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Equinet Secretariat | Rue Royale 138 | 1000 Brussels | Belgium  
info@equineteurope.org | www.equineteurope.org  
ISBN 978-92-990080-0-3  
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### **Acknowledgements**

Author: Niall Crowley  
Publication Coordinator: Katrine Steinfeld  
Editing: Sarah Cooke O’Dowd



Co-funded by the Rights, Equality and Citizenship Programme of the European Union

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## Executive Summary

**There is a wealth and diversity of endeavour across Europe in relation to provision for and implementation of statutory duties within equal treatment legislation.**

Statutory duties include preventive duties requiring organisations to establish systems and processes to prevent discrimination, institutional duties requiring organisations to establish systems and processes to promote equality for employees and service users, and mainstreaming duties requiring public authorities to have due regard to the need to promote equality in legislating, budgeting, regulating, and policy making.

There is an uneven spread and development of these statutory duties. Their geographical spread is significant but not comprehensive. Their ambition differs in different jurisdictions. A broad diversity of approaches in devising and implementing statutory duties is evident. There remain significant challenges to secure their full and effective implementation. The indicators used in this study to assess the statutory duties are their ambition for equality, the extent of their coverage, their impact and the change they contribute to, effective implementation, and adequate enforcement.

There are exemplar legislative provisions in place in various jurisdictions for preventive duties, institutional duties, and mainstreaming duties. These reflect careful and thorough design and can boast significant achievements in progressing institutional and societal change. Positive impacts are most likely to be reported in jurisdictions where detailed provisions are made in legislation for statutory duties. Concern about the potential complexity attendant on such models is misplaced given the evidence of effective implementation in jurisdictions where such provision has been made.

A core set of well-developed, detailed, and innovative tools are available to duty bearers to enable their compliance with statutory duties. The tools are, however, reported in a small number of specific jurisdictions and merit wider dissemination. Such tools need to match traditions and processes within duty bearer organisations and this emphasises the need for innovation in their design and application.

Statutory duties have been found to contribute to institutional and societal change. At an institutional level, they have made a positive impact on organisational culture, decision-making, consultation mechanisms, and resource allocation. They have enabled more coherent, evidence-based and inclusive policy making. At a societal level, they have contributed to improved outcomes in employment and from service provision.

Poor implementation is linked to a lack of understanding and appreciation of equality more generally among duty bearers who see no added value from implementing the duty. It reflects a lack of skills and awareness to meet the demands of moving to a proactive and systemic approach to equality and non-discrimination and limitations in the supports available to duty bearers. Poor implementation ranges from lack of implementation to formulaic implementation with an emphasis on process rather than outcomes.

Equality bodies are playing key roles in progressing the implementation of statutory duties. These roles include: enforcing statutory duties; building awareness of obligations among duty bearers; stimulating expectations of the general public with regard to statutory duties; setting standards for implementing statutory duties; providing guidance materials;

supporting duty bearers to achieve the standards set; and monitoring the implementation and impact of statutory duties.

**A number of proposals to enable the further development of statutory duties and their potential are made:**

The *European Commission* could further promote good practice among the Member States in legislating for and implementing statutory duties.

**National Governments** could introduce and further develop legislative provision for statutory duties. Such legislation should: encompass all grounds covered under equal treatment legislation; include detailed provisions on the implementation steps required, provide for appropriate and adequate sanctions and stimuli to support implementation; include a clear and explicit role for equality bodies in supporting, guiding, setting binding standards for, and monitoring and enforcing statutory duties; and ensure participation of individuals experiencing inequality and their representative organisations in implementing the statutory duties. Preventive duties addressing equal pay should include requirements to conduct analysis and take action to address pay differentials identified, and should address pay structures and composition.

National Governments could develop structures to coordinate and network duty bearers in order to support more effective implementation of statutory duties. They could take steps to create the conditions for effective implementation of statutory duties by all duty bearers including: developing equality data systems; promoting participative models for implementing statutory duties, providing training and guidance for duty bearers; making expert support available to duty bearers; networking duty bearers for mutual support, and monitoring systems to track the actual impact of policy, plans and legislation over time against predicted or planned impact.

**Public authorities, employers, and service providers** should be encouraged and supported to prepare adequately for the effective implementation of statutory duties by: setting equality objectives; identifying internal responsibility and accountability for implementing the statutory duty; building relationships with organisations representing social groups experiencing inequality; and accessing necessary support and guidance materials and identifying and responding to training needs.

**Equality bodies** could usefully be proactive in promoting the case for the development and effective implementation of statutory duties. They need to develop and disseminate guidance materials, support capacity building for duty bearers, and give direct support to exemplar organisations. They are well placed to set standards for the implementation of statutory duties. They need to monitor and evaluate the implementation and impact of statutory duties.

**Equinet** could continue to stimulate and support equality bodies in their roles under statutory duties through peer learning and in promoting and engaging in debate about statutory duties.

# 1. Introduction

## 1.1 The Research

This study, commissioned by Equinet, the European Network of Equality Bodies, examines and analyses the design and implementation of statutory duties in equal treatment legislation that aim to go beyond a prohibition on discrimination to promote equality. These encompass preventive duties, institutional duties and mainstreaming duties. The study explores and assesses the role of, and engagement by, equality bodies in their implementation. In doing so, it draws from the experience and perspective of equality bodies involved in implementing such statutory duties.

The purpose of the study is to map out and compare these three types of statutory duty in different jurisdictions and to examine their advantages, challenges and possible shortcomings in seeking to secure more equal societies. It is to establish and assess the roles accorded to equality bodies in the implementation of such duties and to advance suggestions for equality bodies to promote their further development and effective implementation.

The drafting of this study involved a literature review, a survey of Equinet members with follow-up exchanges with some of these equality bodies, ongoing dialogue with the Equinet Secretariat, and an exchange with the Executive Board of Equinet.

Twenty one equality bodies from sixteen jurisdictions responded to the survey.<sup>1</sup> Follow-up exchanges were pursued with fifteen equality bodies in fourteen jurisdictions.<sup>2</sup> The contribution of the staff members of all twenty two equality bodies has been central to preparing this report and is much appreciated.

## 1.2 The Report

This report explores international standards for statutory duties. It examines the ways these duties are framed. It establishes the rationale for such an approach to equality and sets out the case for their enactment. It establishes indicators for assessing these duties.

The report then examines the various legal provisions made for statutory duties and establishes a typology for each type of duty. Case studies of the different approaches to providing for statutory duties are included. This legal provision is assessed.

The report examines the implementation of statutory duties in order to identify and explore the different tools that are employed. Case studies of these tools are included. The report then identifies the roles played by equality bodies in implementing statutory duties. It sets out and explores the activities engaged in by equality bodies in this work.

Finally, some conclusions are drawn. Future perspectives are suggested for the further development of statutory duties and for evolving the role of equality bodies.

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<sup>1</sup> Austria (2), Belgium (2), Britain, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Ireland, Finland (2), Hungary (2), Latvia, Lithuania, Northern Ireland, Portugal (2), and Slovak Republic.

<sup>2</sup> Austria, Belgium (2), Britain, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Ireland, Latvia, Lithuania, Northern Ireland, Slovak Republic, and Sweden.



## 2. Statutory Duties

This chapter examines provision in international standards on statutory duties in equal treatment legislation and draws out the implication of such provision. It identifies a typology for these duties. It examines the rationale and case for enacting such duties.

### 2.1 International Standards

European standards for equal treatment legislation and equality bodies are rare. They are limited in scope, hard to enforce, and often dated. However, they do offer important understanding of statutory duties and some stimulus for their enactment. The European Commission has provided some limited focus in the equal treatment Directives. The Council of Europe has made broader provision in the work of the Commissioner for Human Rights and of the European Committee against Racism and Intolerance (ECRI).

#### 2.1.1 *Equal Treatment Directives*

The principle of equal treatment encompasses combating discrimination, eliminating inequalities and promoting equality. The European equal treatment Directives establish a minimum standard for equal treatment legislation at Member State level. They make limited reference to statutory duties. The Gender Equal Treatment Directive relating to employment and occupation is the most developed in this regard.<sup>3</sup>

Article 26 of this Directive points towards the need to prevent discrimination. It provides that, “Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion”. No detail is provided on what such measures might be.

Article 29 points towards the need for a more proactive approach to equality and, specifically, for gender mainstreaming. It provides that, “Member States shall 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 referred to in this Directive”. This gives some limited detail on the action required to be proactive.

The ‘Framework Employment’ (Article 11(2)) and the ‘Race’ (Article 13(2)) Directives make limited reference to the need to prevent discrimination.<sup>4</sup> This is posed in terms of Member States encouraging “the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules” in areas covered by the Directives that fall within the scope of collective bargaining. No detail is provided on what such measures might be.

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<sup>3</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>4</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation & Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

### **2.1.2 Council of Europe – ECRI**

The European Commission against Racism and Intolerance (ECRI) of the Council of Europe have published two General Policy Recommendations that make substantial reference to equal treatment legislation. Both address the need for statutory duties.

The recommendation on legislation to combat racial discrimination makes reference to the need for a duty to prevent discrimination and to promote equality. It states that “the law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions”.<sup>5</sup> It points to the need for detailed requirements in this regard and states that such a duty should be “spelled out as clearly as possible in the law”.

The functions of public authorities would include policy-making, employment and service provision. The recommendation is also clear that “the law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination”.

Some guidance on implementing the duty to promote equality is provided. This could involve public authorities in preparing and implementing “equality programmes”. A role for equality bodies is established. These “equality programmes” would be drawn up with the assistance of an equality body and could be enforced through an equality body. A similar approach could be considered for private sector organisations.

This approach is further elaborated in its recommendation on combating racial discrimination in employment.<sup>6</sup> This recommends a statutory duty on all employers to “promote equality, prevent and eliminate racism, racial discrimination, and racial harassment in employment”. It also recommends that contracting authorities should be permitted to impose sanctions in the public procurement process on operators who have violated non-discrimination obligations.

“Equality programmes” should include “an assessment of the impact of all the authorities’ employment policies and decisions on the promotion of equality and the elimination of racism, racial discrimination and racial harassment”. This impact assessment may require “analysis of good equality data, gathered by a variety of means including consultation with the affected groups”.

### **2.1.3 Council of Europe – Commissioner for Human Rights**

The Commissioner for Human Rights in the Council of Europe recommended that Member States should “implement positive duties under the equal treatment legislation. Public sector organisations should be required to have due regard to equality in carrying out their functions. Private sector organisations should be required to be planned and systematic in their approach to equality”.<sup>7</sup> This encompasses the broad duty to promote equality addressed by ECRI and introduces a further type of statutory duty concerned with

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<sup>5</sup> ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, adopted on 13 December 2002.

<sup>6</sup> ECRI General Policy Recommendation No. 14 on Combating Racism and Racial Discrimination in Employment, adopted on 22 June 2012.

<sup>7</sup> Opinion of the Commissioner for Human Rights on national structures for promoting equality, CommDH(2011)2, Council of Europe, Strasbourg, 21 March 2011.



organisational policies and procedures. Some detail on implementation of this organisational type duty is provided. Planned and systematic approaches to equality should involve “organisations putting in place an equality policy, providing equality training to staff and implementing an equality action plan”.

A broad role for equality bodies, covering both types of statutory duty, is identified in “establishing standards for their implementation, in providing guidance and training to support the implementation of the positive duties and in monitoring their implementation and applying sanctions where the positive duty is not being realised”.

#### **2.1.4 Implications**

European standards in relation to statutory duties provide some insight into the scope of statutory duties that could be provided for under equal treatment legislation. Different types of statutory duties that require measures to prevent discrimination, organisational policies and procedures to promote equality, and a proactive approach to equality are established. However, there is limited detail offered on their design or implementation. A role for equality bodies in their implementation is indicated. No reference is made to sanctions for failure to make provision for these statutory duties.

This has meant that the statutory duties provided for in various European jurisdictions evolved in an organic and uneven manner as needs emerged or demand developed. This enables a rich diversity of provision from which to learn. It should allow a tailoring of statutory duties to local circumstances and traditions. However, action at a European level, such as the further development of current standards, might usefully stimulate and drive a more even spread and uniform quality of such statutory duties in all jurisdictions and could support their more effective implementation.

## **2.2 Typology**

International standards allow for the establishment of a typology of statutory duties. Such a typology could shape any examination of the provisions made in equal treatment legislation and the implementation of these. Three types of statutory duties can be identified from international standards. These are termed preventive duties, institutional duties, and mainstreaming duties for the purpose of this report.

**Preventive duties** are statutory duties on organisations to take measures to prevent discrimination, harassment or sexual harassment in employment or in the provision of good and services. Such duties promote institutional change in requiring organisations to develop internal systemic approaches that create the conditions that prevent, or at least limit, the emergence of incidents of discrimination, harassment and sexual harassment. These statutory duties focus on ensuring non-discrimination and compliance with equal treatment legislation.

**Institutional duties** are statutory duties on organisations to promote equality for employees or for people accessing their services. Institutional duties promote institutional change in requiring internal institutional systems and processes that can promote equality, accommodate diversity and ensure non-discrimination within the organisation. These duties contribute indirectly to societal change with their concern for equality for employees and service-users.

**Mainstreaming duties** are statutory duties on public authorities to have due regard to the need to promote equality in carrying out their functions. Specific attention is given in this study to their functions of legislating, making regulations, budgeting, and policy making. However, such a duty can also encompass their functions as employers, service providers, and procurers of goods and services. Mainstreaming duties promote institutional change in requiring administrative systems and processes that result in legislation, budgets and/or policies to achieve equality outcomes for social groups experiencing inequality. They promote societal change by enhancing the potential for equality outcomes for policy beneficiaries.

Preventive duties can form part of institutional duties in that the focus on promoting equality should include steps to prevent discrimination. However, preventive duties need to be addressed separately given their general nature and their more limited focus on non-discrimination. Institutional duties can form part of mainstreaming duties in that the functions covered by mainstreaming duties usually include the roles of public authorities as employers and service providers as well as their role as policy makers. However, institutional duties need to be addressed separately given the specific provisions involved and given that they can also cover the private sector.<sup>8</sup>

**Table 1: Typology of Statutory Duties**

	<b>Focus</b>	<b>Sector</b>	<b>Equality Ambition</b>	<b>Change Sought</b>
<b>Preventive Duty</b>	Take measures to prevent discrimination	Private Sector and Public Sector	Formal Equality	Institutional
<b>Institutional Duty</b>	Develop systems to promote equality for employees and people using the service	Private Sector and Public Sector	Substantive Equality	Institutional
<b>Mainstreaming Duty</b>	Have due regard to the need to promote equality and combat discrimination in implementing functions	Public Sector	Substantive Equality	Societal and Institutional

## 2.3 Rationale

Statutory duties involve a significant evolution in equal treatment legislation. The Commissioner for Human Rights of the Council of Europe suggested that the inclusion of such statutory duties is part of “a new generation of such legislation (that) is beginning to emerge in response to limitations experienced in the implementation of current and

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<sup>8</sup> This study does not cover positive action measures, which in some jurisdictions can be obligatory, with their focus on achieving full equality in practice, or reasonable accommodation measures, which are a requirement in most jurisdictions, with their focus on making adjustments for diversity, in particular disability.

previous provisions". It is useful to establish a clear rationale for this new generation of equal treatment legislation and to make a strong case for its enactment if a more even spread and uniform quality of statutory duties is to be secured across all jurisdictions.

Equality bodies in some jurisdictions have been key actors in promoting the introduction of statutory duties and driving the emergence of this new generation of equal treatment legislation. Such initiative is viewed as an integral part of the advisory function under their mandate. It reflects a common provision in the establishment of equality bodies that they would monitor the implementation of equal treatment legislation and make recommendations for its improvement as necessary. This work, however, could usefully become more widespread.

Fredman captured the need for this evolution in equal treatment legislation in stating that "the tenacity of gender inequality suggests the need to re-examine the methods used to achieve real and substantive equality between men and women. The traditional approach has been to rely on an individual complaints model of adjudication. But a range of new approaches are emerging, which aim at institutional change through proactive measures to promote equality".<sup>9</sup> She identifies four benefits in this:

- Individuals are relieved of the burden and expense of litigation as the initiative is required of policy makers, employers and service providers.
- Systemic change is advanced rather than ad-hoc change and the institutional and structural causes of inequality can be addressed.
- The need to prove discrimination and find a perpetrator is replaced by a focus on identifying systemic discrimination and creating institutional mechanisms for its elimination.
- The participatory role of civil society is broadened in norm setting and in norm enforcing.

### **2.3.1 Preventive Duties**

Preventive duties, as with all statutory duties, reflect a concern to make equal treatment legislation more effective and to ensure its impact. They require employers and service providers to move away from just reacting to individual incidents of discrimination, harassment and sexual harassment after they happen, to be more proactive in implementing systems and processes to ensure they do not happen in the first place or, at least, that if they do they are reported and action is taken.

These duties compensate for low levels of awareness of rights under equal treatment legislation and the high level of under-reporting that persist and diminish the impact of this legislation. They can address particular provisions in the legislation where enforcement has proven elusive, such as equal pay provisions. Preventive duties also minimise exposure to the risk of being subjected to the harm of discrimination, harassment and sexual harassment.

### **2.3.2 Institutional Duties**

Institutional duties evidence greater ambition than preventive duties in seeking to promote equality, while sharing a concern for institutional change in terms of the systems and

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<sup>9</sup> Fredman S. (2009) Making Equality Effective: The role of proactive measures, European Network of Legal Experts in the Field of Gender Equality, European Commission, Brussels.

processes of organisations. The Commissioner for Human Rights of the Council of Europe identified their capacity to “stimulate change in culture, systems and policies of organisations” alongside the necessary “institutional changes such that equality is advanced, diversity is taken into account and discrimination is prevented within organisations”.<sup>10</sup>

Institutional duties reflect a concern that legislation limited to the prohibition on discrimination is not adequate on its own to secure the elimination of discrimination, let alone the advancement of equality. They contribute to new outcomes for the diversity of employees and service users.

There is a business case for the equality and diversity systems required by institutional duties. Equality and diversity initiatives need to be actively managed if the business benefits that should accrue to the company from diversity and equality are to be realised.<sup>11</sup> The planned and systematic approach to equality and diversity within organisations that results from institutional duties leverages business benefits of increased productivity, greater creativity and reduced absenteeism in terms of employment, as well as expanded customer base and enhanced customer loyalty in terms of service provision.

### **2.3.3 Mainstreaming Duties**

Mainstreaming duties evidence a similar ambition to institutional duties but go further in directly seeking societal change through policy mechanisms that “weave policies of equality and non-discrimination into the fabric of decision-making across all spheres of decision making”.<sup>12</sup> Mainstreaming duties respond to the high levels of discrimination and inequality that persist and continue to diminish society, despite the prohibition on discrimination. They bring a concern for equality and diversity into places that anti-discrimination legislation rarely reaches, what McCrudden calls “the bigger decisions of Government”. They can contribute to advancing equality outcomes for the diversity of policy target groups.

McCrudden suggests that “unless special attention is paid to equality in policy making, it will become too easily submerged in the day-to-day concerns of policy makers who do not view that particular policy preference as central to their concerns. The motivation for mainstreaming fairness and equality lies not only, therefore, in the perception that anti-discrimination law, positive action initiatives, and even traditional methods of Constitutional protection of equality, are limited, but also in the perception that questions of equality and non-discrimination may easily become side-lined. Mainstreaming, by definition, attempts to address this problem of side-lining directly, by requiring all government departments to engage directly with equality issues”.

The European Commission identified benefits to the policy process itself from the equality mainstreaming stimulated by mainstreaming duties in that this:

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<sup>10</sup> Opinion of the Commissioner for human rights on national structures for promoting equality, CommDH(2011)2, Council of Europe, Strasbourg, 21 March 2011.

<sup>11</sup> Monks K., *The Business Impact of Equality and Diversity: The international evidence*, National Centre for Partnership and Performance and the Equality Authority, Dublin, 2007.

<sup>12</sup> McCrudden, C. (1999) *Mainstreaming Equality in the Governance of Northern Ireland*, in Fordham International Law Journal, Volume 22, Issue 4, 1998.

- “Enables public policy to more effectively advance equality and eliminate discrimination in society, in organisations and in public sector programmes;
- Supports better policy development and better policy responses by ensuring that policy meets the needs of people who experience inequality and has a positive impact on them;
- Underpins coherence in the policy process by ensuring that all policies make their appropriate contribution to non-discrimination/equality objectives; and
- Makes policy-making an open and transparent process which contributes to good governance and builds greater support for policies”.<sup>13</sup>

### **2.3.4 Implications**

Equality bodies have an important contribution in securing the enactment of effective and relevant statutory duties. This contribution forms part of their advisory function. In making this contribution they will need to articulate a clear case for their enactment. The elements to frame such a case are already available.

