of alleged discrimination to be brought in the CRE's name. Where the current power has been used, it has generally been used in conjunction with an individual case, for example in pursuing a case against a pub for displaying a sign that reads 'No Gypsies', the CRE would challenge the advert in its own name in the same case as an individual victim complains of racial discrimination. Nowadays discriminatory adverts in the UK are often positive action measures – usually in recruitment - that have gone wrong. In such cases the CRE will work with the employer to improve its positive action measures.

- Where a specialised body for strategic reasons would like to see certain cases brought by certain communities, they may have to encourage victims to come forward with their case. At the same time they must avoid raising expectations among the public that all cases can be dealt with by the specialised body. It is therefore crucial to be clear to the public what the body can and cannot do, and to develop networks of other actors that can be called upon to assist in the implementation of equality principles.

- Whereas a balance between reacting to complaints of inequalities and instigating change in a proactive manner is advocated as a highly effective way of fulfilling a specialised body's mandate, some bodies may find they are limited by the law as to the extent they can do this. If a body is bound by law to investigate / take on every complaint it receives, the resources that can be dedicated to proactive work will be limited.

- The Romanian National Council for Combating Discrimination is bound by law to deal with all cases it receives, and after two years of operation it receives a lot of cases. A National Strategic Plan has been launched and the establishment of a legal aid body to give advice to victims and to which the National Council could refer cases is being considered.

- In the Netherlands enforcement is currently largely based on individual complaints on which the Equal Treatment Commission (ETC) issues its opinion. Indeed the Commission must currently hear and decide on

every case brought that is within its statutory competency. That competency relates to employment, the provision of goods and services and, with regard to race, social protection including social advantages and social security. In general Dutch equal treatment law is mainly focused on the private sector; it deals with horizontal relationships between private parties. The public sector belongs to the Commission's competency only when acting in its capacity as employer or provider of goods and services. Statutory exceptions are made for cases that are evidently unfounded, cases in which the interest of the complainant is minor and cases where the alleged discrimination took place so long ago that it has become impossible to investigate it properly. The ETC seeks to be accessible and therefore is open to all complainants. It will not readily judge the interest too small despite calls from some commentators for the ETC to refuse cases that are of a trivial nature. Every large city has a (non-governmental) anti-discrimination bureau, which brings cases before the Equal Treatment Commission. These are largely made up of volunteers and are subsidised by the State. The Equal Treatment Commission has effective legal instruments for its investigations: everyone is obliged to provide all information and documents the Commission requests, and experts and witnesses can be heard and be obliged to appear. Non-cooperation is a criminal offence. The Commission does have formal investigation powers (to carry out investigations on its own initiative when there are suspicions of systemic discrimination) but these are rarely used due to the requirement that the Commission must address a whole sector and cannot investigate a single company or public body. The Dutch law is currently being evaluated and changes to the rules around investigations are expected. The Dutch Equal Treatment Commission also has the power to bring cases before the courts in its own name to enforce its opinions, although it does not exercise this function due to the inherent tension between acting as a quasi-judicial body and appearing as a party before the courts.

- From its establishment, the Irish Human Rights Commission wanted to set out clearly its policy for taking on cases so as to avoid being inundated with cases it could not handle. It can give advice to individual victims and the law lays down mandatory criteria for selecting cases to support. The Commission has also established discretionary criteria in its Strategic Plan. The onus is on the complainant to provide as much information as possible on his/her case on the basis of which the Commission will make a decision to support it or not. Under the legislation, the Commission can bring cases in its own name, assist and represent individual victims and it can file amicus curiae briefs (which is less expensive than the other options).

- In Hungary the law defines the cases in which the Minorities' Ombudsman can refuse to take the case, that is, if it evidently unfounded or it is a repeated case without justification. Where the case is not within the Ombudsman's remit the office will try to refer complainants to another body which can deal with their complaint.

- The Danish Complaints Committee for Ethnic Equal Treatment is a new committee within the Danish Institute for Human Rights and for the moment gives its opinion on every case it receives and for which it is competent. Taking all cases is currently manageable but it recognises that in time a much heavier caseload could change this. A significant difficulty is that the Committee does not have the power to interview witnesses, making it difficult to prove discrimination took place. Only where the Committee makes a finding of discrimination can it exercise its power to recommend that complainants receive legal aid to pursue their complaints in the courts. The Committee also has a duty to promote equality which allows it to investigate complaints of discrimination.

- The Swedish Ombudsman against Ethnic Discrimination (DO) undertakes investigations, mediation, and litigation, but the legislation also emphasises that lawyers work proactively, that the work of the DO is policy orientated and that it should undertake education work. According to the Swedish legislation, the priority of

the DO should be first to reach an out of court settlement and as a result very few cases have been brought to court. Settlements are not however subject to confidentiality and are published on the Ombudsman's website.

