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Mainstreaming Equality in the Governance of Northern Ireland

Christopher McCrudden*

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Christopher McCrudden

Abstract

The purpose of this Article is to discuss this change, concentrating on the development of the approach to equality in the Agreement, and its subsequent incorporation into the Northern Ireland Act of 1998 ("Act"), which now forms the legal basis for the new constitutional settlement in Northern Ireland. The Agreement's approach is that equality should be "mainstreamed" in the future governance of Northern Ireland. But, following the Agreement, there was a real danger that equality would be pushed back to the margins. Fortunately, a coalition of the disadvantaged and politicians ensured that this did not happen. The Act, taken together with the Human Rights Act 1998, which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") into United Kingdom law, now accurately reflects the Agreement's human rights and equality requirements.

ARTICLE

MAINSTREAMING EQUALITY IN THE GOVERNANCE OF NORTHERN IRELAND

*Christopher McCrudden**

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* Reader in Law, Oxford University; Fellow, Lincoln College, Oxford; Visiting Professor, University of Michigan Law School.

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INTRODUCTION

In Northern Ireland, talk of equality and human rights has often, in the past, been ignored or marginalized. It has been perceived by too many in positions of power as divisive, ignoring “the real problems,” even sometimes as subversive. During 1998, something remarkable happened. Discussions about equality and human rights moved from the margins into the mainstream. The Agreement Reached in the Multi-Party Negotiations¹

1. Agreement Reached in Multi-Party Negotiations, Apr. 10, 1998 [hereinafter Good Friday Agreement].

("Good Friday Agreement" or "Agreement"), drawing on the best international and European practice, identified equality and human rights as a central element in the dispute settlement process and in the search for peace in Northern Ireland. Equality and human rights are now neither marginal, nor peripheral, but rather a central element in the structure underpinning the new constitutional settlement.

The purpose of this Article is to discuss this change, concentrating on the development of the approach to equality in the Agreement, and its subsequent incorporation into the Northern Ireland Act of 1998² ("Act"), which now forms the legal basis for the new constitutional settlement in Northern Ireland.³ The Agreement's approach is that equality should be "mainstreamed" in the future governance of Northern Ireland. But, following the Agreement, there was a real danger that equality would be pushed back to the margins. Fortunately, a coalition of the disadvantaged and politicians ensured that this did not happen. The Act, taken together with the Human Rights Act 1998, which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") into United Kingdom law,⁴ now accurately reflects the Agreement's human rights and equality requirements.

That the Act does now implement the Agreement is a testimony both to those who worked to convince the British Government that it must, and to the Government's ability to listen to and act on the basis of advice. The issues considered subsequently are: How the implementation happened; What it means; What the prospects are of it being done successfully; and what others might take from the Northern Ireland experience so far. But first this Article turns to what does mainstreaming equality *mean*?

I. *INTERNATIONAL TRENDS TOWARDS MAINSTREAMING EQUALITY*

"Mainstreaming" is an idea whose time has come, but whose

2. Northern Ireland Act, 1998, ch. 47 (Eng.).

3. See Christopher McCrudden, *Northern Ireland and the British Constitution*, in *THE CHANGING CONSTITUTION* 323 (Jeffery Jowell & Dawn Oliver eds., 3d ed. 1994) (discussing previous failed attempts).

4. Human Rights Act, 1998, ch. 42 (Eng.).

meaning is uncertain and subject to varying interpretations. As a recent major report on mainstreaming put it: "it is striking that . . . mainstreaming is very often not defined at all."⁵ This Article will try to explain the concept in more detail subsequently, but in essence mainstreaming requires that equality be seen as an integral part of all public policy making and implementation, not something that is separated off in a policy or institutional ghetto.⁶

A. *International and Regional Developments on Mainstreaming*

There are several sources from which the idea of mainstreaming has emerged. One early 1980s source was the attempt to integrate gender issues into policy making in the area of development assistance, such as lending by the World Bank,⁷ decision-making in the United Nations Development Program,⁸ and decision-making processes in developing states themselves.⁹ Mainstreaming was seen as "a means of promoting the role of women in the field of development and of integrating women's values into development work."¹⁰

The European Community was instrumental in having the concept adopted more widely with other governments.¹¹ The idea of mainstreaming was adopted as a major policy for future

5. Council of Europe, Rapporteur Group on Equality Between Women and Men, Gender Mainstreaming, GR-EG (98) 1, Mar. 26, 1998, at 12 [hereinafter Rapporteur Group].

6. See EU Commissioner Pdraig Flynn, REUTER EUROPEAN COMMUNITY REP., Feb. 9, 1996 ("Mainstreaming . . . seeks to put an end . . . to the 'ghettoisation' of equal opportunities . . .").

7. See JOSETTE L. MURPHY, GENDER ISSUES, ON WORLD BANK LENDING (1995); Jacklyn Cock & E.C. Webster, *Environmental and Social Impact Assessments*, in JO MARIE GRIESGRABER & BERNHARD G. GUNTER, THE WORLD BANK: LENDING ON A GLOBAL SCALE 81 (1996).