Statutory duties are about achieving change. They secure change for the individual victim of discrimination in shifting responsibility for dealing with this issue to those that have power, such as policy makers, employers, or service providers. They stimulate institutional change in requiring new ways for organisations to conduct their business. New policies, procedures and practices need to be introduced by policy makers, employers, and service providers to comply with these duties. They contribute to societal change in advancing equality and new outcomes for the diversity of policy beneficiaries, employees and service users.

Statutory duties are required to secure and build on the effective implementation of equal treatment legislation and to address the inadequacy of a prohibition on discrimination to achieving the goals that inspired this legislation. Currently, equal treatment legislation is limited by low levels of reporting of discrimination and has been unable to substantially address persistent and high levels of inequality.

Statutory duties are required to pass the initiative to policy makers, employers and service providers to be proactive on equality, diversity and discrimination. They thus contribute to advancing equality outcomes for individuals and groups experiencing inequality. They minimise the risk of harm that people are exposed to from discrimination, sexual harassment and harassment.

Statutory duties stimulate action necessary for organisations to secure the business benefits that have been identified from implementing equality and diversity systems. They enhance the quality and transparency of legislative and policy making processes. They ensure the societal benefits that have been identified in more equal societies.

## **2.4 Assessing Statutory Duties**

The indicators that will be used for this study in assessing the range of statutory duties reported on from across Europe are: the **ambition** for equality that is pursued, the extent of

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<sup>13</sup> Compendium of Practice on Equality/Non-Discrimination Mainstreaming, DG Justice, European Commission, Luxembourg, 2011.

**coverage**, the **impact** and change achieved, effective **implementation**, and adequate **enforcement**.

### *Ambition*

Statutory duties offer the possibility for a new level of ambition for equality and non-discrimination in that they seek to go beyond the prohibition on discrimination in equal treatment legislation. Statutory duties look beyond the ambition for formal equality established in equal treatment legislation. Formal equality is concerned with non-discrimination and equal treatment. It is about not treating people less favourably due to any specific personal characteristics they hold. It merely seeks to ensure that the competition for advantage is governed by fairness. It can and does co-exist with significant levels of inequality.

Statutory duties must reach for a higher level of ambition of seeking to achieve full equality in practice or substantive equality. Substantive equality is based on the goal of eliminating or massively reducing inequalities between and within social groups. It aims to secure new opportunities for members of these social groups and new outcomes in their situation, status, and experience.

In practice, statutory duties differ in the ambition espoused. This can range from an ambition for formal equality to an ambition for substantive equality. Different levels of ambition are evident in the various types of statutory duty. Preventive duties, by definition, hold an ambition close to formal equality, whereas institutional duties and mainstreaming duties aim at substantive equality in seeking to advance equality. However, the level of ambition for equality in institutional duties and mainstreaming duties can likewise vary.

The former Governmental Expert Group of the European Commission identified a useful spectrum of ambition for equality and non-discrimination mainstreaming to:<sup>14</sup>

- Ensure compliance with equal treatment legislation.
- Change the circumstances that act as barriers to the realisation of equality for groups (experiencing inequality and discrimination).
- Ensure that the practical implications of diversity are taken into account.
- Advance equality for groups currently experiencing inequality.
- Foster good relations between groups experiencing inequality and other groups in society.

### *Coverage*

Statutory duties can often involve a choice in the discrimination grounds to be covered. The ground of gender has a head start in that it has provided the learning ground for the development and implementation of statutory duties in many jurisdictions and at European Union level. Some multi-ground statutory duties can cover a restricted list of grounds, whereas others cover the full list of grounds identified in the equal treatment legislation. Choice in this regard can be a matter of meeting specific needs, but is often a matter of

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<sup>14</sup> Good Practice Exchange Seminar on Non-Discrimination Mainstreaming, Governmental Expert Group, European Commission, Finland, 2009.

hierarchy and status. Multi-ground approaches offer the opportunity for comprehensive and integrated approaches to realising the ambition for equality held by the statutory duty.

### *Impact*

Statutory duties are enacted and implemented to achieve change in relation to equality and non-discrimination, whether they are preventive duties, institutional duties, or mainstreaming duties. This encompasses individual change, institutional change, and societal change.

Individual change would be evident in a lower likelihood of experiencing discrimination for individuals from the various social groups experiencing inequality and less pressure to achieve change in their situation through litigation.

Institutional change would be evident in the way in which organisations go about their business of employing people, providing services, and making policy, preparing budgets and drafting legislation. It would be evident in new policies and procedures within the organisation, and more evidence-based and participatory decision-making. It would be visible in an organisational competence to prevent discrimination, accommodate diversity, and advance equality and in an organisational culture that values equality, diversity and non-discrimination.

Societal change would be evident in new outcomes secured by people from groups experiencing inequality as policy beneficiaries and as employees and service users.

### *Implementation*

Implementation is a matter of commitment, motivation, and capacity of duty bearers. Commitment reflects the values prioritised by duty bearers and the understanding of equality, diversity and non-discrimination they might hold. Motivation refers to the manner in which duty bearers might prioritise investing scarce time and resources in implementing statutory duties. Capacity alludes to the technical skills demanded for the effective application of the tools for implementing statutory duties.

Implementation is a matter of expert support for duty bearers. Equality bodies are a key source of guidance, standards, training and advice. Civil society organisations can play valuable roles, in particular those representing social groups that experience inequality.

### *Enforcement*

Sanctions for failure and stimuli for success drive effective implementation of statutory duties. Sanctions for failure to implement the statutory duty need to be designed and applied in a manner that secures compliance with the statutory duty and stimulates commitment and motivation in this regard. They need to be accompanied by accessible procedures through which to bring and resolve complaints of failure to implement statutory duties to the required standard.

Stimuli for successful implementation of statutory duties can include effective implementation of the statutory duty being the gateway for the organisation to access other resources or the use of peer pressure and acknowledgement or some form of naming and



celebrating regime. Sanctions and stimulus require strong standards, effective monitoring, and ready application if they are to make their contribution.

**Table 2: Criteria for Assessment**

	<b>Inquiry</b>
<b>Ambition</b>	What level of ambition shapes the combination of objectives of the statutory duty: compliance, removing barriers to participation, making adjustments for diversity, advancing equality, fostering good relations?
<b>Coverage</b>	How comprehensive is the statutory duty in the range of discrimination grounds covered and the potential for an integrated approach to these grounds?
<b>Impact</b>	What is the impact of the statutory duty on the situation and experience of individuals experiencing discrimination and inequality, on organisational policies and procedures, and on societal outcomes for groups experiencing inequality?
<b>Implementation</b>	Has the statutory duty been designed to secure the necessary commitment, motivation and capacity for implementation?
<b>Enforcement</b>	Is the statutory duty accompanied by appropriate and adequate sanctions and/or stimuli and by sufficient monitoring mechanisms to support effective implementation?

## 3. Design

This chapter examines legal provisions made in relation to statutory duties in jurisdictions from which the equality bodies responded to the survey. The chapter establishes a typology of provision for each type of duty, with case studies of preventive duties, institutional duties, and mainstreaming duties. It then assesses these legal provisions.

### 3.1 Preventive Duties

Preventive duties in equal treatment legislation tend to be of a general nature with a broad focus on preventing discrimination, sexual harassment and harassment. There are more specific preventive duties with a particular focus on the issue of equal pay.

**Table 3: Typology of Preventive Duties**

	Requirement	Examples
<b>General</b>	Broad measures to prevent discrimination, sexual harassment and harassment.	Bulgaria, Croatia, Czech Republic, Estonia, Ireland, and Slovak Republic.
<b>Equal Pay</b>	Specific systems to support compliance with equal pay for work of equal value obligations.	Austria, Britain, Finland, and Sweden.

#### 3.1.1 General Preventive Duties

##### *Introduction*

Explicit preventive duties of a general nature were reported in equal treatment legislation in Bulgaria, Croatia, Czech Republic, Estonia, Ireland and Slovak Republic. These duties are largely uniform in requiring organisations to take unspecified measures to prevent discrimination. They shift responsibility to act from those experiencing discrimination to employers and service providers. They can stimulate the introduction of new organisational policies, procedures and practices on such issues.

Specific mention is made in some instances of employers and education providers. However, given the consistent lack of specificity as to what measures are to be taken on foot of these preventive duties, no typology for these duties can be inferred.

##### *Case.1 Bulgaria*

The Protection Against Discrimination Act 2004 requires employers in all sectors to take effective measures, in cooperation with trade unions, to prevent all forms of discrimination in the workplace. Educational institutions are required to take effective measures to prevent all forms of discrimination by members of the teaching or administrative staff, or by students.

- ⇒ The Act prohibits discrimination on grounds of gender, race, ethnicity, nationality, human genome, citizenship, origin, religion or belief, education, convictions, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status, or any other ground.

- ⇒ There is no specification of the measures required beyond an additional requirement to display the text of the Act where staff can view it.
- ⇒ Failure to comply with these provisions leaves an organisation liable to prosecution for discrimination under the Act. The Commission for Protection against Discrimination has dealt with a small number of such cases.

### *Case.2 Croatia*

The Labour Act, rather than equal treatment legislation, requires public and private sector employers, employing a minimum of twenty employees, to adopt and make publicly available working regulations that include anti-discrimination measures and to appoint a person to deal with workers' complaints of harassment or sexual harassment.

- ⇒ There is a specificity to what is required in that organisations should publish working regulations and appoint a person to deal with complaints.
- ⇒ There are no sanctions associated with this duty. It is explicitly included in the list of regular checks to be conducted by the Labour Inspectorate.

There is a more particular duty in equal treatment legislation that serves a preventive function but falls loosely within the category for being more focused on addressing under-reporting. Organisations and individuals are required to report a reasonable suspicion of discrimination to the Office of the Ombudswoman or a special Ombudsman with the assent of the alleged victim.

- ⇒ The Act covers grounds of race, ethnic affiliation, colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, gender identity, expression, or sexual orientation.
- ⇒ There are no sanctions associated with this duty.

### *Case.3 Czech Republic*

The Anti-Discrimination Act 2008 requires public and private sector employers to adopt measures that create conditions for the effective protection against discrimination.

- ⇒ The Act covers the grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinion.
- ⇒ There is no detail provided on what such measures might involve.
- ⇒ The failure to adopt such measures can be dealt with as a breach of the prohibition on discrimination and a person could, theoretically, take a case to court. However, it is not clear whether the Labour Inspectorate can impose a fine where the employer does not comply.

### *Case.4 Estonia*

Under the Equal Treatment Act, employers are required to take appropriate measures to protect employees from discrimination and to inform employees of their rights and obligations under the Act. Educational and research institutions and other training providers are required to take account of the need to promote equal treatment.

- ⇒ The Act covers the grounds of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability and sexual orientation.
- ⇒ There is no specification of the measures required.

⇒ There are no sanctions in relation to non-compliance with these provisions.

#### *Case.5 Ireland*

The Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2015 allow that, while employers and service providers are vicariously liable for the acts of their employees, it is a defence for them in a case to prove that they took reasonably practicable steps to prevent the person from harassing or sexually harassing the victim. This is a very particular duty and falls loosely within the preventive category.

- ⇒ The Acts cover nine grounds of gender, civil status, family status, age, disability, sexual orientation, race, religion and membership of the Traveller community.
- ⇒ There is no specification of what reasonably practicable steps might be in the Acts. The equality body has prepared a Code of Practice on sexual harassment and harassment in employment that specifies the steps required.
- ⇒ While there are no sanctions, there is an incentive to comply in that compliance serves as a defence in cases under the Acts.<sup>15</sup>

Such provisions are evident in the legislation in many other jurisdictions and is recorded here to provide on such example.

#### *Case.6 Slovak Republic*

The Act on Equal Treatment in Certain Areas and Prohibition of Discrimination 2004 defines that compliance includes the adoption of anti-discrimination measures by all employers and service providers.

- ⇒ The Act prohibits discrimination on the grounds of sex, religion or belief, racial, national or ethnic origin, disability, age and sexual orientation in employment and of sex, racial, national or ethnic origin in the provision of goods and services.
- ⇒ The specific steps required of employers and service providers are not detailed.
- ⇒ Failure to adopt such measures is considered a breach of the principle of equal treatment and general sanctions apply.

#### *Reflection*

The ambition in all these cases is one of formal equality. The preventive duties seek to eliminate discrimination, harassment and sexual harassment in employment, service provision and education provision. This ambition usually covers all grounds addressed in the equal treatment legislation. It seeks compliance with equal treatment legislation and the removal of any barriers posed by discrimination, harassment and sexual harassment for social groups covered.

There is no detail provided in legislation on what measures are required by these preventive duties. There is an implicit concern for institutional change and the introduction of policies, procedures and practices to prevent discrimination, sexual harassment, and harassment from occurring and deal with it effectively when it does.

Sanctions are available for preventive duties as an integral part of the sanctions regime for acts of discrimination. Failure to implement preventive duties can be considered a violation

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<sup>15</sup> Code of Practice on Sexual Harassment and Harassment at Work, Equality Authority (now Irish Human Rights and Equality Commission), given legal effect in Statutory Instrument 'Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002 (S.I. No. 78 of 2002)', Ireland, 2002.

of the act. However, few such cases are reported. In some instances, an incentive underpins these duties in that the duty bearer can make a successful defence in cases of discrimination involving actions by their employees, if they can demonstrate that they have fulfilled these preventive duties.

### **3.1.2 'Pay Gap' Preventive Duties**

#### *Introduction*

A particular and more developed subset of preventive duties relates to equal pay provisions in equal treatment legislation. These have been introduced in Austria, Britain, Finland and Sweden. There have been difficulties in effectively bringing forward cases of discrimination in relation to equal pay. Preventive duties can require action by employers to identify and justify pay differentials and take action to respond to unjustified pay differentials.

#### *Case.1 Austria*

Since 2011, the Equal Treatment Act requires companies with more than 150 employees to compile a report every two years on incomes which is to be analysed with a view to establishing whether or not there are discriminatory gender wage gaps.

- ⇒ The report is to be in an anonymised form and should contain details of:
  - number of women and men assigned to specific employment categories;
  - number of women and men assigned to specific employment category years;
  - the average or median earned income of women and men assigned to particular employment categories and employment category years.
- ⇒ The report is submitted to the works council in the organisation. However, a weakness is identified by the Ombud for Equal Treatment in that the reports are a compilation of figures without analysis of the reasons for pay differences and no requirement to look into the different components of wages.
- ⇒ There are no sanctions associated with this duty. However, a works council or individual employee can seek preparation and submission of this report through the Courts. However, no claims have been made in relation to this duty, despite a significant pay gap at national level.

#### *Case.2 Britain*

The Equality Act 2010 provided for Government to make regulations requiring private sector employers, with at least 250 employees, to publish pay gap information in order to establish if there are differences in pay between women and men employees. The Small Business, Enterprise and Employment Act 2015 committed the Secretary of State to make regulations in relation to these requirements by 26<sup>th</sup> March 2016. Draft regulations have been consulted on but have yet to be finalised. These draft regulations require that:

- ⇒ Private sector employers with 250 or more employees must publish information relating to the difference in pay between men and women employees and provide the number of men and women employed in quartile pay bands.
- ⇒ The information should include differences in mean pay, median pay and mean bonus pay, during the pay period, between relevant men and women employees.
- ⇒ Pay covers basic pay, paid leave, maternity pay, sick pay, area allowances, shift premium pay, bonus pay and other pay (including car allowances paid through the payroll, on call and standby allowances, clothing, first aider or fire warden

allowances) but does not include pay for a different pay period, overtime pay, expenses, the value of salary sacrifice schemes, benefits in kind, redundancy pay, arrears of pay and tax credits.

⇒ The information is to be retained by the employer for 3 years.

The Equality and Human Rights Commission reports that it has sought that these provisions would be enforceable by the equality body whereby a failure to implement the duty would be treated as prohibited conduct under equal treatment legislation. It has also sought the inclusion of gender pay information relating to part-time employees and relating to starting pay. On a broader level it has recommended that employers should be encouraged to provide a narrative on the cause of any pay gaps and that Government should review whether the requirements should be extended to smaller employers in due course.

The Equality Act 2010 empowers Government to impose statutory duties by way of regulation on public authorities to enable better implementation of the mainstreaming duties to which public authorities are subject. In **Wales**, public authorities must collect data about pay, identifying any gender differences and causation. They must have due regard to the need to have equality objectives to address the causes of any difference established and to publish an action plan. The Government has announced its intention to extend mandatory pay gap reporting to the public sector in England.

In **Scotland** public authorities are required to publish annualised information of employees by protected characteristic, as well as their recruitment, development and retention; publish gender pay gap information every two years where they have twenty or more employees; and publish equal pay statements every four years, the first of which must relate to gender and subsequent statements must include disability and ethnicity. This equal pay statement should include an equal pay policy as well as details of both horizontal and vertical segregation by grade and occupation. The Equality and Human Rights Commission in Scotland and others have published assessments of performance in implementing these duties and found a high level of publication rates but little evidence of underlying developmental work.<sup>16</sup>

### *Case.3 Finland*

Gender equality legislation requires employers with at least 30 employees to prepare a gender equality plan every three years.

- ⇒ Employers are required to conduct a pay survey as part of this.
- ⇒ The survey is to be used to ensure no unjustified pay differences between women and men.
- ⇒ If clear pay differences emerge, the employer must analyse the reasons for these and, if there is no justification, take measures to rectify such differences.
- ⇒ Employers may be ordered by the National Non-Discrimination and Equality Tribunal, on foot of an application from the Ombudsman for Equality, to implement these duties subject to a financial penalty.

### *Case.4 Sweden*

The Discrimination Act which entered into force on 1<sup>st</sup> January 2009 requires employers to

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<sup>16</sup> Measuring Up? Report 4: Performance – a report of public authorities' performance in meeting the Scottish Specific Equality Duties, Equality and Human Rights Commission, Britain, 2015.

survey and analyse provisions and practices regarding pay and other terms of employment that are used at the employer's workplace, and pay differences between women and men performing work regarded as equal or of equal value.

- ⇒ The employer must assess whether pay differences are directly or indirectly associated with sex.
- ⇒ Employers with 25 or more employees are required to draw up an action plan for equal pay every three years. In this they must:
  - report the results of the survey and analysis;
  - indicate the pay adjustments and other measures that need to be taken to bring about equal pay for equal work or work of equal value.
- ⇒ Employers may be ordered by the Board against Discrimination, on foot of an application from the Equality Ombudsman, to implement these duties subject to a financial penalty. If the Equality Ombudsman decides not to make such an application, it can be made by certain labour unions.

This legislation is being amended and new provisions will come into force in 2017. The duty will then cover employers with 10 or more employees and they will be required to conduct the pay survey every year.

### *Reflection*

The ambition in all of these cases is one of formal equality. The focus is on unjustifiable pay differences and on compliance with the requirements in this regard of equal treatment legislation.

There is some detail provided in the legislation on what is required of employers. Institutional change is an evident goal in that employers are required to take systemic approaches to equal pay issues. The specific procedures required include survey systems to monitor and analyse pay differences, publication of survey outcomes to promote pay transparency, and, in some cases, action plans for equal pay.

These preventive duties all focus on gender equality, except in Scotland where public sector bodies are required to address grounds of racial or ethnic origin and disability. The Equality and Human Rights Commission in Britain is to publish research on gender, disability and ethnicity pay gaps, alongside a paper on interventions and solutions.

However, there is an evident challenge to move from information gathering to analysis of causes to identification of action, with implementation anchored at information gathering in most instances. Fredman notes that many 'pay gap' preventive duties "halt at the collection of gender-disaggregated statistics. A few States have, however, taken a further step and established mechanisms to identify possible solutions".<sup>17</sup> She emphasises the need for "concentrating on pay structures at enterprise or occupational level, where the primary causes of the gender pay gap are found".

Sanctions are available in Finland and Sweden. No sanctions are provided for in Austria and Britain.

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<sup>17</sup> Fredman S. (2009) Making Equality Effective: The role of proactive measures, European Network of Legal Experts in the Field of Gender Equality, European Commission, Brussels.



## 3.2 Institutional Duties

Institutional duties were reported in Belgium, Estonia, Finland, Hungary, Northern Ireland, Portugal, and Sweden. A typology for these institutional duties emerges from their particular focus:

- ‘Employment Equality Focus’ in six jurisdictions.<sup>18</sup>
- ‘Education Equality Focus’ in four jurisdictions.<sup>19</sup>
- ‘Service Provision Equality Focus’ in no jurisdictions.