- Mediation can be useful where the plaintiff expects to continue his/her relationship with the defendant, as mediation puts less strain on such relationships than litigation, but in terms of strategic enforcement its value is limited by the fact cases and outcomes are often confidential which restricts the impact it can have in society more broadly. It was noted that in the USA to counter this disadvantage following a settlement courts can nevertheless go on to make a ruling on a principle involved ('mootness').

- The Austrian Ombud for Equal Employment Opportunities combines the functions of supporting complainants and promotional work.

- Experience shows that by issuing Codes of Practice, a specialised body may circumvent a large number of complaints, as employers etc. are more likely to take proactive measures on the basis of the Code of Practice. If a Code of Practice is breached, this can in some jurisdictions be used in evidence against the perpetrator of discrimination.

- A good example of proactive enforcement is found in Northern Ireland where all specified public authorities and those private sector employers with 11 or more employees must register with the Equality Commission for Northern Ireland (ECNI). Once registered, they are required to monitor the religious composition of their workforce (Catholic or Protestant) by gender. Under Article 55 of the Fair Employment and Treatment (NI) Order 1998, employers are required to review their workforce composition and recruitment, training and promotion practices at least once every three years. The purpose is to ensure that Catholics and Protestants are enjoying fair participation in employment. If the Article 55 review has identified the absence of fair participation, then affirmative action by the employer may be required. If affirmative action measures are deemed necessary, employers are strongly recommended to set goals and time-tables for participation rates in regard to applicants, appointees, and the overall workforce. If an employer fails to co-operate, the ECNI may issue directions to that effect. In general, however, employer compliance with workforce monitoring has been excellent.

- In many countries a hierarchy of grounds of discrimination can be identified, whether it is for historical or sociological reasons, in law or in practice. This is of major concern to many specialised bodies, for whom the challenge is to ensure that all grounds are treated as equally important. It was recalled that under international law such as the International Covenant on Civil and Political Rights there is no hierarchy of grounds, and the grounds of discrimination are non-exhaustive ('…any other status'). It was noted that the grounds of discrimination are non-exhaustive in the Romanian legislation. Neither is the list of grounds exhaustive in the Dutch Constitution, but the Equal Treatment Commission's competences are in relation to only certain grounds of discrimination.

- A short discussion on proving cases of indirect discrimination heard that the Dutch Equal Treatment Commission relies on the shift of the burden of proof, often using reports from the national statistics office to make the prima facie case. The Irish Equality Authority collects data through a panel of independent consultants which it trains to carry out confidential surveys of e.g. the ethnicity of staff. This information can be held by those carrying out the survey without sharing it with the employer, which allays fears that an employer may misuse such data.

PROGRAMME

THURSDAY 4 MARCH 2004, FRIDAY 5 MARCH 2004

THURSDAY, 4 MARCH 2004

9.00	Partner Meeting
10.30	Tea/Coffee break
11.00	Welcome and introduction to the Conference
11.10	'Strategic Enforcement – from Concept to Practice' Eilis Barry, Legal Advisor, Equality Authority
12.00	Discussion groups to respond to the paper
12.30	Lunch
14.00	Irish EU Presidency Event Keynote presentation on 'Promoting Equality and Combating Discrimination at EU level' Michael Mc Dowell, TD, Minister for Justice, Equality and Law Reform Presentations from Barbara Nolan, Head of the Unit Anti-discrimination, Fundamental Social Rights and Civil Society, DG Employment and Social Affairs, European Commission And Niall Crowley, CEO, Equality Authority
15.30	Tea/Coffee break
16.00	"Positive Duties within a Wider Legal Strategy" Paul O'Neill, Senior Legal Officer, Equality Commission for Northern Ireland
16.45	Discussion groups to respond to the paper
17.30	Close
19.00	Depart for Conference dinner, Malahide Castle, Co. Dublin

FRIDAY, 5 MARCH 2004

9.30	Welcome
9.40	"Inquiries within a wider Legal Strategy" Des Hogan, Senior Caseworker, Irish Human Rights Commission
10.10	"A Legal Strategy to Combine and Coordinate different Tools available" Razia Karim, Head of Legal Policy, Commission for Racial Equality
10.40	Discussion groups to respond to the paper
11.00	Tea/Coffee break
11.30	Workshops to share experiences and dilemmas in pursuing a strategic enforcement approach
12.30	Lunch
14.00	Welcome
14.10	"The Race Directive as a basis for Strategic Enforcement and the Development of Positive Duties" Colm O' Cinneide, Lecturer in Law, University College London
14.50	Discussion groups to respond to the paper
15.15	Closing plenary
16.00	Close of Conference

PARTICIPANTS:

Austria:
Christine Baur, Ombud for Equal Employment Opportunities
Sandra Konstatzky, Ombud for Equal Employment Opportunities