While no example of the third type was identified through the survey, it is mentioned for thoroughness and for the obvious need for an institutional duty of such a character. Legal provisions address both the first two of these types of institutional duty in Estonia, Finland, Hungary and Sweden.

**Table 4: Typology of Institutional Duties**

	Requirement	Examples
<b>Employment Equality Focus</b>	Policies and procedures to promote equality, adjust for discrimination and combat discrimination for employees.	Belgium, Estonia, Finland, Hungary, Northern Ireland, Portugal, and Sweden.
<b>Education Equality Focus</b>	Policies and procedures to promote equality, adjust for discrimination and combat discrimination for students.	Estonia, Finland, Hungary, and Sweden.
<b>Service Provision Equality Focus</b>	Policies and procedures to promote equality, adjust for discrimination and combat discrimination for service users.	None

### 3.2.1 ‘Employment Equality Focus’

#### *Introduction*

Institutional duties were identified in Belgium, Estonia, Finland, Hungary, Northern Ireland, Portugal, and Sweden on employers to implement forms of institutional change that would result in a more proactive approach to equality, diversity, and non-discrimination for their employees.

#### *Case.1 Belgium – Brussels*

Under Decree dated 4 September 2008, public services are required to elaborate ‘diversity plans’ that address employment in the public services. The plans should address the ground of gender, young unemployed people, disabled people, older workers, and people who live in disadvantaged neighbourhoods. Public services should:

- ⇒ Nominate a diversity manager.
- ⇒ Make a diagnosis of their current employment situation.

<sup>18</sup> Belgium, Estonia, Finland, Hungary, Northern Ireland, Portugal, and Sweden.

<sup>19</sup> Estonia, Finland, Hungary and Sweden.

- ⇒ Prepare an action plan addressing human resources management, organisation of work, organisational culture, and contact with citizens.
- ⇒ Consult with public sector trade unions on the plan.
- ⇒ Submit the plan to the Minister of Public Services.

The equality body, UNIA (Interfederal Centre for Equal Opportunities), provides advice on request to support this process. There is a regional public service with the specific role to coach diversity managers in each regional public service to prepare their action plan. Most public services have an action plan in place. However, there is a predominant focus on raising awareness and there is a concern that the plans are superficial in nature without real diagnosis or clear goals.

### *Case.2 Belgium – Flanders*

Under the Decree on Proportional Representation on the Labour Market 8 May 2002, labour market participation should relate to the composition of the population.

- ⇒ This duty requires the active participation of intermediary organisations and the relevant Flemish services in preparing an annual action plan to promote such proportional participation.
- ⇒ The Decree defines ‘intermediate organisations’ as all public and private organisations providing career guidance, professional education or job placement to benefit young people, adults of working age, enterprises or other organisations, workers or job seekers.
- ⇒ The organisations involved must provide progress reports on the targets set.

The Decree covered the grounds of gender, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. However, the Secretary of Employment has now reduced this to young people, people with a disability, and workers aged over 55 years.

The Secretary of Employment, in a further change, has now stopped all funding for structural projects and for project developers who helped organisations with the elaboration of diversity plans. Structural projects are long-term relationships between the Flemish government and four groups of partners: trade unions; employer organisations; Minderhedenforum (representative body of minority organisations); and GRIP (NGO working for equal rights for people with a disability). The Government funds work being done by these organisations on equal representation on the labour market based on goals agreed in a collaboration agreement.

SMEs are now to receive subsidies for a demand driven training in HR-policy. The activities of employer’s organisations to promote diversity are to be funded. Other stakeholders receive funding from European Social Fund projects. The decision on what replaces the structural projects has still to be taken.

The results for the Flemish government as an employer is monitored by the Dienst Diversiteitsbeleid (Service on Diversity Policy) using an online tool.<sup>20</sup> Other measures are monitored using individual studies.

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<sup>20</sup> See: <https://overheid.vlaanderen.be/bedrijfsinformatie/personeelsleden-met-een-handicap-chronische-ziekte>.

### *Case.3 Estonia*

The Gender Equality Act requires employers to take actions to promote gender equality in recruitment and working conditions, to inform employees of their rights under the Act and to collect sex-disaggregated data concerning employment that allow the relevant institutions to monitor the principle of equal treatment.

- ⇒ There is no guidance on implementing this duty to collect data.
- ⇒ There are no sanctions applicable for failure to comply.

The Ministry of Social Affairs initiated a regulation on collecting sex disaggregated employment data in 2015. However, the regulation was not approved by many Ministries, was opposed by the employers' union, and made no progress.

### *Case.4 Finland*

Since 2015, under the Non-Discrimination Act 2004, employers are required to evaluate the achievement of equality in the workplace and develop the working conditions and methods for selecting personnel and making decisions about personnel including through positive action measures.

- ⇒ The Act covers the grounds of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics.
- ⇒ An employer with at least 30 employees must prepare a plan of the necessary measures to promote equality.
- ⇒ The measures should be effective, efficient and proportionate and their effectiveness should be discussed with personnel or their representatives.
- ⇒ The occupational health and safety authorities supervise the implementation of this institutional duty.

Separate gender equality legislation requires employers, with due regard to the resources available, to act to ensure job vacancies attract women and men; promote equitable recruitment of women and men and create equal opportunities for career advancement; promote gender equality especially in regard to pay; develop working conditions suitable for women and men; facilitate reconciliation of work and family life; and prevent gender discrimination.

- ⇒ Employers with at least 30 employees must prepare a gender equality plan every three years in cooperation with employee representatives.
- ⇒ This should:
  - assess the gender equality situation in the workplace.
  - establish the necessary measures to promote gender equality and achieve equality in pay.
  - review measures previously implemented.
- ⇒ The plan should include pre-emptive action against discrimination based on gender identity and gender expression.
- ⇒ Employers may be ordered by the National Non-Discrimination and Equality Tribunal, on foot of an application from the Ombudsman for Equality, to implement these duties subject to a financial penalty.

### *Case.5 Hungary*

The 2003 Law on Equal Treatment and Promotion of Equal Opportunities requires public and Government institutions with more than fifty employees to adopt an equal opportunities plan.

- ⇒ The Act covers an open list of grounds with eighteen named grounds. However, the duty is silent on the grounds covered.
- ⇒ There is no detail provided on what issues or areas the plan should address.
- ⇒ The Equal Treatment Authority has powers to investigate, on request, whether the equal opportunities plan has been approved by an employer and to apply sanctions where they have not been, including application of a fine.

### *Case.6 Northern Ireland*

The Fair Employment & Treatment (NI) Order 1998 covers the grounds of religious belief, similar philosophical belief and political opinion. It requires specified public authorities and all other employers who employ more than ten employees to:

- ⇒ Register with the Equality Commission for Northern Ireland.
- ⇒ Monitor the community background of their job applicants and employees, whether a person is a member of one of the two main communities in Northern Ireland (Protestant or Roman Catholic). The term is broader than religion and includes consideration of political and cultural identities.
- ⇒ Use this information to submit annual reports to the Commission on the community background composition of their workforces and of their job applicants and appointees during that year.
- ⇒ Analyse this information and review their employment policies and practices every three years, and determine whether members of the Protestant and Roman Catholic communities are enjoying fair participation in employment within the organisation (Article 55 Reviews).
- ⇒ If one or other community is found not to be enjoying fair participation, the employer is obliged to determine what affirmative action it would be reasonable and appropriate to take. This can include: changing policies and practices, encouraging members of an under-represented group to apply for jobs, and providing employment-related training. It does not include the use of quotas.

The Equality Commission for Northern Ireland contacts every employer annually to ensure that the monitoring duty and the annual report duty are complied with. It has the power to issue directions to defaulting employers and a power to prosecute them in Court. The maximum fine payable is £5,000, but usually the fines are less than £500 and the power is little used as there are high rates of compliance with the duty. A defaulting employer may be barred from tendering for work and from entering into contracts for the supply of goods and services with Government departments and other public authorities. This penalty has never been invoked.

### *Case.7 Portugal*

Decree-Law n.º 133/2013, of 3rd October provides a legal framework for public companies. A broad social responsibility article provides, "State-Owned Companies should pursue social and environmental responsibility objectives, consumer protection, investment in professional development, promoting equality and non-discrimination, environmental

protection and respect for the principles of legality and ethics". State owned companies must report annually on their performance in this regard.

State owned companies are required to:

- ⇒ Adopt equality plans to achieve effective equality of treatment and opportunities between men and women, eliminate discrimination, and allow reconciliation of personal, family and professional life. In doing so they should:
  - diagnose the internal situation of men and women, based on equality indicators.
  - develop, implement and monitor a plan for equality adjusted to the respective reality of the business.
  - evaluate ex post the impact of the measures implemented.
  - report on results every six months.
- ⇒ There are no sanctions.
- ⇒ The Commissioner for Citizenship and Gender Equality (CIG) monitors this duty and provides training to support implementation.

#### *Case.8 Sweden*

The Discrimination Act, which entered into force on 1<sup>st</sup> January 2009, includes an institutional duty on employers to take a goal oriented approach to advance equality on grounds of sex, ethnicity (racial or ethnic origin), and religion or belief.

- ⇒ Employers are required to take active measures for equality on the three grounds, in specific areas of working conditions and recruitment.
- ⇒ Every three years, employers with 25 or more employees are to draw up a plan for equality work on the ground of sex. The plan should contain:
  - an overview of the action in response to requirements under the Act to take measures to advance gender equality, particularly in working conditions and recruitment.
  - a summary account of the action plan for gender equal pay.
- ⇒ Employers may be ordered by the Board against Discrimination, on foot of an application from the Equality Ombudsman, to fulfil these duties subject to a financial penalty. If the Equality Ombudsman decides not to make such an application, it can be made by certain labour unions.

The legislation is being amended and new provisions will come into force in 2017. The institutional duty will then require employers to take active measures on all seven grounds covered under the Discrimination Act: sex, transgender identity or expression, ethnicity ("national or ethnic origin, skin color or other similar circumstances"), religion or other belief, disability, sexual orientation, and age.

Employers should investigate whether there is a risk of discrimination and if there are other obstacles to an individual's equal rights and opportunities at work, analyse the causes of any risks or obstacles, implementing preventive and promotional measures that are reasonably required, and follow up and evaluate this work.

Active measures should include working conditions, provisions and practices regarding pay and other employment conditions, recruitment and promotion, education and other competence development, and opportunities to combine paid work and parenthood.

## *Reflection*

The ambition for equality is not always explicit in the formulation of these institutional duties. However, there is evidence of an ambition that stretches beyond formal equality to more substantive equality outcomes. This can be seen, in particular, in the requirement for proportional participation in the labour market in Belgium (Flanders), the emphasis on effectiveness and positive action in the Finnish duties, the requirements on fair participation and affirmative action in Northern Ireland, and the concept of a goal oriented approach in Sweden.

In most instances the institutional duties cover both public and private sector employers. One differentiation made is that of size, where smaller organisations can be exempted on the basis of the numbers employed. A goal of institutional change is evident in the detail that is provided on the measures required of employers. In this, there is a particular emphasis on equality planning. Monitoring and reporting systems, data gathering, and systems for consultation with employees are also named.

These institutional duties have a particular focus on the ground of gender. This is evident in the provisions in Estonia, Finland, Portugal and Sweden. In Finland the institutional duty on the ground of gender is accompanied by another similar multi-ground institutional duty. In Sweden, a subset of grounds is covered in the more general duty in relation to active measures and this is to change in 2017 when requirements on active measures are to encompass all seven grounds covered under the equal treatment legislation. Northern Ireland is an exception with a specific focus on grounds of religious belief, similar philosophical belief, and political opinion. The institutional duties in Belgium (Flanders) and Hungary encompass all grounds covered under equal treatment legislation including gender. The ground of gender is acting as a gateway ground, where progress made on this ground is stimulating the inclusion of further grounds.

Sanctions are available in relation to a failure to implement institutional duties in Finland, Hungary, Northern Ireland and Sweden. No sanctions are available in the other three jurisdictions.

### **3.2.2 'Education Equality Focus'**

#### *Introduction*

Institutional duties were identified in Estonia, Finland, Hungary and Sweden on education providers to implement forms of institutional change that would result in a more proactive approach to equality, diversity, and non-discrimination for their students. These match similar provisions made in relation to employers in these jurisdictions.

#### *Case.1 Estonia*

The Gender Equality Act requires education and research institutions and institutions engaged in training to actively promote gender equality.

- ⇒ Education and training providers should ensure equal treatment of women and men in vocational guidance, acquisition of education, professional and vocational development and re-training.
- ⇒ They should ensure that curricula, study materials and research facilitate the elimination of unequal treatment of women and men.
- ⇒ There are no details on how to implement this statutory duty.

⇒ There are no sanctions applicable for failure to comply with this duty.

### *Case.2 Finland*

Since 2015, under the Non-Discrimination Act 2004 education providers are required to evaluate the achievement of equality in their activities and to take necessary measures to promote the achievement of equality.

- ⇒ The Act covers the grounds of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics.
- ⇒ Education providers must prepare a plan for these measures.
- ⇒ The measures should be effective, efficient and proportionate and should take account of the operating environment and resources of the education provider.
- ⇒ The plan should involve co-operation with students and guardians, if minors.
- ⇒ The Non-Discrimination Ombudsman supervises implementation of this institutional duty and may bring a failure of compliance before the National Non-Discrimination and Equality Tribunal. The Tribunal can make an order requiring implementation and can impose a conditional fine to support such an order.

Separate gender equality legislation requires education providers to prepare a gender equality plan every three years in cooperation with staff and students.

- ⇒ This plan should:
  - assess the gender equality situation within the establishment.
  - establish the necessary measures to promote gender equality.
  - review measures previously implemented.
- ⇒ Education providers may be ordered by the National Non-Discrimination and Equality Tribunal, on foot of an application from the Ombudsman for Equality, to implement these duties subject to a financial penalty.

### *Case.3 Hungary*

The 2003 Law on Equal Treatment and Promotion of Equal Opportunities requires public education institutions to adopt equal opportunities plans.

- ⇒ The Act covers the grounds of sex, racial origin, skin colour, nationality, national or ethnic origin, mother tongue, disability, state of health, religious or ideological conviction, political or other opinion, family status, motherhood (pregnancy) or fatherhood, sexual orientation, sexual identity, age, social origin, financial status, the part-time nature or definite term of employment relationship or other employment-related relationship, membership of an organisation representing employees' interests, and other characteristics.
- ⇒ Equal opportunities plans should be aligned with the local authority equal opportunities programmes, which are also required under the legislation.
- ⇒ Plans should be modified within eight days of notice of modification of the local authority equal opportunities programme.

### *Case.4 Sweden*

Under the Discrimination Act, which entered into force on 1<sup>st</sup> January 2009, certain types of education providers listed in the legislation are required to take a goal oriented approach to advance equality on grounds of sex, ethnicity (national or ethnic origin, skin color or any



other circumstance), religion or belief, disability and sexual orientation.

- ⇒ These education providers are required to prepare an annual equal treatment plan setting out active measures required to promote equal rights and opportunities for pupils and to prevent harassment and sexual harassment.
- ⇒ Education providers may be ordered by the Board against Discrimination, on foot of an application from the Equality Ombudsman, to fulfil these duties subject to a financial penalty.

The legislation is being amended and new provisions will come into force in 2017. The institutional duty will then require education providers to take active measures on all seven grounds covered under the Discrimination Act: sex, transgender identity or expression, ethnicity (racial or ethnic origin), religion or other belief, disability, sexual orientation, and age.

Education providers should investigate if there is a risk of discrimination and if there are other obstacles to a pupil's equal rights and opportunities; analyse the causes of any risks or obstacles; implement preventive and promotional measures that are reasonable; and follow up and evaluate this work.

For some named categories of education providers, active measures are limited to admission and recruitment procedures, forms of teaching and organisation of education, examinations and evaluation of student's performance, learning environment, and opportunities to combine studies with parenthood. For other education providers covered, the active measures are defined in general terms.

### *Reflection*

The ambition for equality is not always explicit in the formulation of these institutional duties. However, there is evidence of an ambition that stretches beyond formal equality to more substantive equality outcomes. This can be seen, in particular, in the emphasis on achieving equality in the Finnish duties, and the concept of a goal oriented approach in Sweden. The institutional duty in Estonia, with its focus on eliminating unequal treatment, appears to be more focused on the goal of formal equality.

A goal of institutional change is evident in the detail that is provided on the measures required of education providers. In this, there is a particular emphasis on equality planning. Systems for consultation with students are also named.

These institutional duties have a multi-ground approach in Finland, Hungary, and Sweden. The grounds covered in Sweden are to be expanded in 2017 to all grounds covered under equal treatment legislation. In Finland, separate gender institutional duty accompanies the multi-ground duty. In Estonia, there is only a gender equality institutional duty.

Sanctions are available in relation to a failure to implement institutional duties in Finland and Sweden. There are no sanctions in the other jurisdictions.

## **3.3 Mainstreaming Duties**

Mainstreaming duties were reported in Austria, Belgium, Britain, Estonia, Finland, Hungary, Ireland, Lithuania, Northern Ireland and Portugal. A typology for mainstreaming duties, based on their core methodology for implementation, is evident:

- ‘Equality Impact Assessment’ approach, where implementation is centred on organisations covered by the duty assessing draft policies and legislation for their potential impact on social groups experiencing inequality.<sup>21</sup>
- ‘Equality Plan’ approach, where the duty involves a specific equality planning exercise by policy organisations covered by the duty.<sup>22</sup>
- ‘Coordination’ approach, where implementation of the mainstreaming duty is driven by an institutional structure that engages and coordinates representatives of the organisations covered by the duty.<sup>23</sup>
- ‘Process’ approach, where the mainstreaming duty forms part of an existing process, usually strategic planning, in the organisations covered by the duty.<sup>24</sup>

Mainstreaming duties are focused exclusively on public authorities. They pay particular attention to the legislative, budgetary, policy making, and programme development functions of these organisations. This concern for policy beneficiaries is the source of their societal impact. Their focus on the process of developing legislation, budgets, policy and programmes is the source of their institutional impact. Mainstreaming duties can also encompass institutional duties in their concern for the functions of public authorities as employers and service providers.

**Table 5: Typology of Mainstreaming Duties**

	<b>Requirement</b>	<b>Examples</b>
<b>Equality Impact Assessment Approach</b>	Assessment of the impact on equality across the grounds covered of policy at draft stage.	Belgium (Federal), Britain, Estonia, Finland, and Northern Ireland.
<b>Equality Plan Approach</b>	Planning for action on equality across the grounds covered.	Finland, Hungary and Portugal.
<b>Coordination Approach</b>	Engagement in an institutional coordination of planning and action on equality across the grounds covered.	Belgium (Flanders)
<b>Process Approach</b>	Incorporate an equality focus within mainstream organisational processes such as strategic planning.	Austria, Ireland, and Lithuania.

### **3.3.1 ‘Equality Impact Assessment’ Approach**

#### *Introduction*

Mainstreaming duties were identified in Belgium, Britain, Estonia, Finland, and Northern Ireland based on a core methodology of equality impact assessment. Equality impact assessment is a long-standing and traditional methodology for implementing equality

<sup>21</sup> Belgium (Federal), Britain, Estonia, Finland, and Northern Ireland.

<sup>22</sup> Finland, Hungary, and Portugal.

<sup>23</sup> Belgium (Flanders).

<sup>24</sup> Austria, Ireland and Lithuania.

mainstreaming, with its roots in the early phases of gender mainstreaming.

The European Institute for Gender Equality (EIGE) has conducted extensive research work on gender mainstreaming. Gender has been a gateway ground in the development of this 'equality impact assessment' approach and the work of EIGE offers useful insights. EIGE defines gender impact assessment as "an *ex-ante* evaluation, analysis or assessment of a law, policy or programme that makes it possible to estimate in a preventative way the likelihood of a given decision to have positive, negative or neutral consequences for the state of equality between women and men."<sup>25</sup> Gender impact assessment seeks to prevent a negative impact from policy and legislation on gender equality and to strengthen gender equality through better designed legislation and policy. An equality impact assessment has a multi-ground focus and establishes the potential impact of new legislation or policy at design stage on advancing equality for, responding to the diversity of, and preventing discrimination against the full groups experiencing inequality that are covered under equal treatment legislation.

#### *Case.1 Belgium – Federal*

A gender based mainstreaming duty was introduced in the Law of 12 January 2007 aimed at monitoring the application of the resolutions from the world conference on women held in Beijing in September 1995 and at integrating the gender perspective into all federal policies. The Law established obligations on government departments, including to:

- ⇒ Produce and gather gender disaggregated statistics.
- ⇒ Analyse gender impact of regulatory and legislative proposals.
- ⇒ Include agreed strategic objectives and adopt gender indicators to incorporate a gender dimension in management plans and strategic planning.
- ⇒ Attach a gender note in relation to funds assigned to actions aimed at achieving equality of women and men to each draft of the general expense budget.
- ⇒ Integrate a gender perspective in procurement and the granting of subsidies.
- ⇒ Report to Parliament on their implementation of the legislation.

A gender perspective must be integrated into all phases of the policy cycle: analysing the situation; defining the policy; implementing the policy; and evaluating the policy.

Government departments are required to appoint a staff member to coordinate the implementation of the provisions in the legislation in their Department and to participate on an interdepartmental coordinating group. The group includes administrative and political representatives of each department and Minister. It draws up a federal gender mainstreaming plan which is key in making this process work. The Institute for the Equality of Women and Men is a member of the group.

There are no sanctions for failure to comply. The interdepartmental coordinating group seeks to guarantee implementation of the law. The requirement on government to report to Parliament on implementation of the law further assists in this regard.

A similar duty in relation to gender is required in the Wallonia region. A mainstreaming duty covering gender and disability is currently being developed in the Brussels region based on this model.

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<sup>25</sup> See more: <http://eige.europa.eu/gender-mainstreaming/tools-and-methods/gender-impact-assessment>.

## Case.2 Britain

The Equality Act 2010, imposes a duty on public authorities and bodies exercising public functions to have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other prohibited conduct. This requires that:
  - policy and practice be in compliance with the Act.
- Advance equality of opportunity. This requires:
  - removing or minimising disadvantage experienced by people with protected characteristics;
  - taking steps to meet needs specific to people with protected characteristics;
  - encouraging people with protected characteristics to participate in public life or in any other activity where participation by their group is low.
- Foster good relations. This requires:
  - acting to tackle prejudice and promote understanding between people with protected characteristics and others.

The concept of 'due regard' is central to this mainstreaming duty. Case law has determined a set of principles, commonly known as the Brown principles<sup>26</sup>, that the Courts will take into account when assessing compliance with the duty. These are that:

- a decision-maker must be aware that he/she is obliged to comply with public sector duties;
- the duties must be fulfilled before and at the time that a particular decision is being considered, and not afterwards;
- the duties must be exercised in substance, with rigour and an open mind; and not as a "box ticking" exercise;
- the duties are non-delegable; meaning that it is the actual decision-maker who must comply with the duties, and not some other person;
- the duties are continuing ones;
- it is good practice to keep adequate records that will show that the statutory goals have actually been considered and pondered and to promote transparency and discipline in the decision-making process.

There are specific requirements for the implementation of the public sector duty introduced on foot of Government regulation. Public authorities are required to.:

- ⇒ Publish information that demonstrates their compliance with the public sector duty in a manner that is accessible to the public.
- ⇒ Prepare and publish equality objectives to be achieved through the public sector duty. These should be evidence based, specify measurable outcomes to be achieved, and be reviewed every four years.
- ⇒ Conduct an equality impact assessment on draft policy. This is an explicit requirement in Scotland, for all policies and practices, and in Wales, when impact is likely to be substantial. It is an implicit requirement in England.

In **Scotland**, the specific duties include giving consideration to issues of discrimination, equal opportunity and good relations in the award criteria and conditions for public procurement.

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<sup>26</sup> R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin).

In **Wales**, the specific duties include involving representative groups in implementing the mainstreaming duty and providing training to staff in the public authority to promote knowledge and understanding of the mainstreaming duty.

The mainstreaming duty covers the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

The Equality and Human Rights Commission is enabled under the equal treatment legislation to conduct assessments of the extent to which, or manner in which, an organisation has complied with the mainstreaming duty. Following such an assessment, the Commission can issue a compliance notice requiring the organisation to comply with the mainstreaming duty. The Commission can apply for a Court order requiring an organisation to comply with a compliance notice.

A failure to comply with the mainstreaming duty can be challenged in Court by an individual, a group of individuals or the Commission. If such a judicial review challenge is successful, the Court can quash the decision of the public authority being challenged.

### *Case.3 Estonia*

A gender based mainstreaming duty was introduced under the Gender Equality Act that requires state and local government authorities to:

- ⇒ Promote gender equality systematically and purposefully in order to change the conditions and circumstances that hinder the achievement of gender equality.
- ⇒ Take account of the different needs and social status of women and men in institutional strategies, policies and action plans.
- ⇒ Consider how the measures involved will affect the situation of women and men.
- ⇒ Consult the relevant interest groups in doing so.

There are no sanctions associated with this statutory duty. The relevant Minister can make recommendations on its implementation. The Minister has not made any such recommendations but has published handbooks on gender mainstreaming and impact assessment in the legislative process. However, these are largely theoretical.

### *Case.4 Finland*

A gender based mainstreaming duty is provided for under the Act on Equality between Women and Men. This requires public authorities to:

- ⇒ Promote equality between women and men purposefully and systematically.
- ⇒ Create and consolidate administrative and operating practices to ensure the advancement of gender equality in preparatory work and final decision-making.
- ⇒ Change any circumstances that prevent the attainment of gender equality.
- ⇒ Take promotion of gender equality into account in availability and supply of services.

No specific implementation mechanisms are provided for. A gender equality impact assessment methodology is implemented by the Government Department. This is supported and coordinated by the Government Gender Equality Unit. There are no sanctions associated with this mainstreaming duty. The Ombudsman for Equality supervises overall compliance with the Act.

### *Case.5 Northern Ireland*

A multi-ground mainstreaming duty was introduced under Section 75 of the Northern Ireland Act 1998. This requires public authorities to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations. They must:<sup>27</sup>

- ⇒ Publish an equality scheme, to be reviewed within five years, setting out arrangements for complying with this mainstreaming duty, that should include:
  - An outline of the internal arrangements, responsibility and accountability for implementing the duty and for training staff.
  - Description of how public authorities will assess and consult on the likely impact of policies. Screening and equality impact assessment tools are recommended for this.
  - Description of how consultation with affected individuals and representative groups will be organised.
  - Monitoring arrangement for any future negative impact of the policy.

The so-called ‘Brown Principles’ that interpret the concept of ‘due regard’ are also applied in Northern Ireland and have been communicated to public authorities in guidance from the Equality Commission for Northern Ireland.<sup>28</sup>

Public authorities are required to implement guidance from the Equality Commission for Northern Ireland, which is approved by the Secretary of State for Northern Ireland, on the form and content of these Equality Schemes. The Commission has recommended a range of processes that can be used by public authorities including:

- ⇒ Screening a policy to determine if it is relevant to the statutory duty and how relevant it is, in terms of having a major potential to impact on equality of opportunity or good relations. If it does, an equality impact assessment should be done.
- ⇒ Implementing an equality impact assessment that defines the aims of the policy, considers available data, assesses the impact of the policy, consults with affected individuals and representative groups, considers how to deal with negative impact and/or opportunities to better promote equality of opportunity, and identifies systems for monitoring the policy into the future.

The duty to have due regard to the need to promote equality of opportunity covers the grounds of religious belief, political opinion, race, age, marital status, sexual orientation, gender, disability and family (dependents) status. The duty to have regard to the desirability to promote good relations covers the grounds of religious belief, political opinion and race.

Allegations that public authorities have breached the substantive elements of these is challengeable in a civil court by way of judicial review. This process has been rarely used in Northern Ireland and no Court has made any findings of breach of duty against any public authority in the few challenges that have been made. Early interpretation of the Northern

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<sup>27</sup> Section 75 of Northern Ireland Act 1998 – A Guide for Public Authorities, Equality Commission for Northern Ireland, 2010.

<sup>28</sup> The Public Sector Equality, Disability, and Good Relations Duties. A Series of Short Guides, Equality Commission for Northern Ireland, Belfast, 2015.

Ireland Act 1998 accorded this role of securing compliance to the Commission.

Equality schemes must be submitted to the Equality Commission for Northern Ireland for approval. They will only be approved if they conform to the guidelines of the Commission. If they are not approved by the Commission the matter can be referred to the Secretary of State for Northern Ireland who may, as a last resort, impose a suitable scheme on the public authority. The default will also be reported to the Northern Ireland Legislative Assembly. This has never occurred.

The Commission has enforcement powers to consider complaints of a failure by a public authority to comply with its approved equality scheme and to undertake investigations on its own initiative where it believes there is such a failure. It can make recommendations for action to rectify any such failure established. Failure to follow the Commission's recommendations can be referred to the Secretary of State for Northern Ireland who has the power to issue directions to the defaulting public authority.

Section 49 A of the Disability Discrimination Act 1995 obliges public authorities when carrying-out their functions, to have due regard to the need to promote positive attitudes towards disabled persons, and the need to encourage participation by disabled people in public life. These duties complement the disability element of the Section 75(1) mainstreaming duty outlined above. Public authorities are required to prepare a disability plan. This is essentially an equality scheme in that it should set out the arrangements for compliance with the Section 49 A duty.

### *Reflection*

An ambition of substantive equality is evident in the formulation of these mainstreaming duties. In Britain the mainstreaming duty is concerned with advancing equality of opportunity in removing disadvantages, meeting specific needs and encouraging participation. The mainstreaming duty in Estonia is concerned with changing the conditions and circumstances that hinder the achievement of gender equality. The goal in Finland is defined in terms of advancing gender equality and changing circumstances that prevent its attainment. Britain and Northern Ireland add a unique dimension to this ambition with their concern to promote good relations.

In all instances these mainstreaming duties are on public authorities. There is an explicit focus on institutional change with the use of equality impact assessment processes in the policy making process of public authorities. This focus is further reinforced with provisions that require systems for data gathering, indicator development, objective setting, reporting, consultation, coordination and long-term monitoring. There is an implicit focus on societal change. This focus is evident in the explicit ambition for substantive equality and creating the possibility for public authorities to contribute to new outcomes for social groups experiencing inequality in the mainstreaming duties.

The mainstreaming duties in Belgium and Scotland include specific mention of public procurement as a part of the mainstreaming duty. In Belgium, the mainstreaming duty includes requirements in relation to building an equality focus into the budgetary process.

Given the origins of the equality impact assessment approach in gender mainstreaming, it is not surprising that three of the five cases, Belgium, Estonia, and Finland, are specifically focused on gender equality. There is a multi-ground approach in Britain and Northern Ireland. In Britain, this multi-ground approach developed out of three single ground strands



of conducting equality impact assessments, one of which was gender. The gender ground has served as an important gateway ground for multi-ground equality impact assessment.

There are no sanctions for lack of compliance with mainstreaming duties in Belgium, Estonia and Finland. In Britain and Northern Ireland, the equality bodies can take defined steps in response to failures in compliance. In Belgium, implementation of the mainstreaming duty is supported by the peer pressure and mutual support of participating in interdepartmental coordinating structures and by the requirement to report on implementation to Parliament.

### **3.3.2 'Equality Plan' Based Approach**

#### *Introduction*

Mainstreaming duties were identified in Finland, Hungary and Portugal that are based on equality planning. An equality plan involves analysing situations and experiences of discrimination and inequality and defining objectives, targets, and measures to address these. The preparation of the equality plan should involve organisations representing groups experiencing inequality in a participative planning process.

#### *Case.1 Finland*

The Non-Discrimination Act 2004, amended in 2015, requires public authorities, including central and local government authorities, independent bodies governed by public law and parliamentary agencies to promote equality. They must:

- ⇒ Evaluate the achievement of equality in their activities.
- ⇒ Take necessary measures to promote the realisation of equality.
- ⇒ Draw up an equality plan of these measures for the promotion of equality, where
  - measures should take account of the operating environment and resources of the public authority.
  - measures should be effective, expedient and proportionate.

The mainstreaming duty covers the grounds of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, disability, state of health, sexual orientation, or other personal characteristics.

There are sanctions for failure to comply with this mainstreaming duty. The Non-Discrimination Ombudsman may bring a matter concerning such a failure to the National Non-Discrimination and Equality Tribunal. The Tribunal can order the public authority to take action within a reasonable time to fulfil its planning obligations and may impose a fine to reinforce this order.

#### *Case.2 Hungary*

A multi-ground mainstreaming duty is provided for in the 2003 Law on Equal Treatment and Promotion of Equal Opportunities. Local authorities must:

- ⇒ Adopt local equal opportunities programmes every five years.
- ⇒ Include a situation analysis on the educational, housing, employment, health and social circumstances of disadvantaged social groups in their programmes.
- ⇒ Draw up a plan of action on foot of this, giving special attention to: measures for the enforcement of equal treatment, equal opportunities and social convergence; prevention of unlawful segregation in education and training; measures to provide equal access to public services and/or health care services; and measures to reduce

barriers for disadvantaged groups in the job market.

- ⇒ Give specific regard to people living in poverty, Roma, children, women, older people and disabled people.

Municipalities seeking additional financial support from the state budget or any EU grants must be able to present the equal opportunities programme they have prepared to be entitled to this funding.

The equal opportunities programmes are to be prepared in accordance with guidelines set out by the Minister of Human Resources and the Minister is responsible for monitoring this process.

### *Case.3 Portugal*

Law n.º 75/2013, of 12<sup>th</sup> September provides the legal framework for local authorities. Municipalities are required to:

- ⇒ Ensure the integration of a gender equality perspective in all municipal fields of action, through the adoption of municipal plans for equality.
- ⇒ There are no sanctions.
- ⇒ The Commissioner for Citizenship and Gender Equality (CIG) monitors and supports implementation of this duty.

### *Reflection*

The ambition of these mainstreaming duties is less explicit than those identified for the equality impact assessment approach. In Finland a clear focus on substantive equality is evident in the concern for achieving equality. The combined goal of preventing equality and promoting equal opportunities, in Hungary, suggests an ambition of substantive equality, although equality of opportunity is not defined.

There is limited detail provided in these cases as to the steps required of public authorities. The core requirement is the preparation of equality plans and a goal of institutional change is evident in the need for public authorities to develop adequate planning systems for this. These mainstreaming duties are multi-ground in Finland and Hungary. In Portugal, the mainstreaming duty is gender focused.

Sanctions, as part of the sanctions regime for acts of discrimination are available in Finland. In Hungary, the stimulus for implementation comes from the need to have complied with the mainstreaming duty in order to receive any additional funding sought by the public authority. There are no sanctions in Portugal.

### **3.3.3 'Coordination' Based Approach**

#### *Introduction*

A mainstreaming duty was reported from Belgium (Flanders) that puts a primary focus on coordination between public authorities. Coordination between public authorities is a feature in the implementation of many mainstreaming duties, but it is not necessarily identified as the driver for equality mainstreaming as it is in the Belgian example. Coordination between government departments offers direction, coherence and mutual support in pursuing and realising agreed equality objectives. It stimulates shared commitment to these objectives and can secure an agreed standard in their implementation.

### *Case.1 Belgium – Flanders*

A multi-ground mainstreaming duty is provided for under Article 7 of the Decree on Equal Opportunities and Equal Treatment (July, 10<sup>th</sup> 2008) in the Flemish region of Belgium. The Decree identifies the goal of promoting balanced participation by the social groups covered in all social domains and requires the Flemish government to develop and implement a coordinated and coherent Equal Opportunity Policy.

An institutional coordination mechanism is used to implement this requirement. It involves representatives of all Government departments. It operates to:

- ⇒ Inform the framework of equal opportunities objectives agreed by the Flemish Government every two years.
- ⇒ Coordinate the preparation of the Equal Opportunity Policy with measures for each of the different policy domains of Government by the Secretary for Equal Opportunities.
- ⇒ Coordinate and support implementation of the measures agreed in each of the policy domains.

The mainstreaming duty covers the grounds of gender, sexual orientation, and disability. The grounds of racial or ethnic origin, religion or belief and age have still to be included by Government.

It is left to individual administrations to monitor impact of the equal opportunities policy. There is no external monitoring conducted.

### *Reflection*

This mainstreaming duty reflects an ambition for substantive equality with its concern for balanced participation by different social groups. It is concerned for institutional change with its emphasis on coordination between different public authorities. This is further reinforced by a focus on equality planning. It is a multi-ground duty but is not yet comprehensive in its coverage of all grounds covered by equal treatment legislation. While there are no sanctions, implementation is supported by peer pressure and the mutual support of participating in an institutional coordination mechanism.

### **3.3.4 'Process' Based Approach**

#### *Introduction*

Mainstreaming duties were identified in Austria, Ireland and Lithuania that are built into already existing public sector processes. In Ireland and Lithuania these mainstreaming duties make use of strategic planning processes in public authorities. In Austria, the mainstreaming duty makes use of grant making and procurement processes. Existing processes already in use by public authorities offer a familiar and simple context within which to secure implementation of mainstreaming duties.

#### *Case.1 Austria*

Mainstreaming duties are provided for under the Equal Treatment Act and the Federal Contracts Act. The Equal Treatment Act requires that guidelines on granting subsidies to enterprises must stipulate that such subsidies may be granted exclusively to enterprises complying with the provisions of the Act. This covers the grounds of gender, racial or ethnic origin, sexual orientation, religion or belief and age.

In the Federal Contracts Act there is a provision that in specifying criteria for the award of a contract or in the terms of the contract, a public authority can take into account the employment of women, long-term unemployed, people with disabilities and older employees and the number of people in training/apprenticeships.

There is no detail provided on implementation. No sanctions apply to these duties.

### *Case.2 Ireland*

A multi-ground equality and human rights duty is provided for under the Irish Human Rights and Equality Commission Act 2014. This requires public authorities in performing their functions to have regard to the need to:

- Eliminate discrimination;
- Promote equality of opportunity and treatment of its staff and service users; and
- Protect the human rights of its members, staff, and service users.

The equality and human rights duty covers all Departments of State (except the Department of Defence and the Defence Forces), local authorities, the Health Service Executive, universities, Institutes of Technology and Education and Training Boards, and any organisation formally established by law, charter or statutory scheme that is wholly or partly financed by Government. The relevant Minister can prescribe any other organisations in receipt of public finance to be subject to the duty.

These public authorities are required to address equality and human rights issues in their planning and reporting processes:

- ⇒ In planning, usually as part of their strategic plans, public authorities must:
  - set out the equality and human rights issues for staff and service users that are relevant to their functions as employers, policy makers, service providers, and procurer of services.
  - identify the policies, plans, and actions they are taking or intend to take to address these issues.
- ⇒ In reporting, usually as part of their annual reports, they must report on:
  - developments in relation to these issues and on their achievements in addressing them.

The statutory duty encompasses the grounds of gender, civil status, family status, sexual orientation, religion or belief, age, disability, race, and membership of the Traveller community. It covers human rights set out in the Irish Constitution and in international instruments having force of law in the State, principally civil and political rights.

There are limited sanctions. The Irish Human Rights and Equality Commission can invite a public body to implement an internal equality and human rights review and prepare an equality and human rights plan when there is failure of compliance.

### *Case.3 Lithuania*

Two separate mainstreaming duties are identified in the equal treatment legislation:

- ⇒ The Law on Equal Opportunities for Women and Men requires state and municipal institutions and agencies to:
  - ensure that equal rights for women and men are guaranteed in all legislation.
  - draw up and implement programmes and measures aimed at ensuring equal

opportunities for women and men.

⇒ The Law on Equal Treatment requires state and municipal institutions and agencies to:

- ensure that equal rights and opportunities are enshrined in all legislation on grounds of gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin, and religion.
- develop, approve and implement programmes and measures to ensure equal treatment on these grounds.

Public authorities are required to provide for such programmes and measures in their strategic planning documents. No other specific steps are provided for.

The Law on Equal Opportunities, focused on gender, does not include sanctions and implementation is based on the commitment of the bodies concerned. Under the Law on Equal Treatment, non-compliance with these duties constitutes violation of equal treatment and is subject to an administrative fine.

### *Reflection*

The ambition for equality in these mainstreaming duties is not explicit. In Austria, the goal in relation to granting subsidies is one of compliance, whereas the goal in relation to procurement is more substantive with its concern for the employment of women, people with disability and older people. In Ireland the goal is posed in terms of an undefined equality of opportunity. The focus on equal rights in Lithuania suggests a goal closer to formal equality.

These mainstreaming duties are concerned with institutional change. A concern for equality is to be built into the existing systems for planning and reporting in Ireland and Lithuania. This concern is to be included in procurement and funding processes in Austria.