Belgium:
Dirk De Meirleir, Centre for Equal Opportunities and Opposition to Racism

Denmark:
Bjørn Dilou Jacobsen, Danish Institute for Human Rights, Complaints Committee for Ethnic Equal Treatment
Mandana Zarrehparvar, Danish Institute for Human Rights

Hungary:
Eszter Regényi, Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities

Ireland:
Eilis Barry, Equality Authority
Hilkka Becker, Immigrant Council of Ireland
Niall Crowley, Equality Authority
Dave Ellis, Community Legal Resource
Michael Farrell, Michael E. Hanahoe & Co. Solicitors
Liam Herrick, Irish Human Rights Commission
Des Hogan, Irish Human Rights Commission
David Joyce, Irish Traveller Movement (ITM)
Cathal Kelly, Equality Authority
Jason McCabe, Equality Authority
Amanda McCrudden, Equality Authority
Brian Merriman, Equality Authority
Donie O'Shea, National Disability Authority
Philip Watt, National Consultative Committee on Racism and Interculturalism
and Minister for Justice, Equality and Law Reform Michael McDowell T.D.

Italy:
Mario Serio, Italian Ministry for Equal Opportunities

Netherlands:
Edith Brons, Equal Treatment Commission
Anja Pranger, Equal Treatment Commission
Chila M. van der Bas, Equal Treatment Commission
Marcel Zwamborn, Equal Treatment Commission

Poland:
Jolanta Rejniak, Government Plenipotentiary for Equal Status for Women and Men

Romania:
Adrian Vasile Camarasan, National Council for Combating Discrimination
Asztalos Csaba Ferenc, National Council for Combating Discrimination

Spain:
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Carmen Comas-Mata Mira, Office of the Ombudsman

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Migration Policy Group:
Janet Cormack
Jan Niessen

TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION: THE ROLE OF SPECIALISED BODIES

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* ('Framework Directive', prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation) enhance the potential to combat discrimination in the European Union. These compliment the existing legislative programme on sex discrimination, which was most recently added to by *Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.* All EU Member States required legislative change to ensure compliance with these Directives.

Under Article 13 of the Racial Equality Directive, a specialised body (or bodies) must be designated for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies that have a wider brief than racial and ethnic discrimination. Article 8a of Directive 76/207/EEC as amended by Directive 2002/73/EC requires the same in relation to discrimination on the grounds of sex. The bodies' tasks are to provide independent assistance to victims of discrimination, conduct independent surveys on discrimination, and publish independent reports and make recommendations on any issue relating to such discrimination. Many States were thus faced with the challenge either of establishing a completely new body for this purpose, or revising the mandate of an existing specialised body.

The project *Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies* is funded by the European Community Action Programme to Combat Discrimination (2001-2006). It creates a network of specialised bodies with the objective of promoting the uniform interpretation and application of the EC anti-discrimination directives, and of stimulating the dynamic development of equal treatment in EU Member States. It promotes the introduction or maintenance of provisions that are more favourable to the protection of the principle of equal treatment than those laid down in the Directives, as allowed under Article 6(1) of the Racial Equality Directive and Article 8(1) of the Framework Directive. The partners of the project are the Ombud for Equal Employment Opportunities (Austria), the Centre for Equal Opportunities and Opposition to Racism (Belgium), the Equality Authority (Ireland), the Equal Treatment Commission (Netherlands, leading the project), the Ombudsman against Ethnic Discrimination (Sweden), the Commission for Racial Equality (Great Britain), the Equality Commission for Northern Ireland, and the Migration Policy Group (Brussels).

The project provides a platform for promoting the exchange of information, experience and best practice. Specialised bodies from other existing and acceding EU Member States are also participating in the activities of the project.

This is the report of the sixth in a series of 7 experts' meetings conducted under the project, which was hosted by the Equality Authority in Dublin on 4-5 March 2004. The theme of the meeting was *Strategic Enforcement and the EC Equal Treatment Directives.* The five previous publications in this series are *Proving Discrimination, Protection against Discrimination and Gender Equality: how to meet both requirements, Equal Pay and Working Conditions, Discrimination in Working Life – Remedies and Enforcement* and *Combating discrimination in Goods and Services.*

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISME BESTRIJDING
CENTRE POUR L'ÉGALITÉ DES CHANCES ET LA LUTTE CONTRE LE RACISME
MPG
OMBUDSMANNEN MOT ETNISK DISKRIMINERING DO
CGB Commissie Gelijke Behandeling
Equality Commission FOR NORTHERN IRELAND
THE EQUALITY AUTHORITY AN EQUALITY IN A DIVERSE IRELAND
COMMISSION FOR RACIAL EQUALITY
BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT UND GENERATIONEN Anwältin für Gleichbehandlungsfragen