They are predominantly multi-ground. There is a specific focus on gender alongside this in Lithuania and a selection of grounds is covered in Austria.

Sanctions, as part of the sanctions regime for acts of discrimination are available in Lithuania for their multi-ground mainstreaming duty, but not the gender mainstreaming duty. In Ireland, the equality body can take defined steps in response to failures in compliance. There are no sanctions in Austria.

## **3.4 Overall Assessment**

### *Ambition*

institutional duties and mainstreaming duties are largely characterised by an ambition for equality that goes beyond the prohibition of discrimination. The language in which they are couched in equal treatment legislation points to a concern for substantive equality and securing new outcomes for individuals and groups experiencing inequality. These types of duties hold greater potential than preventive duties in pursuing such an ambition. While preventive duties are limited by their ambition for formal equality, they might still offer a pragmatic starting point from which to build greater ambition in some jurisdictions.

institutional duties usually form part of mainstreaming duties that apply to all the functions of public authorities. As such, mainstreaming duties can hold greater potential in being more comprehensive. However, institutional duties hold a capacity to engage the private sector. In this regard, the lack of a 'service provision equality focus' institutional duty on the private sector is evident and needs to be developed and introduced.

### *Coverage*

Some statutory duties have a single-ground focus, others focus on a select number of grounds, and others have a multi-ground focus that encompasses all grounds covered in equal treatment legislation. Single-ground statutory duties give visibility in policy and practice to particular grounds and respond to their specific problems. However, there can be a backlash from favouring one ground over others. The same issue applies to statutory duties focused on a select set of grounds.

Multi-ground statutory duties are important in advancing equality and eliminating discrimination in a comprehensive manner. They can be complex and difficult to implement, but there are strong arguments for taking a comprehensive approach. The proposed extension of the grounds covered under the institutional duty in Sweden to encompass all grounds covered by the equal treatment legislation was welcomed by the Equality Ombudsman for both intellectual and practical reasons. It was intellectually difficult to offer any explanation to justify the exclusion of certain grounds. In practice, the inclusion of all grounds allows for a holistic and integrated way of implementing a goal oriented approach to equality.

### *Impact*

Equality bodies appreciate the goal oriented approach to equality in statutory duties and welcome their promise of contributing to new outcomes for people experiencing inequality, in a context where discrimination and inequality have proven persistent and resistant to change. They prize their encouragement of more planned and systemic approaches to equality and non-discrimination, in a context where responses to these issue can be ad-hoc or left to the responsibility of individual champions within organisations. They appreciate their ability to stimulate awareness, commitment and cultural change within institutions, in a context where other priorities can leave equality considerations unaddressed. They identify value in their capacity to complement equal treatment legislation with a focus on systemic and structural processes of disadvantage and their ability to prevent discrimination, in contexts of high levels of under-reporting.

Provision for statutory duties is still a new phenomenon in some jurisdictions and it is too early to make judgements on their impact. This was highlighted in Ireland where the equality and human rights duty was enacted in late 2014, and in Finland where multi-ground institutional duties on educational establishments and employers were introduced in 2015, with a two year transition period for implementation.

There are few evaluations of the impact of statutory duties. The results identified in the evaluations detailed below are mixed. Key impacts identified, particularly in the evaluations from Northern Ireland, Britain, Wales, and Scotland, include

- Institutional change in organisational culture, decision-making, consultation mechanisms, and resource allocation.
- Institutional change in more coherent, evidence-based and inclusive policy making.

- Societal change in improved outcomes in employment and from service provision.

Impact is, however, found to be difficult to track, particularly in relation to societal change. Some of the evaluations detailed below raise key issues of ineffective or inadequate implementation. Barriers to implementation emerge, including:

- Duty bearers seeing no added value from implementing the statutory duty, holding a limited understanding of equality, diversity and non-discrimination, and having limited capacity to implement the statutory duty.
- A formulaic implementation of statutory duties with an emphasis on process rather than outcomes. A focus on institutional change and process can be pursued without an understanding that the purpose of this is to achieve societal change and outcomes. More cynically the statutory duty can be implemented without any commitment change, for examples preparing equality plans that are not implemented.
- The lack of support put in place for duty bearers to implement statutory duties despite a clear need for intensive support.

The Government Equalities Office in Britain commissioned, in 2009, a review of the three single ground mainstreaming duties in place prior to the Equality Act 2010 with its integrated multi-ground mainstreaming duty. These three mainstreaming duties related to the grounds of gender, racial or ethnic origin, and disability. They addressed public authorities as policy makers, employers and service providers in requiring them to have due regard to the need to eliminate discrimination and promote equality. They led to:<sup>29</sup>

- A positive shift in culture in organisations, which brought equality into the mainstream and built commitment from senior leaders and staff.
- Improvements in the way that organisations made decisions and allocated resources.
- Improved outcomes, including outcomes relating to:
  - service provision: such as increased access to services and positive service user views.
  - employment: such as improvements in tackling harassment, recruitment, representation at senior levels, pay gaps, and staff satisfaction.

Mainstreaming duties can come under pressure. A review of the 2010 multi-ground mainstreaming duty was conducted and published by the Government Equalities Office in 2013.<sup>30</sup> This concluded it was too early to make a final judgement about the impact of the mainstreaming duty and that a full evaluation should take place in 2016. This inconclusive review noted that “the legislation is primarily aimed at driving culture change in public bodies rather than driving improvements in outcomes, but we have looked at the extent to which improved outcomes have arisen from operating the public sector equality duty. We have heard many reports of generalised benefits which can be ascribed to the duty but, as yet, very few concrete examples of where the public sector equality duty has led to improved outcomes”.

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<sup>29</sup> Equality Duties: Assessing the Cost and Cost-Effectiveness of the Specific Race, Gender and Disability Equality Duties, Government Equalities Office and Schneider Ross, London, 2009.

<sup>30</sup> Review of the Public Sector Equality Duty: Report of the Independent Steering Group, Government Equalities Office, Britain, 2013.

The Equality Act 2010 included a provision requiring public authorities, “when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage”. It is a noteworthy example of the pressures that mainstreaming duties can come under that this provision was never commenced.

In Wales, the Equality and Human Rights Commission evaluated the mainstreaming duty. They found that the duty had raised equality issues up the agenda of most public authorities and that many leaders had begun to take personal responsibility for driving the equality agenda. Benefits were identified in an increased engagement by public authorities with people covered by the grounds under equal treatment legislation, change in the focus of delivery to allocate resources where they are most needed, and action to bring separate initiatives together in an action plan to gain increased momentum.<sup>31</sup>

The Equality Commission for Northern Ireland undertook a major review of the effectiveness of the mainstreaming duty in 2008.<sup>32</sup> This concluded that the mainstreaming duty had made an impact on how policy was made. In particular, it had stimulated more informed, evidence based, and inclusive policy making. This has led to policy that better reflects the needs of individuals in relation to equality of opportunity and good relations. Effective consultation was identified as a particular success. There was less evidence that the mainstreaming duty had the intended impacts on outcomes for individuals. The review noted the “critical role” of the Commission in ensuring the effectiveness of the mainstreaming duty in providing advice, monitoring and reporting on compliance, and investigating alleged breaches of required equality schemes.

A key conclusion was that a “shift in gear now needs to take place within public authorities; away from concentrating primarily on the process of implementing Section 75 (the mainstreaming duties), towards achieving outcomes”. The review also suggested that public authorities should prioritise measurement of the impact on individuals of their actions under the mainstreaming duty. This would enable the Commission to better assess the overall impact of the mainstreaming duty on individuals.

In its 2007 report of the five year self-assessment of the implementation of this mainstreaming duty carried out by public authorities, the Equality Commission for Northern Ireland pointed to impacts of:

- Improvements in core business, with public authorities identifying structural and cultural changes within their organisations. Equality of opportunity and good relations considerations were brought into Business Plans and then cascaded down into associated objectives and tasks for all staff. Training, good communication and increased partnership working led to equality thinking being more commonplace within organisations.
- Enhanced engagement with civil society organisations, with greater engagement or consultation with those directly affected by their policies being a key success noted

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<sup>31</sup> Review of the Public Sector Equality Duty in Wales, NatCen and Equality and Human Rights Commission Wales, Wales, 2013.

<sup>32</sup> Section 75 – Keeping it Effective, Reviewing the Effectiveness of Section 75 of the Northern Ireland Act 1998, Equality Commission for Northern Ireland, Belfast, 2008.



as arising from the mainstreaming duty. Considerable time was spent by public authorities in building up relationships with civil society organisations and individuals to ensure they could contribute to the policy making process.

- Greater coherence, with strategic arrangements put in place within some sectors to facilitate policy development and networking between public authorities in implementing the mainstreaming duty.<sup>33</sup>

In 2009 the Equality and Human Rights Commission in Britain reviewed the mainstreaming duties on public authorities to promote equal opportunities on an open list of grounds in relation to their Scottish functions under the Scotland Act 1998. It was found that “equality considerations were embedded in public policy discourse” and there was “awareness that equal opportunities or equality matters are part of how they must operate as a public authority”. Specifically, the review found:<sup>34</sup>

- Positive benefits have been seen in relation to changes in processes including data collection, research, policy design and consultation.
- There has also been greater awareness and understanding of equality issues and capacity building through, for example, equality training and secondments across the public sector.
- The move to a more equality sensitive culture within public authorities and greater accountability for meeting the requirements of equality legislation is also seen as an important positive benefit of this activity.

On a more negative note, a 2011 study by the Equal Treatment Authority in Hungary on the institutional duty on employers found that employers saw no added value in the equality plans required and saw little value in equal opportunities as a concept. The approach, where it was implemented was formulaic and once a plan was in place there was no guarantee that it would be implemented. A survey by the Office of the Equal Opportunities Ombudsman in Lithuania of the mainstreaming duty on public authorities identified a poor response to this statutory duty. It found a general lack of understanding of equality among public authorities and a lack of knowledge on how to implement the mainstreaming duty within their strategic plans.

These two reports link lack of implementation with lack of understanding and appreciation of equality more generally. Many equality bodies highlight that this ‘new generation’ of equal treatment legislation challenges mind sets and traditional approaches. In moving from a reactive approach to a proactive approach, statutory duties demand new ways of thinking about equality and how equality can be achieved. In seeking more systemic approaches to equality, statutory duties demand new ways of approaching policy-making, human resources management, and service provision. This change takes time and requires intensive support.

The Ombudsman for Equality in Finland carried out assessments of the institutional duties on the ground of gender on employers and on educational establishments. The assessments

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<sup>33</sup> Section 75 of the Northern Ireland Act 1998, Report of public authority five year reviews of equality schemes, Equality Commission for Northern Ireland, Belfast, 2007.

<sup>34</sup> Fitzgerald, R. & Associate, Equal opportunities and the Scottish Parliament: a progress review, Equality and Human Rights Commission research report 32, Edinburgh, 2009.

looked at both the quantity and the quality of gender equality plans produced on foot of this institutional duty. The conclusion in both cases was that the results were modest.

### *Implementation*

The potential of statutory duties often remains to be realised due to poor implementation. The better design of legal provisions could assist. The manner in which legal provisions are devised, in many jurisdictions, could be more explicit about the ambition of substantive equality for the statutory duty. Statutory duties would benefit from more detailed provisions on the steps required to implement them. Positive impacts are most likely to be reported in jurisdictions where such detailed provisions are made in the legislation, despite the complexity attendant on these models. Equality bodies could assist, where such detail is lacking, if they were given powers to establish binding standards for the implementation of the statutory duty.

A particular issue requiring more detailed legal provisions relates to preventive duties addressing equal pay. These need to go beyond requirements to collect data, to include requirements to conduct analysis and to take action to address pay differentials identified, and to ensure they take a broad view of pay structures and composition so that all issues are addressed.

There are particular challenges too for the effective implementation of mainstreaming duties that apply across different areas of government. Horizontal strategies are never easy to implement in systems that are organised in a vertical manner. It is difficult to secure uniform high quality implementation across the different silos of government and administration. Structures for coordination are, therefore, important for effective implementation of mainstreaming duties.

Action is required to motivate duty bearers in seeking to secure implementation of statutory duties. Sanctions in the legislation are useful, as are institutional structures that enable peer pressure and mutual support. Training and awareness raising of duty bearers is important to secure the valuing of equality and the skills base required for effective implementation. The availability of expert support stimulates implementation as does engagement by duty bearers with organisations representing social groups experiencing inequality.

A clear and explicit role for equality bodies in supporting, guiding, setting standards for, monitoring and enforcing statutory duties would assist such motivation. This role should be provided for in the legislation and it needs to be linked to an adequate resourcing of equality bodies to play this role. Legal provision in some instances makes useful reference to the participation of interested stakeholders in implementing the statutory duties. This provision could usefully be more widespread and more explicit in identifying the role of these organisations both in assisting implementation and in ensuring implementation. This provision needs to be linked to capacity building and adequate resourcing of these stakeholders.

### *Enforcement*

Fredman suggested that the greatest challenge in relation to effective implementation of statutory duties “remains that of creating appropriate incentives, sanctions and mechanisms for accountability to ensure that elaborate structures do not simply conceal

apathy or proceduralism”.<sup>35</sup> Equality bodies noted the dangers of statutory duties becoming ‘box-ticking’ or formulaic exercises or their implementation becoming an end in itself rather than a means to an end of greater equality for social groups.

Sanctions for failure to implement the statutory duty that are designed and applied in a manner that secures compliance with the statutory duty and stimulates commitment and motivation in this regard are needed to ensure their implementation. Accessible procedures through which to raise and resolve complaints of failure to implement statutory duties to the required standard are also needed. Inadequate, inappropriate or inaccessible sanctions leave a gap in the legal provisions made for statutory duties in most jurisdictions. There is a high level of consensus among equality bodies that sanctions are important in driving better implementation.

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<sup>35</sup> Fredman S. (2009) Making Equality Effective: The role of proactive measures, European Network of Legal Experts in the Field of Gender Equality, European Commission, Brussels.

## 4. Implementing Statutory Duties

This chapter first identifies the steps needed for policy makers, employer, and service providers to create the conditions to implement statutory duties within their organisations. It then explores and reviews the core tools used in each type of statutory duty with case studies. The tools identified come from seven of the seventeen jurisdictions that reported and clearly there is a case for their further dissemination.<sup>36</sup>

### 4.1 Create Conditions

The European Commission highlighted elements that are important in creating the conditions for effective implementation of equality and non-discrimination mainstreaming: leadership, coordination structures, guidance materials, training provision, expert support, participation, legislative requirements, and data.<sup>37</sup>

Fredman identified “four central ingredients of a proactive approach” to equality:<sup>38</sup>

- Responsibility, and the importance of a specific allocation of responsibility for implementing the statutory duty.
- Participation, with systematic principles deployed in the selection of consultees and “weight given to opinions of consultees”.
- Monitoring, to “assess whether a proactive measure is effective, to review its progress, and to readjust it if necessary”.
- Enforcement, responding to the imperative to devise “appropriate means of enforcement”.

Drawing from these two sources, a number of steps that are needed to create the conditions for the effective implementation of statutory duties can be identified. These include: **data gathering, participation, capacity support, networking, and monitoring.**

#### 4.1.1 Data gathering and analysis

Data gathering and analysis about groups experiencing inequality enables the evidence-based approach called for by many statutory duties. It provides a knowledge base about the situation, experience and identity of the social groups experiencing inequality, that is relevant to the specific statutory duty and the area it is being implemented in.

This data can be either quantitative or qualitative and should draw from a range of sources including academic research, administrative data gathered by public authorities, research and survey work done by non-governmental organisations, and organisational surveys and focus groups. Data gaps can be an impediment to effective implementation of statutory duties. However, while the data needs to be sufficient, it does not need to be exhaustive, and data gaps should not block implementation.

#### 4.1.2 Participation

The participation of individuals experiencing inequality and of organisations representing

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<sup>36</sup> Belgium, Britain, Finland, Hungary, Ireland, Northern Ireland, and Slovak Republic.

<sup>37</sup> Good Practice Exchange Seminar on Non-Discrimination Mainstreaming, Governmental Expert Group, European Commission, Finland, 2009.

<sup>38</sup> Fredman S. (2009) Making Equality Effective: The role of proactive measures, European Network of Legal Experts in the Field of Gender Equality, European Commission, Brussels.

groups experiencing inequality in the implementation of statutory duties provides knowledge, information, and expertise to duty bearers. Effective participation requires adequate preparation by, support for, and, if required, capacity building for these individuals and organisations.

This participation enables greater transparency in the preparation of legislation and policy. Equality and non-discrimination mainstreaming should not only be a technical mechanism of assessment within the administration, but an approach that encourages the participation of those with an interest.<sup>39</sup> The specific tools being used in implementing the statutory duty establishes a clear agenda for discussion between groups experiencing inequality and policy makers, employers, and service providers.

#### **4.1.3 Capacity Support**

The implementation of statutory duties requires specific knowledge, skills and awareness. In most instances this needs to be supported externally and developed over time within organisations covered by the statutory duty. External expert support is deployed to assist those responsible to implement statutory duties. It can also support the development of internal expertise over time. Equality bodies or specialist NGOs have been engaged in this way to work with policy makers, employers and service providers in implementing equality and non-discrimination mainstreaming.

Training is required to build staff capacity within the public authority to implement statutory duties. This training should:

- Develop awareness of concepts and values of equality and diversity;
- Build knowledge of equality, diversity and discrimination issues and about the social groups experiencing these issues;
- Inform about equal treatment legislation and strategies to promote equality;
- Build skills in equality and non-discrimination mainstreaming.

This training needs to be continuous given the likely turnover in staff responsibilities within organisations. There needs to be an effective stimulus to ensure attendance.

#### **4.1.4 Networking**

Coordination, in particular across public authorities, is valuable in implementing mainstreaming duties. This has been identified above as a specific approach to implementing mainstreaming duties and as a means of securing implementation of these duties. Inter-institutional structures enable a coherent approach across different bodies to implementing mainstreaming duties and builds a shared commitment to implementation.

Less formal forms of networking among those responsible for implementing statutory duties can assist policy-makers, employers and service providers in fulfilling these duties. Networking allows peer learning, mutual support, a drawing in of external expertise, and standard setting for implementing statutory duties.

#### **4.1.5 Monitoring**

The need for monitoring recognises that the assessment of legislation or policy at draft stage is a prediction of impact. This prediction needs to be checked over time against the

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<sup>39</sup> McCrudden, C. (1999) Mainstreaming Equality in the Governance of Northern Ireland, in Fordham International Law Journal, Volume 22, Issue 4, 1998.

real impact, as the legislation or policy is implemented. Quantitative and qualitative data can be gathered and used to assess the impact of the legislation or policy as it is implemented. Any divergence from the predicted impact should serve as an alert to the need for further revision.

Likewise, the preparation of equality plans is a statement of aspiration. The transforming of this aspiration into outcomes for policy beneficiaries, service users or employees needs to be tracked over time. Any divergence from targets set should serve as an alert to review and revise equality plans.

**Table 6: Key Tools for Creating the Conditions**

<b>Tool</b>	<b>Description</b>
<b>Data</b>	Gather and analyse quantitative and qualitative data from different sources on groups experiencing inequality.
<b>Participation</b>	Structured participation by individuals that experience inequality and their representative groups in the process and decision-making for implementing the statutory duty.
<b>Capacity</b>	External support and training to build staff knowledge, skills and awareness for implementing the statutory duty.
<b>Networking</b>	Formal and informal networking among duty bearers to build mutual support and stimulate peer pressure for implementation.
<b>Monitoring</b>	Monitoring outcomes from the equality impact assessments or equality planning carried out to track that assumptions made are valid and the outcomes planned and predicted are achieved.

## 4.2 Preventive Duties

### *Introduction*

There is limited definition of measures required under preventive duties in equal treatment legislation. The Commissioner for Human Rights in the Council of Europe has pointed to the need for organisations to be “planned and systematic in their approach to equality”.<sup>40</sup> Such an approach offers a frame for compliance with preventive duties. It requires an internal institutional infrastructure that includes:<sup>41</sup>

- An equality policy that sets out a formal institutional commitment to equality and a standard to be achieved in this regard.
- Equality training that builds staff capacity to reflect this commitment in practice.
- Equality planning with clearly stated equality and non-discrimination objectives and activities sufficient to realise these.
- Governance and decision-making processes that allow for an equality impact assessment, participation by representatives of groups experiencing inequality,

<sup>40</sup> Opinion of the Commissioner for human rights on national structures for promoting equality, CommDH(2011)2, Council of Europe, Strasbourg, 21 March 2011.

<sup>41</sup> Crowley N., *An Ambition for Equality*, Irish Academic Press, Dublin, 2006.

allocation of responsibility for driving equality issues, and data gathering for evidence-based decision-making as appropriate.

**Table 7. Key Tools for Preventive Duties**

<b>Tool</b>	<b>Description</b>
<b>Equality Policy</b>	Set out a the commitment to and standard for equality and non-discrimination in the organisation.
<b>Equality Training</b>	Provide training to develop staff knowledge, skills and awareness to implement the equality policy.
<b>Equality Planning</b>	Establish equality and non-discrimination objectives for the organisation and the measures to be taken to achieve these.
<b>Governance and Decision-Making</b>	Inform key decisions by conducting equality impact assessments, engaging with individual experiencing inequality and their representative organisations, and gathering equality data.

*Case.1 Slovak Republic*

Substantive legal commentary on the Act on Equal Treatment in Certain Areas and Prohibition on Discrimination has suggested that anti-discrimination measures required under the preventive duty would include:

- Publishing information in the workplace on discrimination and on legal protection against discrimination, including leaflets and information boards.
- Educational activities for employees of the organisation on discrimination themes.
- Making provision in relation to discrimination in internal regulations of the organisation.
- Creating complaint mechanisms to deal with issues of discrimination arising.
- Conducting surveys or audits to detect issues of discrimination and assess the impact of preventative measures.

*Case.2 Ireland*

A code of practice on sexual harassment and harassment at work, developed by the Equality Authority (now the Irish Human Rights and Equality Commission) establishes the steps required to implement a preventive duty on employers:<sup>42</sup>

- ⇒ Employers should adopt, implement and monitor a comprehensive, effective and accessible policy on sexual harassment and harassment.
  - This should include: statement of commitment; definitions of sexual harassment and harassment; allocation of responsibility in relation to the issue; set out the contribution of trade unions, employees and non-employees; steps to communicate the policy; staff training; monitoring of the policy; complaints mechanisms; and review of the policy.

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<sup>42</sup> Code of Practice on Sexual Harassment and Harassment at Work, Equality Authority, Dublin - given legal effect in the Statutory Instrument 'Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002 (S.I. No. 78 of 2002)'.

- ⇒ Clear and precise procedures to deal with sexual harassment and harassment once it has occurred are required that ensure the resolution of problems in an effective and efficient manner.
  - These should be set out in plain language and should include information on: time limits; statutory rights; victimisation; sanctions; confidentiality; and steps in the formal investigation of complaints.

The Code of Practice has been given legal effect and can be used as evidence in cases of workplace sexual harassment and harassment under the Employment Equality Acts.

### *Reflection*

The practice tools reported for implementing preventive duties is closely aligned with the theoretical concept of a ‘planned and systematic’ approach to equality, that involves organisational policies, procedures and training for equality and non-discrimination. This approach is simple to implement and appears to be effective in securing and driving institutional change. However, it needs further definition in legislation.

## **4.3 Institutional Duties**

### *Introduction*

Equality planning is the core tool for implementing most institutional duties. This tends to be specified, sometimes in detail, in the legal provision for these duties. The European Commission identifies valuable outcomes from equality planning in securing a commitment within the organisation to equality objectives, involving organisations representing groups experiencing inequality in a policy dialogue, and supporting a capacity to promote equality within the organisation.<sup>43</sup> It suggested that equality plans should: assess the needs of the groups experiencing inequality which are being targeted by the plan; establish objectives to be achieved; identify actions to be taken in pursuit of these objectives; and set out systems of monitoring and reporting on progress made. Equality planning should be participative in involving organisations representing groups experiencing inequality.

**Table 8. Key Tools for Institutional Duties**

<b>Tool</b>	<b>Description</b>
<b>Equality Planning</b>	Participative planning that assesses the needs of and current situation for people within the organisation from groups experiencing inequality, establishing objectives to address their needs and improve their situation, establish actions to be taken to achieve objectives, and monitor outcomes.

### *Case.1 Finland*

The institutional duty on employers and education providers under the Non-Discrimination Act was only enacted in 2015. The Ministry of Justice has developed detailed guidelines for one of the key steps required, namely the assessment of equality achieved within the

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<sup>43</sup>Compendium of Practice on Equality/Non-Discrimination Mainstreaming, DG Justice, European Commission, Luxembourg, 2011.



organisation.<sup>44</sup> This precedes the development of an equality plan and applies to employers, education providers, and public authorities. The guidance identifies that the “purpose of assessing equality is to identify discrimination and methods of improving equality in the workplace and in various activities”.

The guidance for employers recommends examination of the following:

- ⇒ What is to be assessed?
  - Identification of discrimination being experienced and of interventions to combat discrimination.
    - This focuses on human resource policy and activities.
    - It includes an assessment of whether discrimination has happened, how it was observed, and who faces discrimination.
    - It involves an examination of the procedures to address discrimination and the activities to prevent discrimination.
  - Identification of the situation of equality between different groups and organisational activities for equality, or good relations between groups.
    - Attend to formal and actual equality in the work force.
    - The functions of an organisation can be examined for equality issues and the kinds of measures that might best foster equality.
    - The impacts of the social atmosphere in the working community on the operational capacity of people from diverse backgrounds can be explored.
- ⇒ How is the assessment to be implemented?
  - An equality survey for employees and stakeholders.
  - Special theme based events to assess the organisation’s equality and non-discrimination status.
  - Consultation with groups at risk of discrimination.
  - Conducting an equality impact assessment of various functions of the organisation. Establish common equality objectives as the basis for this.
- ⇒ How to move from assessment to equality planning?
  - Measures for promoting equality in the workplace can be planned on the basis of this assessment.
  - Concrete measures are entered in the equality plan, which may be separate or form part of another plan.

### *Reflection*

The practice tool reported for implementing institutional duties accords with and goes beyond the standard suggested for equality planning. It reflects a systematic approach for organisations that is not complex to implement once such a framework has been established.

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<sup>44</sup> Tool for the Assessment of Equality, Ministry of Justice, Finland, 2015.

## 4.4 Mainstreaming Duties

The typology of mainstreaming duties is based on their specific approaches of equality impact assessment, equality planning, coordination, and existing process based. Each approach has its own dedicated core implementation tool as described below.

**Table 9. Key Tools for Mainstreaming Duties**

Tool	Description
<b>Equality Impact Assessment</b>	Test a policy, regulation, law or plan at draft stage for its potential impact on groups experiencing inequality.
<b>Equality Planning</b>	Plan for the equality outcomes desired and to be achieved through the functions of the public body over a period of time.
<b>Coordination</b>	Coordinate plans, resources and approaches across public bodies to achieve agreed equality outcomes.
<b>Incorporate an equality focus in an existing institutional process</b>	In the strategic plan of the public authority, establish equality issues relevant to the functions of an organisation and identify policies and places in place or to be put in place to address these.

### 4.4.1 Equality impact assessment

#### *Introduction*

The European Commission defined an equality impact assessment as an exercise to assess the potential impact of a policy on advancing equality, eliminating discrimination, and improving the situation and experience of groups experiencing inequality.<sup>45</sup> It is done at the draft stage of policy and involves four core steps:

- Gather relevant data in relation to the situation, experience and identity of each of the groups experiencing inequality that are present among the policy target group to identify:
  - relevant resources available to the group, including economic resources and political resources;
  - the attitudes and behaviours of the wider society towards the group and how these are likely to find expression within the organisations implementing the policy; and
  - the perspective of the group on the policy area, including the potential behaviours of the group in response to the policy proposed.
- Analyse this data to assess the potential impact on these groups of the policy as currently designed. The analysis would examine whether the policy:
  - takes account of the particular situation, experience and identity of groups experiencing inequality.
  - improves the situation and experience of these groups.

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<sup>45</sup> Compendium of Practice on Equality/Non-Discrimination Mainstreaming, DG Justice, European Commission, Luxembourg, 2011.

- Includes any provision in the policy that could discriminate against members of these groups.
- Establish what changes are required to enhance impact, better take account of difference, eliminate discrimination and/ or alleviate any adverse impact.
- Review this analysis and the quality of the data gathered with organisations that represent the groups that are a focus for the equality impact assessment.

The European Institute for Gender Equality has identified five steps for a gender equality impact assessment:

- Definition of policy purpose: producing a precise definition of the purpose of the planned policy or legislative measure.
- Checking gender relevance: analysing whether or not the measure is susceptible to impact on gender equality.
- Gender-sensitive analysis: seeking to understand the present situation for the groups concerned by the measure and how this situation would evolve without the measure; and analysing how the planned intervention is expected to change this situation.
- Weighting the gender impact: establishing how the measure will contribute to gender equality, as well as assessing its potential impact on gender relations.
- Findings and recommendations: how to eliminate negative impacts on gender equality and on how to enhance positive impacts predicted from the measure.<sup>46</sup>

Both of these approaches offer standards against which to consider the tools being used within different jurisdictions.

#### *Case.1 Belgium - Federal*

The gender mainstreaming duty requires a gender test to be implemented in policy-making before the policy decision is made. The Law containing various provisions on administrative simplification of December 2013 addresses impact analysis required of policy in relation to objectives of gender equality, sustainable development, and policy coherence for development, and in relation to issues for small and medium enterprises, and of administrative burden. It provides for an Impact Analysis Committee, composed of members of the administration in charge of the domains covered. The Committee was charged with developing the gender test, which must subsequently be adopted by the Council of Ministers. The Institute for the Equality of Women and Men is a member of this Committee and led the production of this.

The gender test is based on five questions:

- What people are (directly and indirectly) involved in the project and what is the gender composition of the group(s) of people?
- Are there any differences between the respective situations of men and women that relate to the draft regulations?
- Do any of these differences limit access to resources or the exercise of fundamental rights of women or men (problematic differences)?
- What, based on this, are the positive and/or negative impacts of the draft regulation on equality of women and men?

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<sup>46</sup> See more: <http://eige.europa.eu/gender-mainstreaming/tools-and-methods/gender-impact-assessment>.

- What measures are going to be taken to reduce/offset any negative impacts?

The first three questions establish the situation of women and men in relation to the policy and require the use of gender statistics. The fourth question assesses the impact on equality of women and men and is based on the situation established. The final question identifies possible compensatory measures in the event of negative impact.

Guidance developed by the Institute for the Equality of Women and Men identifies four phases in policy-making: policy analysis; policy definition; policy implementation; and policy evaluation.<sup>47</sup> The first two phases are key in the 'gender test':

- ⇒ The analysis phase, where the institution responsible for the policy gathers and analyses relevant data to:
  - identify gender differences and gender inequalities in the policy area;
  - identify and analyse the causes and consequences of these inequalities;
  - define objectives to address inequalities or take differences into account
- ⇒ The policy definition phase, where a strategy is formulated to achieve these objectives involving steps to:
  - analyse the content of the policy from the perspective of gender.
    - Analyse the content of the draft in terms of representation, resources, and reality. Representation is the distribution of women and men among the target group. Resources is how the policy benefits are distributed between women and men. Reality is the reasons for gender imbalances between women in the policy area.
  - evaluate the positive and/or negative effects of the policy on gender equality and address any negative impact found by adjusting the policy or proposing alternative measures to compensate.
  - establish indicators to be used in monitoring the implementation phase and in the evaluation phase from a gender perspective.

Consultation with stakeholders and with external experts is recommended.

The Institute for the Equality of Women and Men has also prepared guidance on gender budgeting to support implementation of that element of the mainstreaming duty.<sup>48</sup> Gender budgeting involves "evaluating the (potential) impact of the sums invested in public policies on the respective situation of women and men in society". It is defined as "analysing and creating budgets (both revenues and expenditures) taking into account the respective situations of women and men. This integration of the gender perspective has to be carried out in all phases of the budgetary cycle".

It is based on a process of categorisation. Items to be financed are categorised as:

- Concerning internal functioning or otherwise not having a gender perspective.
- Aiming specifically to achieve equality between women and men. Or
- Concerning a public policy and has a gender perspective.

If the items relate to the third category those responsible must explain briefly in a 'gender

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<sup>47</sup> Manual for the Application of Gender Mainstreaming within the Belgian Federal System, Institute for the Equality of Women and Men, Belgium, 2011.

<sup>48</sup> Manual for the Application of Gender Budgeting within the Belgian Federal System, Institute for the Equality of Women and Men, Belgium, 2011.

comment' the manner in which the gender perspective has been or will be taken into account. The Institute for the Equality of Women and Men monitors this.

### *Case.2 Britain*

Public authorities must first prepare and publish equality outcomes to be achieved through the mainstreaming duty, subject to review every four years. Conducting an equality impact assessment on policy at draft stage is an explicit requirement in Scotland and Wales. It is viewed as key to "having due regard" as required by the mainstreaming duty and, therefore, an implicit requirement in England. It should involve:<sup>49</sup>

- ⇒ Consideration of available equality data. Both quantitative and qualitative evidence should be considered.
- ⇒ Assessment of the likely effect of the policy or practice on the public authority's duty to give due regard to the need to eliminate discrimination, advance equality and foster good relations and to the achievement of the equality outcomes set.
- ⇒ Identification of measures to mitigate any adverse impact and alternative policies or practices to better promote equality or foster good relations.
- ⇒ Publication of the results of the equality impact assessment.

If the assessment indicates that the proposed policy or practice could give rise to discrimination or other prohibited conduct, it must be modified. Where the assessment indicates potential adverse impact the public authority must consider whether to adopt the policy or practice as proposed, modify it, or mitigate any adverse impact.

The involvement of persons likely to be affected by the decisions of the public authority is identified as enabling compliance with the statutory duty.<sup>50</sup> Public authorities must take reasonable steps to involve people with protected characteristics, and any person which appears to the public authority to represent the interests of these people.

The equality impact assessment must be a continuous process that includes monitoring of the actual impact of the policy and of the effect of any mitigating actions over time.

### *Case.3 Northern Ireland*

When a policy is identified as having a major potential impact on equality of opportunity or good relations, it should be subject to an equality impact assessment. This should involve the following steps:<sup>51</sup>

- ⇒ Define the aims of the policy.
- ⇒ Consider available data and research, including qualitative and quantitative data.
- ⇒ Assess the impact of the policy.
- ⇒ Consider:
  - measures which might mitigate any adverse impact;
  - alternative policies which might better achieve the promotion of equality of opportunity.

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<sup>49</sup> Equality Act 2010 - Technical Guidance on the Public Sector Equality Duty: Scotland, Equality and Human Rights Commission, UK, 2014.

<sup>50</sup> Equality Act 2010 - Technical Guidance on the Public Sector Equality Duty: Scotland, Equality and Human Rights Commission, UK, 2014.

<sup>51</sup> Section 75 of the Northern Ireland Act 1998 - Practical Guidance on Equality Impact Assessment, Equality Commission for Northern Ireland, Belfast, 2005.

- ⇒ Consult with affected individuals and representative groups.
- ⇒ Decision by the public authority on the policy and publication of a report on the results of the equality impact assessment.
- ⇒ Monitor for adverse impact of the policy into the future.

This guidance also suggests a set of questions for the impact assessment step:

- Does the quantitative data reveal any differential impact on any of the groups?
- Does the qualitative or evaluative data reveal any differential impact on any of the groups?
- Is there a difference in the conclusions reached using quantitative and qualitative methods? How can the difference be reconciled?
- Is the differential impact an adverse one?
- Is the policy directly or indirectly discriminatory? If the policy is not directly or indirectly discriminatory, does it still have an adverse impact?
- Is the policy intended to increase equality of opportunity by permitting or requiring affirmative or positive action or action to redress disadvantages? Is it lawful?
- Is there any alternative measure which would achieve the desired aim without the adverse impact identified?
- Is there any measure which would mitigate the adverse impact identified? Are there additional measures which would further equality of opportunity in the context of this policy?

### *Reflection*

The tool described in these three cases accords well with and goes beyond the standards suggested by the European Commission and EIGE. In two cases the tools are multi-ground, in Belgium (federal) it is gender based. The similarity of approach, despite this different coverage, is important to note.

These three cases involve and require action to create the conditions for the effective application of this tool. This includes generating equality data, developing institutional coordination, establishing equality objectives, setting up consultation mechanisms, and putting long-term monitoring systems in place.

The tools clearly require a significant level of knowledge, skill and awareness for their effective implementation. The external support infrastructure is vital in this regard and equality bodies are playing a key role in this by providing guidance and practical supports.

Evaluations from Britain and Northern Ireland were positive about the impact of the mainstreaming duties. Yet, these are the jurisdictions deploying what are complex tools. Complexity or the avoidance of complexity cannot, therefore, be the key determinant of success. More important for success would appear to be the match with traditions and processes within duty bearer organisations and the quality of the support infrastructure for duty bearers.

The Equality Commission for Northern Ireland commissioned a review of the practice of both screening and equality impact assessment under their mainstreaming duty in 2016.<sup>52</sup> This found that “although the number of EQIAs being undertaken across public authorities

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<sup>52</sup> Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice, Policy Arc Ltd & Kremer Consultancy Services Ltd., for Equality Commission for Northern Ireland, Belfast 2016.

over recent years was not large, the quality of these assessments was high, conforming closely to ECNI guidance and often leading to significant mitigations or the introduction of alternative policies. The structure and content of EQIA consultation reports would suggest a good understanding of the EQIA process, and without doubt the reviewed EQIAs often represented significant research enterprises taking up considerable resources and time”.

#### **4.4.2 Equality plans**

##### *Introduction*

The European Commission identified that “equality plans provide a standard against which to assess policies being developed by the public authority in other policy areas. New policy can be assessed for its contribution to the objectives of the equality plan. Elements of the equality plan can be built into new policy”.<sup>53</sup> Equality plans should establish objectives, identify actions, set targets and timescales, allocate responsibilities, and identify indicators. Linking public authorities involved in equality planning is recommended to secure coherence of effort.

##### *Case.1 Finland*

Guidance has been provided by the Ministry of the Interior for equality planning by public authorities, required under the Non-Discrimination Act.<sup>54</sup> The aim of the equality plan is identified as being to “improve equality in the functions and activities of the public authority”. It should:

- ⇒ Identify and tackle discrimination.
- ⇒ Assess the impact of its functions and activities on equality.
- ⇒ Implement measures to promote equality.
- ⇒ Increase participation by members of groups affected by inequality.

The planning methodology should include:

- ⇒ Forming a working group with staff, management and groups at risk of discrimination.
- ⇒ Consultation among staff, clients, and stakeholders.
- ⇒ Surveying the situation and operating environment for the public authority from an equality perspective. This can examine:
  - how existing strategies and policies take account of equality and non-discrimination.
  - data available on the operating environment.
  - data on staff and clients.
  - client feedback.
  - consultation with relevant organisations.
  - research or other studies of relevance.
- ⇒ Establishing measures that could respond to issues emerging from the survey.
- ⇒ Drafting the equality plan.
- ⇒ Publishing and implementing the equality plan.
- ⇒ Monitoring the impact of the measures included in the equality plan and the

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<sup>53</sup> Compendium of Practice on Equality/Non-Discrimination Mainstreaming, DG Justice, European Commission, Luxembourg, 2011.

<sup>54</sup> Equality Planning Guide, Ministry of the Interior, Finland, 2010.

evolving equality situation.

⇒ Updating the equality plan as required.

### *Case.2 Hungary*

Government Decree No. 321/2011. (XII. 27.) provides guidance on the local equal opportunities programmes required under equal treatment legislation. These should:

- ⇒ Include a situation analysis with regard to people living in poverty, Roma, children, women, older people and disabled people in their area.
- ⇒ Include a plan of action to address this situation. Specific guidance is provided on the content of the local equal opportunities programme in the Decree.
- ⇒ Be drawn up by public servants in the local government. External mentors train the public servants and supervise the preparation and completion of the equal opportunities programme. The Türr István Training and Research Institute (TKKI), an institution of the Ministry of Human Resources is indicated as providing this support.
- ⇒ Publish and make the equal opportunities programme available, including through the TKKI website.
- ⇒ Review the equal opportunities programme every two years.

### *Reflection*

The practice tool reported for implementing these mainstreaming duties accords with and goes beyond the standard suggested for equality planning. As with the equality planning approach reported for institutional duties, it reflects a systematic approach for organisations that is not complex to implement once such a framework has been established.

The focus on monitoring the impact of the equality plan over time in Finland is useful in capturing the need to ensure that plans have the anticipated impact and taking action if they don't. The focus on expert support in Hungary is useful in ensuring a standard quality in implementing this tool and in promoting a coherence of approach across public authorities.

There is limited information given in relation to any wider use of equality plans as a template for equality and non-discrimination mainstreaming as suggested in the report of the European Commission.

### **4.4.4 Coordination**

#### *Introduction*

The 'coordination' approach to implementing mainstreaming duties is explicitly linked to the 'Open Method of Cooperation' model developed by the European Commission. This model provides a framework for cooperation between the Member States, whose national policies can be directed towards agreed common objectives. Member States are evaluated by each other through peer review, with the European Commission supervising the process. Institutional structures for this 'Open Method of Coordination' have engaged the Member States with the European Commission on policy issues of employment, education and training, and social inclusion.

This 'Open Method of Coordination' model is based on:

- Jointly identifying and defining objectives to be achieved, that are adopted by the Council;



- Jointly established measuring instruments to track progress, including statistics, indicators, and guidelines;
- Benchmarking through comparison of the Member States' performance and exchange of best practices.

The Open Method of Coordination encourages convergence among Member States of objectives, performance and broad policy approaches, but not of programmes, rules or institutions<sup>55</sup>. It is seen as a means of promoting experimental learning and deliberative problem solving and of turning the diversity within the EU Member States into an asset.

#### *Case.1 Belgium – Flanders*

The Flemish Government in Belgium has used this 'Open Method of Coordination' model in implementing the mainstreaming duty. A specific interdepartmental structure has been established for this purpose. The Equal Opportunities Commission, made up of civil servants representing the thirteen different Flemish policy domains, is the key driver for implementing the mainstreaming duty. It meets five times a year to:

- ⇒ Support development of the framework of equal opportunity objectives and preparation of departmental action plans to realise these.
- ⇒ Enable a peer review process between Departments on their individual action plans.
- ⇒ Give coherence to the departmental planning process.
- ⇒ Monitor implementation of the plans.
- ⇒ Evaluate the impact of the coordination process.

#### *Reflection*

The practice tool reported for implementing this mainstreaming duty accords with the standard it has set for itself of the 'Open Method of Coordination' of the European Commission. As with the standard set, the impact of the tool depends on the quality of the planning work of the individual departments and the capacity of the coordination structure to advance a critical peer review process.

### **4.4.5 Process**

#### *Introduction*

Organisational values have emerged as an innovative focus for implementing mainstreaming duties based on existing processes within public authorities, in particular strategic planning processes. Values are key motivators. Valuing equality and non-discrimination drives change within organisational decision-making. Values shape what organisations prioritise and how they implement their priorities. Values focus attention on organisational culture, an area that is of key importance for statutory duties.<sup>56</sup>

A three stage process has been identified by civil society in Ireland for a values-based approach to implementing an equality and human rights duty:<sup>57</sup>

- Pre-planning and preparation:
  - Agree equality and human rights values relevant to the functions of the

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<sup>55</sup> Zeitlin J., in Zeitlin J. & Pochet P., with Magnusson L. (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E.-Peter Lang, Switzerland, 2005.

<sup>56</sup> *Common Cause Handbook*, Public Interest Research Centre, Wales, 2011.

<sup>57</sup> Mullen R., *A New Public Sector Equality and Human Duty*, Equality and Rights Alliance, Dublin, 2015.

- public authority.
- Set out what these values mean with objectives for each value.
- Assessing and Action-Planning:
  - Consult external and internal stakeholders representing affected groups.
  - Review the public authority's plans, policies and services against the objectives for each value.
  - Conduct impact assessment of plans, policies and services against the objectives set for each value and address any issues identified by this.
  - Undertake an employment equality and human rights review of internal operations to identify issues for employees from the affected groups against the objectives for each value and take action on issues identified.
- Monitoring, evaluating and reporting on outputs and outcomes:
  - Develop data systems to measure the situation and experience of people from the affected groups in a manner relevant to the definition of the equality and human rights values.
  - Set indicators to measure progress on achieving objectives for each value.
  - Track progress on these objectives at management level and conduct evaluations as appropriate.

### *Case.1 Ireland*

The mainstreaming duty in Ireland has an added layer of complexity in being both an equality and a human rights duty. The Irish Human Rights and Equality Commission has published a training module workbook for a course it is developing with the Institute for Public Administration. The course is primarily for public servants and is focused on equality and human rights, including on implementing the equality and human rights duty. The workbook includes sections on a values based approach to implementing the duty and identifies the following steps:<sup>58</sup>

- ⇒ Develop, agree, and define the equality and human rights values to be prioritised. The values of autonomy, democracy, social justice, inclusion, and dignity are suggested as a starting point.
- ⇒ Gather and analyse relevant data across the nine grounds covered by the equality legislation and a socio-economic status ground.
- ⇒ Prepare and agree an equality and human rights statement.
- ⇒ Deploy the equality and human rights statement in:
  - preparing their strategic plan, both in terms of the planning process and the content of the plan.
  - managing implementation of their strategic plan.
  - reporting on progress made in implementing their strategic plan.
  - Evaluating their strategic plan and any of their functions as policy makers, employer, service provider, and procurer of goods and services.
- ⇒ Ensure participation by organisations representing groups experiencing inequality and human rights violations in developing and applying their equality and human rights statement.

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<sup>58</sup> Crowley N., Human Rights and Equality in Public Management: The public sector duty, Module 4, Irish Human Rights and Equality Commission and Institute of Public Administration, 2016.

The steps involved in preparing the equality and human rights statement are to:

- ⇒ Identify an objective under each of the equality and human rights values agreed, that the organisation seeks to achieve for each of its functions as a policy maker, employer, service provider and procurer of goods and services.
- ⇒ Establish, for each of these objectives, the pertinent equality and human rights issues that the organisation needs to address in its work as a policy maker, employer, service provider and procurer of goods and services.
- ⇒ Set out a methodology to bring the equality and human rights statement into play in the organisation at relevant decision-making moments of the planning cycle of planning, implementing, monitoring, and evaluating.

### *Reflection*

This practice tool is still at a design stage. However, it accords with and goes beyond the standard suggested for this approach by civil society.

The challenge for tools to match current traditions and processes of duty bearers points out the importance of innovation in their design and application. The values-based approach opens up a new type of approach that responds to the tradition of a strong citizen focused value base in public bodies. This tradition is important for many who work in these organisations and engages their commitment with the statutory duty.

## 5. Equality Bodies Roles

This chapter explores the contribution and role of equality bodies in the effective design and implementation of statutory duties. It provides examples of actions taken by equality bodies in supporting the implementation of statutory duties. Finally, it provides some assessment of this engagement by equality bodies with statutory duties.

### 5.1 Role

Equality bodies have a particular contribution to make to the effective implementation and impact of statutory duties of all types. Such a contribution fits neatly with their mandate to promote equality and combat discrimination and aligns well with the promotional activities already developed by equality bodies with policy makers, employers and service providers. The broad mandate of equality bodies mirrors the potential of statutory bodies to create institutional and societal change, and their ambition to promote substantive forms of equality.

There are clear and evident difficulties in the implementation of statutory duties in most jurisdictions. These difficulties appear to be fewer where equality bodies are accorded a central role in relation to the implementation of statutory duties and are given appropriate resources to implement such a role. Equality bodies don't implement the statutory duties on behalf of duty bearers. However, they can provide the hub around which duty bearers are enabled to effectively fulfil these statutory duties.

The European Commission emphasises the important role of expert centres in supporting equality and non-discrimination mainstreaming and notes equality bodies as one type of expert centre. An expert centre is needed to "provide equality expertise directly to the organisation but it should also assist in building this expertise within the organisation".<sup>59</sup> As a hub, equality bodies can provide further and additional support in enabling coordination, networking, and peer learning between duty bearers. They can:

- Play an enforcement role in mobilising sanctions available in cases of non-compliance.
- Build and ensure a broad public and institutional awareness of and commitment to statutory duties.
- Set and promote standards for implementing these duties and provide advice, training, mentoring, and guidance to enable duty bearers to meet such standards.
- Stimulate the growth and further evolution of statutory duties through tracking and evaluating their implementation and impact, and recommending changes to the equal treatment legislation in the provisions made for statutory duties.

**Table 10: Roles for Equality Bodies under Statutory Duties**

Role	Description
Enforce	Monitor implementation, deploy standards, and call up stimuli for implementation.
Promote	Build awareness among the public and key stakeholders about the

<sup>59</sup> Compendium of Practice on Equality/Non-Discrimination Mainstreaming, DG Justice, European Commission, Luxembourg, 2011.

	statutory duty and create demand and motivation for its implementation.
<b>Set Standards</b>	Provide a standard to be met in implementing the statutory duty that includes the specific steps required in its implementation.
<b>Support</b>	Offer training, mentoring, expert support and guidance material to duty bearers to assist in implementing the statutory duty.
<b>Champion</b>	Provide advice and make recommendations to the legislature to develop or further enhance statutory duties in equal treatment legislation.

## 5.2 Action

Actions reported by equality bodies in relation to statutory duties encompasses all of these potential roles of:

- Enforcement
- Awareness
- Support and guidance
- Monitoring

### 5.2.1 Enforcement

Preventive duties have been a focus for enforcement action by equality bodies. This action has been largely progressed within the sanctions regime for acts of discrimination. This is particularly true for predominantly tribunal type bodies, that work mainly on hearing, investigating, and deciding on individual instances of discrimination.

In Bulgaria the Commission for Protection against Discrimination has dealt with a small number of cases regarding preventive duties. The Public Defender of Rights in the Czech Republic handled six cases regarding the preventive duty since the adoption of the Anti-Discrimination Act in 2009. On foot of developing the code of practice, the Equality Authority (now the Irish Human Rights and Equality Commission) supported extensive casework before the Equality Tribunal that relied on this preventive duty.

This enforcement role is not confined to preventive duties. In Sweden, the legal position is that the Equality Ombudsman can seek to enforce institutional duties before the Board of Discrimination. In Finland, the Non-Discrimination Ombudsman can seek to enforce institutional duties and the mainstreaming duty before the Board of Discrimination. It has brought no such cases. However, the two-year transition period for the new legislation is not over yet. It also notes that the right to bring such a case can be an effective threat in itself. The Finnish Ombudsman for Equality likewise can bring a case for the gender institutional duties.

The Equality and Human Rights Commission in Britain has intervened in a series of strategic cases with the aim of strengthening the mainstreaming duty as an effective tool for delivering improved decision-making by and outcomes from public authorities. In *Bracking vs. Secretary of State for Work and Pensions* (Court of Appeal, 2013), the Court confirmed and approved key principles to help public authorities better understand how they can fulfil

the duty to have 'due regard' under the mainstreaming duty ('Brown Principles'). These principles include that:

- ⇒ The mainstreaming duty is an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
- ⇒ The duty is upon the decision maker personally. What matters is what he or she took into account and what he or she knew.
- ⇒ A body must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy.

The case also confirmed that a body subject to the duty must have enough evidence available to demonstrate that it has discharged the duty.

The Equality Commission for Northern Ireland has roles and responsibilities in relation to the enforcement of the mainstreaming duty. It is responsible for approving equality schemes. It can respond to individual complaints or investigate on its own initiative in relation to alleged or perceived failures to implement equality schemes. Completed investigations set out whether the alleged or perceived failure to implement has been established and the action recommended to be taken by the public authority.

The Equality Commission for Northern Ireland reports investigating sixteen individual complaints on its website. In ten of these the public authority was found to have failed to implement its equality scheme and specific recommendations were made to address this. It reports eight investigations on its own initiative on its website. In five of these the public authority was found to have failed to implement its equality scheme and specific recommendations were made to address this. In all cases, detailed investigation reports are provided on the website of the Commission.

The Equality Commission for Northern Ireland has an enforcement role in relation to the institutions duty under the Fair Employment and Treatment (Northern Ireland) Order 1998. However, these powers are little used as compliance rates are high.

The Office of the Equal Opportunities Ombudsperson in Lithuania can receive complaints in relation to the failure to implement the mainstreaming duty, but there have been no such complaints. The Irish Human Rights and Equality Commission is accorded a form of enforcement role in relation to the equality and human rights duty in that it can invite public authorities that fail to comply to conduct an equality and human rights review of their organisation. This has not happened yet. The Equal Treatment Authority in Hungary can investigate, on request, whether the required equal opportunities plan has been approved by an employer and to apply sanctions if not. However, no such cases have been investigated.

### **5.2.2 Awareness**

In a context where statutory duties reflect a new generation of equal treatment legislation, where they demand change in perceptions and approaches by duty bearers, and where implementation remains a significant challenge, the work of equality bodies in building awareness of these duties and their benefits is necessary.

The awareness work reported by equality bodies is particularly evident in relation to preventive duties. The network of regional representatives of the Commission for Protection against Discrimination in Bulgaria engages directly with local employers and

trade unions to promote the equality agenda, including the preventive duties in the equal treatment legislation. The Office of the Ombudswoman in Croatia has promoted the duty to report discrimination in its educational activities. The training and educational activities of the Slovak National Centre for Human Rights includes a focus on the preventive duties.

The Equality and Human Rights Commission in Wales has developed an innovative approach to promoting awareness of the mainstreaming duty. They are planning an initiative to raise awareness and build capacity of civil society organisations in relation to the mainstreaming duty. Their aim is to encourage these organisations to use the mainstreaming duty as a lever to improve services for people from the groups they represent.

In Austria, the Ombud for Equal Treatment organised an event for those working in public authorities in relation to tenders for public contracts and to granting subsidies to fuel new debate and promote action on the mainstreaming duty relating to these fields. The Irish Human Rights and Equality Commission plans an information booklet to promote the new equality and human rights duty.

### **5.2.3 Support and Guidance**

Equality bodies report a significant role in supporting and providing guidance on the implementation of statutory duties. This reflects the need for support to and capacity building of duty bearers, and responds, in some instances, to provisions in regard to such a role in the equal treatment legislation.

The Office of the Ombudswoman in Croatia has published a manual on 'How to Recognise Discrimination Cases' to support civil servants to respond to the preventive duty to report incidents of discrimination. The Equality Authority in Ireland (now the Irish Human Rights and Equality Commission) published a 'Code of Practice on Sexual Harassment and Harassment in the Workplace' to support compliance with the preventive duty on that issue. This code can be used in support of cases taken on this issue under equal treatment legislation. In Sweden, the Equality Ombudsman has published a brochure on pay surveys that provides 'helpful hints' on how to comply with the duty to conduct pay surveys and analyse the results.

The Non-Discrimination Ombudsman in Finland provides guidance on and supervises compliance with the institutional duties on equality planning. A customer service call line provides advice to duty bearers. It provides lectures, training, and seminars on equality planning. It holds meetings with key stakeholder networks specifically to discuss equality planning. A specific workshop is provided to private companies to encourage and support their commitment to equality planning.

The Ombudsman for Equality in Finland has supported gender equality planning and the development of measures to promote gender equality in educational establishments in response to the institutional duty. The equality body worked with the Finnish National Board of Education, the Ministry of Education and Culture, and the Ministry of Social Affairs and Health to prepare a handbook for comprehensive schools. Training seminars using this handbook have been held for principals and teachers as well as representatives of educational providers (municipalities) and the partner organisations.

UNIA (Interfederal Centre for Equal Opportunities) in Belgium has been invited to provide advice on equal opportunities objectives to the Equal Opportunities Commission established by the Flemish Government to implement the mainstreaming duty. It has been invited to

give methodological input to assist the institutional duty in that region on proportional participation in the labour market.

The Institute for the Equality of Women and Men in Belgium is charged, under the equal treatment legislation, with “guidance and support of the integration process of the gender perspectives within public policies, measures and actions”. It has established a gender mainstreaming unit for this purpose with four staff on a part-time regime, accounting for some 7% of the staff of the equality body. Their work is done through participation on the interdepartmental coordination group. The Institute for the Equality of Women and Men assists policy makers and their administrations to integrate gender equality from policy development to policy implementation. It offers advice, provides training, and develops manuals in this work.

The Equality Commission for Northern Ireland has published guidance on implementing the mainstreaming duty. This has been both general and specific. General guidance has included, for example, guidance to local authorities. Specific guidance has included, for example, guidance on budgeting and on the meaning of ‘due regard’. Training is provided, seminars are organised, and support is provided to individual public authorities on their equality schemes. The Commission has also provided guidance for self-assessment by public authorities of their equality schemes.<sup>60</sup> The Commission has also published extensive guidance in relation to the institutional duty under the Fair Employment and Treatment (Northern Ireland) Order 1998.

Staff in the advice and compliance division provide this support. Staff in the legal division are responsible for enforcement. Some 25% to 30% of the full staff complement of the Commission can be involved at different times in this work.

The Equality and Human Rights Commission in Britain has published a suite of guidance materials on implementing the mainstreaming duty for England, Wales and Scotland. It is working on developing more engaging, accessible and practical guidance. It researched awareness, understanding, and use of some of this guidance which, among other things, found that most public authority staff rely on their equality leads to read and understand the guidance and to tell them what is required. Several respondents were newly appointed equality leads with no previous mainstreaming duty expertise and little time to develop it. The more numerous specific duties in Wales and Scotland, while helpful in some respects, did not remove the need for stakeholders to make judgements, for example about what is ‘reasonable’ in terms of information gathering, or what represents a ‘substantial impact’.

In Wales, the Equality and Human Rights Commission has developed an equality and human rights exchange network. This involves public authorities covered by the mainstreaming duty and enables a sharing of good practice in implementing the duty.

The Commission has a core team of three staff members in England, one staff member in Wales and one staff member in Scotland who have the mainstreaming duty as part of their responsibilities. The total level of staff resources dedicated changes depending on business plan priorities. When assessing how public bodies were responding to the mainstreaming duty, for example, the staff numbers were increased. Staff members in the Legal Directorate work on the mainstreaming duty as required.

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<sup>60</sup> Section 75, Northern Ireland Act 1998, Guidance on conducting a 5 year review of an equality scheme, Equality Commission for Northern Ireland, Belfast, 2016.



Specific projects have been funded to enable equality bodies to support implementation of gender mainstreaming duties in Lithuania and in Estonia. The Office of Equal Opportunities Ombudsperson is developing an initiative with Lithuanian municipalities to empower municipalities with knowledge and skills to support implementation of measures to embed equal opportunities for women and men in municipal strategic development and/or municipal strategic action plans. This is funded under the 'Operational Programme for EU Funds' Investments 2014-2020'.

The Office of the Gender Equality and Equal Treatment Commissioner in Estonia implemented a Norway grants project from 2013 to 2016 that included actions to support public authorities in implementing their gender mainstreaming requirements. This support included creating an inter-ministerial working group on gender mainstreaming and building its expertise in order to continue operating after the project period. It focused in particular on: preparing guidelines of a theoretical nature on gender mainstreaming; piloting gender mainstreaming tools and methods in the Ministry of Social Affairs; and consulting on and auditing the gender impact analyses conducted by the Ministries in drafting legislation and development plans.

The Irish Human Rights and Equality Commission has been accorded roles under the legislation to give guidance to encourage good practice in implementing the equality and human rights duty, issue guidelines on implementing the duty; and prepare Codes of Practice to set standards for public authorities. It has developed a one year Professional Diploma in Human Rights and Equality for public servants with the Institute of Public Administration that includes a module on implementing the duty. It has used a funding programme to support pilot projects to implement the duty.

#### **5.2.4 Monitoring**

Most equality bodies are accorded the function to keep equal treatment legislation under review and to make recommendations for its further development as found necessary. This function allows equality bodies a role in monitoring statutory duties and advising on their further development.

The Equal Treatment Authority in Hungary published a study of the implementation of the institutional duty on employers to produce equality plans in 2011. The Office of the Equal Opportunities Ombudsperson in Lithuania carried out a survey in order to identify the level of implementation of the mainstreaming duty to include equality measures in strategic plans and made recommendations in its Annual Report to Parliament that the statutory duties should be further specified in legislation to assist their implementation. However, these proposals were not approved.

The Equality Ombudsman in Sweden has published a report on how employers are responding to the duties in relation to gender differences in pay. This is a qualitative analysis of the documentation of some 120 employers on their survey and analysis of pay differences between women and men performing work that is to be regarded as equal or of equal value, and their action plan for equal pay.

The Equality Commission in Northern Ireland has kept the implementation of the mainstreaming duty under review. It has conducted one major review on the effectiveness of the mainstreaming duty and the results of this were published in 2008 and are available on its website. It is currently preparing for a second review. Public authorities were also

required to review their implementation of their equality schemes within five years and the Commission published a commentary on this.

The Equality and Human Rights Commission assessed implementation of the pay gap preventive duty in Scotland.<sup>61</sup> This is part of a series of evaluations examining the response of public authorities to specific mainstreaming duties. Previous work has focused on implementation of the mainstreaming duty, implementation of the specific employment duties, and implementation of the duty to publish information about equality outcomes and employment practices. Future work will involve research into the effectiveness of these duties in delivering positive change. In Wales, the Commission evaluated the mainstreaming duty and has also published annual targeted monitoring reports to establish and share trends and good practices. In England, the Commission assessed the extent to which public authorities have implemented the specific duty to publish information to demonstrate compliance with the mainstreaming duty. This covered 1,159 public authorities and reviewed their websites for relevant, comprehensive, and accessible information.

### **5.3 Reflection**

Equality bodies report a strong alignment between statutory duties in equal treatment legislation and their functions, goals, and priorities. Many equality bodies report significant investment of scarce human resources in enforcing, promoting awareness of, supporting and guiding, and monitoring implementation of these statutory duties. Work on statutory duties is deemed an essential part of their work.

Equality bodies emerge as key actors in securing implementation of statutory duties and in supporting their implementation to a standard that ensures they have an impact of institutional change and societal change. In particular, their support and guidance role attempts to fill significant gaps in the knowledge, skills and awareness of duty bearers that are an impediment to the implementation and impact of statutory duties.

Equality bodies play roles in enforcing statutory duties, building an awareness of obligations among duty bearers and expectations among the general public with regard to statutory duties, setting ambitious standards for implementation of statutory duties in their guidance materials, supporting duty bearers to achieve these standards, and monitoring the implementation and impact of statutory duties. There are exemplar equality bodies that stand out in this regard and there is a need for more equality bodies to play more of these roles if statutory duties are to realise their potential.

The actions taken by equality bodies on statutory duties are not determined by the type of duty. Similar types of action are evident across the different types of statutory duty. The actions taken can be influenced somewhat by the type of body, where the roles prioritised reflect the particular mandate of the equality body. This is evident, for example, where the equality body is primarily mandated to hear and mediate cases of discrimination and the role of enforcement is prioritised.

The core barrier to equality body engagement with statutory duties is a lack of human and financial resources. In two instances, engagement was only made fully possible with additional external grants. This funding, however, is time limited. Effective engagement with

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<sup>61</sup> Measuring Up? Report 4: Performance – a report of public authorities' performance in meeting the Scottish Specific Equality Duties, Equality and Human Rights Commission, Britain, 2015.

requires significant long-term resources. This is evident in the dedicated staff teams working on statutory duties in Belgium, Britain, and Northern Ireland.

Another barrier identified by equality bodies is the failure to establish their role in relation to statutory duties in the equal treatment legislation. Linked to this is the absence or limited form of sanctions provided for non-compliance with statutory duties in equal treatment legislation. Effective, proportionate and dissuasive sanctions would enable and empower the overall role and contribution of equality bodies, and, in particular, any role they might play in relation to enforcement.

## 6. Conclusions and Recommendations

### 6.1 Conclusions

There is an uneven development of statutory duties in relation to equality and non-discrimination across Europe. The ambition of the statutory duties in place differs in different jurisdictions. A broad diversity of approaches in devising and implementing statutory duties is evident.

Three types of statutory duty can be identified. Preventive duties require organisations to establish systems and processes to prevent discrimination, harassment or sexual harassment from occurring in employment or in the provision of good and services. Institutional duties require organisations to establish systems and processes to promote equality for employees and service users. Mainstreaming duties require public authorities to have regard to the need to promote equality in legislating, budgeting, regulating, and policy making, and as employers and service providers, and in procurement.

Statutory duties pursue a spectrum of ambitions in seeking to promote equality, ensure that the practical implications of diversity are taken into account, eliminate barriers to achieving equality of opportunity and equality outcomes, ensure compliance with equal treatment legislation, and foster good relations between social groups.

Statutory duties are about achieving change. They secure change for the individual victim of discrimination in shifting responsibility for dealing with this issue to policy makers, employers, or service providers. They stimulate institutional change in requiring new ways for organisations to conduct their business. New policies, procedures and practices need to be introduced by policy makers, employers, and service providers. They contribute to societal change in advancing equality and new outcomes for the diversity of policy beneficiaries, employees and service users.

The ambition for equality that is pursued by statutory duties, the comprehensive nature of their coverage, their impact and the change they contribute to, effective implementation, and adequate enforcement are the indicators used in assessing the range of statutory duties reported on from across Europe for this study.

There are exemplar legislative provisions in place for preventive duties, institutional duties, and mainstreaming duties that reflect careful and thorough design and that can boast significant achievements in progressing individual, institutional and societal change. However, while there is limited evaluation available of these statutory duties, there is evidence of a lack of effective implementation in many jurisdictions. Poor implementation is linked to lack of understanding and appreciation of equality more generally and to the lack of skills and awareness to meet the demands of moving to a proactive and systemic approach to equality and non-discrimination.

Legal provision for mainstreaming duties could be improved to assist implementation and to realise the potential of statutory duties. In particular, more detailed provision on what is required of duty bearers by the statutory duties and a stronger sanctions regime would assist effective implementation.

A core set of well-developed, detailed, and innovative tools are available to duty bearers to enable their compliance with statutory duties. The tools are reported in a small number of specific jurisdictions and merit wider dissemination. The tools identified can make

significant demands on duty bearers and require a significant level of knowledge, skills and awareness to enable their implementation. They need to be accompanied by a commitment to equality and an understanding of the case for statutory duties among duty bearers, and by support and capacity building being provided to duty bearers.

Evaluation suggests that complexity is not a barrier to effective implementation. The match of the tools with traditions and processes within duty bearer organisations and the quality of the support infrastructure for duty bearers is more important.

Equality bodies are supporting the implementation of statutory duties. There is a strong alignment between these duties and their mandate and objectives. They play roles in:

- Enforcing statutory duties.
- Building awareness of obligations among duty bearers.
- Stimulating expectations of the general public with regard to statutory duties.
- Setting standards for implementing statutory duties.
- Providing guidance materials.
- Supporting duty bearers to achieve the standards set.
- Monitoring the implementation and impact of statutory duties.

The core barrier to this engagement is the limited human and financial resources that are made available to them. Another barrier identified by equality bodies is the failure to establish their role in relation to statutory duties in the equal treatment legislation.

## **6.2 Future Perspectives: Statutory Duties**

At a European level, there is a need to further promote good practice among the Member States in legislating for and implementing statutory duties. This work should create a more even spread of these duties across Europe, alongside a shared ambition in and common purpose for their implementation. It should allow for a diversity of models of statutory duties to emerge and a tailoring of these to local contexts and traditions. It could involve the development and promotion of good practice models and developing standards for statutory duties to guide and support the Member States. Ultimately, it could involve further legislation at European level.

European level initiative should stimulate further legislative provision in relation to statutory duties at Member State level. This will be new legislation in some jurisdictions. However, the legislation already in place also requires further development. In particular, legislative provisions for statutory duties need to:

- Encompass all grounds covered under equal treatment legislation.
- Include more detailed provisions on the implementation steps required.
- Provide for adequate and appropriate sanctions that can support implementation and enable commitment and motivation of duty bearers.
- Include a clear and explicit role for equality bodies in supporting, guiding, setting binding standards for, and monitoring and enforcing statutory duties.
- Ensure participation of individuals and organisations representing social groups experiencing inequality in implementing the statutory duties.

More specifically, preventive duties addressing equal pay should include requirements to conduct analysis and take action to address pay differentials identified, and should address pay structures and composition.

Individual jurisdictions need to develop structures to coordinate and network duty bearers in order to support more effective implementation of statutory duties. Public authorities subject to mainstreaming duties could be formally coordinated within government departments and across government departments. Private sector employers and service providers subject to institutional duties could be networked in more informal processes. This coordination and networking should enable shared ambition and purpose in implementing statutory duties alongside mutual support and peer review for duty bearers. It should drive and ensure a high standard of implementation.

Individual jurisdictions need to invest in building new traditions in implementing proactive and systemic approaches to promoting equality, accommodating diversity, and preventing discrimination. They need to create the conditions for effective implementation of statutory duties by all duty bearers. In particular:

- Data systems need development to support evidence based decision making.
- Participative models of implementing statutory duties should be promoted with supports provided to individuals and organisations representing social groups experiencing inequality to enable their effective participation.
- Training and guidance needs to be provided for duty bearers to develop necessary knowledge, skills and awareness to implement statutory duties.
- Expert support needs to be sourced and made available to duty bearers. Equality bodies should be identified as key sources of such support, with adequate human and financial resources provided to ensure they can play this role to full effect.
- Networking of duty bearers needs to stimulate and enable mutual support and peer pressure for implementation.
- Monitoring systems to track the impact of policy, plans and legislation over time to check that predicted or planned outcomes are achieved and to make revisions if necessary.

Public authorities, employers, and service providers should be encouraged and supported to prepare adequately for the effective implementation of statutory duties. This would involve duty bearers in:

- Setting equality objectives for what they want to achieve in implementing the statutory duty.
- Identifying internal responsibility and accountability for implementing the statutory duty.
- Building relationships with organisations representing social groups experiencing inequality.
- Accessing necessary support and guidance materials and identifying and responding to training needs.

### **6.3 Future Perspectives: Equality Bodies and Statutory Duties**

Equality bodies are key sources of expertise to support the implementation of statutory duties. They offer an independent source of standard setting, monitoring, and enforcement of these statutory duties. If they are to meet this promise, equality bodies need to prioritise this work and to invest scarce human and financial resources in it.

In a context of uneven development and poor implementation of statutory duties, equality bodies need to be proactive in promoting the case for their development and effective implementation. This is particularly important in jurisdictions where there is no statutory duty provided for. This work could also include deployment of the advisory function of equality bodies in recommending the introduction or further development of statutory duties in equal treatment legislation.

Statutory duties pose new challenges as a ‘new generation’ of equal treatment legislation. They demand new mind sets and new approaches. Where statutory duties are in place, equality bodies need to be at the forefront in developing and disseminating guidance materials, supporting capacity building for duty bearers, and giving direct support to organisations whose good example would generate peer pressure for effective implementation by others. This contribution is central to securing effective implementation of statutory duties.

Equality bodies, as independent statutory entities, are well placed to set standards for the implementation of statutory duties. Standards must establish the ambition and purpose for the statutory duties with a view to giving clarity as to the outcomes expected and to be measured. They need to offer detail on the steps required by duty bearers to create the conditions for implementation of the duty, to actually implement the duty, and to monitor the impact of the duty. These standards should be binding on duty bearers.

Equality bodies need to monitor and evaluate the implementation and impact of statutory duties. This is, in part, to reinforce the case for their implementation, in part to ensure that standards set for their implementation are met, and in part to support their further evolution in law and in practice. Indicators need to be established for implementation and impact, data flows need to be developed from duty bearers, and evaluation initiatives need to be implemented.

Equinet has an important role in stimulating and supporting equality bodies in their roles under statutory duties through peer learning and in promoting and engaging in debate about statutory duties and the importance of and value in such provisions to complement current equal treatment legislation. It could usefully further develop its focus in this area on foot of this research.

## References

1. An Equality Proofing Template for City and County Development Boards, Equality Authority, 2002.
2. Code of Practice on Sexual Harassment and Harassment at Work, Equality Authority (now Irish Human Rights and Equality Commission), given legal effect in Statutory Instrument 'Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002 (S.I. No. 78 of 2002)', Ireland, 2002.
3. Compendium of Practice on Equality/Non-Discrimination Mainstreaming, DG Justice, European Commission, Luxembourg, 2011.
4. Crowley N., *An Ambition for Equality*, Irish Academic Press, Dublin, 2006.
5. Crowley N., *Human Rights and Equality in Public Management: The public sector duty*, Module 4, Irish Human Rights and Equality Commission and Institute of Public Administration, 2016.
6. *Equality Duties: Assessing the Cost and Cost-Effectiveness of the Specific Race, Gender and Disability Equality Duties*, Government Equalities Office and Schneider Ross, London, 2009.
7. Fredman S. (2009) *Making Equality Effective: The role of proactive measures*, European Network of Legal Experts in the Field of Gender Equality, European Commission, Brussels.
8. *Equality Act 2010 - Technical Guidance on the Public Sector Equality Duty: Scotland*, Equality and Human Rights Commission, UK, 2014.
9. *Equality Planning Guide*, Ministry of the Interior, Finland, 2010.
10. Fitzgerald R. & Associates, *Equal opportunities and the Scottish Parliament: a progress review*, Equality and Human Rights Commission, research report 32, Britain, 2009.
11. *Good Practice Exchange Seminar on Non-Discrimination Mainstreaming*, Governmental Expert Group, European Commission, Finland, 2009.
12. *Measuring Up? Report 4: Performance – a report of public authorities' performance in meeting the Scottish Specific Equality Duties*, Equality and Human Rights Commission, Britain, 2015.
13. McCrudden, C., *Mainstreaming Equality in the Governance of Northern Ireland*, in *Fordham International Law Journal*, Volume 22, Issue 4, 1998.
14. *Manual for the Application of Gender Mainstreaming within the Belgian Federal System*, Institute for the Equality of Women and Men, Belgium, 2011.
15. Monks K., *The Business Impact of Equality and Diversity: The international evidence*, National Centre for Partnership and Performance and the Equality Authority, Dublin, 2007.
16. Mullen R., *A New Public Sector Equality and Human Duty*, Equality and Rights Alliance, Dublin, 2015.
17. *Pay surveys – provisions and outcomes*, Equality Ombudsman, Sweden, 2009.
18. *Review of the Public Sector Equality Duty: Report of the Independent Steering Group*, Government Equalities Office, Britain, 2013.
19. *Review of the Public Sector Equality Duty in Wales*, NatCen and Equality and Human Rights Commission Wales, Wales, 2013.
20. *Section 75 of Northern Ireland Act 1998 – A Guide for Public Authorities*, Equality Commission for Northern Ireland, 2010.



21. Section 75 of the Northern Ireland Act 1998 - Practical Guidance on Equality Impact Assessment, Equality Commission for Northern Ireland, Belfast, 2005.
22. Section 75 of the Northern Ireland Act 1998, Report of public authority five year reviews of equality schemes, Equality Commission for Northern Ireland, Belfast, 2007.
23. Section 75 – Keeping it Effective, Reviewing the Effectiveness of Section 75 of the Northern Ireland Act 1998, Equality Commission for Northern Ireland, Belfast, 2008.
24. Section 75, Northern Ireland Act 1998, Guidance on conducting a 5 year review of an equality scheme, Equality Commission for Northern Ireland, Belfast, 2016.
25. Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice, Policy Arc Ltd and Kremer Consultancy Services Ltd., for the Equality Commission for Northern Ireland, Belfast 2016.
26. The Common Cause Handbook, Public Interest Research Centre, Wales, 2011.
27. The Public Sector Equality, Disability, and Good Relations Duties. A Series of Short Guides, Equality Commission for Northern Ireland, Belfast, 2015.
28. Tool for the Assessment of Equality, Ministry of Justice, Finland, 2015.
29. Zeitlin J., in Zeitlin J. & Pochet P., with Magnusson L. (eds.), The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies, P.I.E.- Peter Lang, Switzerland, 2005.

# EQUINET MEMBER EQUALITY BODIES

## ALBANIA

Commissioner for the Protection from Discrimination  
[www.kmd.al](http://www.kmd.al)

## AUSTRIA

Austrian Disability Ombudsman  
[www.behindertenanwalt.gv.at](http://www.behindertenanwalt.gv.at)

## AUSTRIA

Ombud for Equal Treatment  
[www.gleichbehandlungsanwaltschaft.at](http://www.gleichbehandlungsanwaltschaft.at)

## BELGIUM

Institute for the Equality of Women and Men  
[www.igvm-iefh.belgium.be](http://www.igvm-iefh.belgium.be)

## BELGIUM

Unia (Interfederal Centre for Equal Opportunities)  
[www.unia.be](http://www.unia.be)

## BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina  
[www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba)

## BULGARIA

Commission for Protection against Discrimination  
[www.kzd-nondiscrimination.com](http://www.kzd-nondiscrimination.com)

## CROATIA

Office of the Ombudsman  
[www.ombudsman.hr](http://www.ombudsman.hr)

## CROATIA

Ombudsperson for Gender Equality  
[www.prs.hr](http://www.prs.hr)

## CROATIA

Ombudswoman for Persons with Disabilities  
[www.posi.hr](http://www.posi.hr)

## CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)  
[www.ombudsman.gov.cy](http://www.ombudsman.gov.cy)

## CZECH REPUBLIC

Public Defender of Rights  
[www.ochrance.cz](http://www.ochrance.cz)

## DENMARK

Board of Equal Treatment  
[www.ast.dk](http://www.ast.dk)

## DENMARK

Danish Institute for Human Rights  
[www.humanrights.dk](http://www.humanrights.dk)

## ESTONIA

Gender Equality and Equal Treatment Commissioner  
[www.svv.ee](http://www.svv.ee)

## FINLAND

Non-Discrimination Ombudsman  
[www.syrjinta.fi](http://www.syrjinta.fi)

## FINLAND

Ombudsman for Equality  
[www.tasa-arvo.fi](http://www.tasa-arvo.fi)

## FRANCE

Defender of Rights  
[www.defenseurdesdroits.fr](http://www.defenseurdesdroits.fr)

## GERMANY

Federal Anti-Discrimination Agency  
[www.antidiskriminierungsstelle.de](http://www.antidiskriminierungsstelle.de)

## GREECE

Greek Ombudsman  
[www.synigoros.gr](http://www.synigoros.gr)

## HUNGARY

Equal Treatment Authority  
[www.egyenlobanasmod.hu](http://www.egyenlobanasmod.hu)

## HUNGARY

Office of the Commissioner for Fundamental Rights  
[www.ajbh.hu](http://www.ajbh.hu)

## IRELAND

Irish Human Rights and Equality Commission  
[www.ihrec.ie](http://www.ihrec.ie)

## ITALY

National Equality Councillor  
[www.lavoro.gov.it/ConsiglieraNazionale](http://www.lavoro.gov.it/ConsiglieraNazionale)

## ITALY

National Office against Racial Discrimination - UNAR  
[www.unar.it](http://www.unar.it)

## LATVIA

Office of the Ombudsman  
[www.tiesibsargs.lv](http://www.tiesibsargs.lv)

## LITHUANIA

Office of the Equal Opportunities Ombudsperson  
[www.lygybe.lt](http://www.lygybe.lt)

## LUXEMBURG

Centre for Equal Treatment  
[www.cet.lu](http://www.cet.lu)

## (FYRO) MACEDONIA

Commission for the Protection against Discrimination  
[www.kzd.mk](http://www.kzd.mk)

## MALTA

National Commission for Persons with Disability  
[www.knpsd.org](http://www.knpsd.org)

## MALTA

National Commission for the Promotion of Equality  
[www.equality.gov.mt](http://www.equality.gov.mt)

## MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)  
[www.ombudsman.co.me](http://www.ombudsman.co.me)

## NETHERLANDS

Netherlands Institute for Human Rights  
[www.mensenrechten.nl](http://www.mensenrechten.nl)

## NORWAY

Equality and Anti-Discrimination Ombud  
[www.ldo.no](http://www.ldo.no)

## POLAND

Commissioner for Human Rights  
[www.rpo.gov.pl](http://www.rpo.gov.pl)

## PORTUGAL

Commission for Citizenship and Gender Equality  
[www.cig.gov.pt](http://www.cig.gov.pt)

## PORTUGAL

Commission for Equality in Labour and Employment  
[www.cite.gov.pt](http://www.cite.gov.pt)

## PORTUGAL

High Commission for Migration  
[www.acm.gov.pt](http://www.acm.gov.pt)

## ROMANIA

National Council for Combating Discrimination  
[www.cncd.org.ro](http://www.cncd.org.ro)

## SERBIA

Commissioner for Protection of Equality  
[www.ravnopravnost.gov.rs](http://www.ravnopravnost.gov.rs)

## SLOVAKIA

National Centre for Human Rights  
[www.snspl.sk](http://www.snspl.sk)

## SLOVENIA

Advocate of the Principle of Equality  
[www.zagovornik.net](http://www.zagovornik.net)

## SPAIN

Council for the Elimination of Ethnic or Racial Discrimination  
[www.igualdadynodiscriminacion.msssi.es](http://www.igualdadynodiscriminacion.msssi.es)

## SWEDEN

Equality Ombudsman  
[www.do.se](http://www.do.se)

## UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland  
[www.equalityni.org](http://www.equalityni.org)

Co-funded by the Rights, Equality and Citizenship Programme of the European Union



ISBN 978-92-990080-1-0 | © Equinet 2016

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