8. SHAHRA RAZAVI & CAROL MILLER, GENDER MAINSTREAMING: A STUDY OF EFFORTS BY THE UNDP, THE WORLD BANK AND THE ILO TO INSTITUTIONALIZE GENDER ISSUES (Aug. 1995) [hereinafter GENDER MAINSTREAMING].

9. ANNE MARIE GOETZ, THE POLITICS OF INTEGRATING GENDER TO STATE DEVELOPMENT PROCESSES (May 1995). For an interesting discussions of mainstreaming women's equality in the Philippines, see Virginia O. del Rosario, *Mainstreaming Gender Concerns: Aspects of Compliance, Resistance and Negotiation*, 26 IDS BULLETIN, no. 3, 102 (1995) [hereinafter *Mainstreaming Gender*].

10. Rapporteur Group, *supra* note 5, at 10.

11. Pdraig Flynn, *Address at the Fourth World Conference on Women*, REUTER TEXTLINE, Sept. 8, 1995 (presenting European Community view); Stephen Dale, *Canada Seeks Gender Impact Assessments at Beijing*, INTER PRESS SERV., Aug. 15, 1995 (discussing Canada's view).

action at the Fourth United Nations World Conference on Women, which took place in Beijing in September 1995. Strategic Objective H.2 calls for the integration of gender perspectives in legislation, public policies, programs, and projects.¹² The Strategic Objective has been a major influence in stimulating governments, and the United Nations system itself, to address the issue systematically.

The European Commission's Third Action Programme had stressed the importance of integrating equality issues into government decision-making. More recently, the Commission became involved in attempting to develop such approaches in Europe more systematically.¹³ Mainstreaming is a feature of the Community's development co-operation policy.¹⁴ Mainstreaming is central to the Fourth Action Program on Equal Opportunities for Men and Women (1996–2000).¹⁵ The Council Decision establishing this action program reinforced this idea further.¹⁶ The Commission should integrate equality issues into its decision making as should the Member State governments.¹⁷ A group of Commissioners, chaired by President Santer,¹⁸ produced a communication on mainstreaming of equality in all appropriate Community policies.¹⁹ In 1996, the Commission urged the mainstreaming of equality for people with disabilities

12. *Report of the Fourth World Conference on Women*, U.N. Doc. A/Conf.177/20 (1995). For a general discussion, see Valerie A. Dormady, Note, *Women's Rights in International Law: A Prediction Concerning the Legal Impact of the United Nations' Fourth World Conference on Women*, 30 *VANDERBILT J. TRANSNAT'L L.* 97 (1997).

13. EUROPEAN COMMISSION, *EQUAL OPPORTUNITIES FOR WOMEN AND MEN IN THE EUROPEAN UNION 1996*, at 15-20 (1997) [hereinafter *EQUAL OPPORTUNITIES*]; see TERESA REES, *MAINSTREAMING EQUALITY IN THE EUROPEAN UNION* (1998).

14. European Commission, Communication from the Commission and Council and the European Parliament on Integrating Gender Issues in Development Cooperation, COM (95) 423 Final (1995).

15. European Commission, Proposal for a Council Decision on the Fourth Medium-term Community Action Programme on Equal Opportunities for Women and Men (1996-2000), COM (95) 381 Final (1995).

16. Council Decision No. 95/593/EC, O.J. L 335/1, at 37 (1995).

17. See EU Commissioner Pdraig Flynn, REUTER TEXTLINE, NOV. 28, 1995 ("The global objective of the Fourth Programme is to contribute to the integration of the equality dimension into all relevant policies and actions. . . . Mainstreaming is one of the leitmotifs of the Fourth Programme . . .").

18. European Commission, Progress Report from the Commission on the Follow-up of the Communication, "Integrating Equal Opportunities for Women and Men in All Community Policies and Activities," COM (98) 122 Final, at 8 (1998).

19. European Commission, Communication from the Commission "Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities,"

in policy formulation.²⁰ The Amsterdam Treaty²¹ amended the Treaty on European Union²² ("EC Treaty") to incorporate gender equality as a principle of Community law.²³ The regulations governing the Structural Funds will be revamped to include greater recognition of the importance of women's equality issues.²⁴

The report of the Secretary-General to the U.N. General Assembly at its fifty-first session provided a first assessment of the practical implications of gender mainstreaming for the United Nations.²⁵ In June 1997, the report of the Secretary-General to the Economic and Social Committee addressed the issue of gender mainstreaming by intergovernmental bodies and the U.N. system more fully.²⁶ On the basis of this report, the Economic and Social Committee reached agreed conclusions on the issue in July 1997.²⁷ During the next year, the Secretary-General reported on the status of the follow-up activities requested by the Council in their conclusions.²⁸ The Council followed this report

COM (96) 67 Final (1996). A report critical of the lack of impact of this initiative was completed in 1998. See 18 CREW REPORTS No. 2/3, at 3.

20. European Commission, Communication of the Commission on Equality of Opportunity for People with Disabilities, COM (96) 406 Final, at 12 (1996).

21. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) (not yet ratified) [hereinafter Treaty of Amsterdam].

22. Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]. The Treaty establishing the European Community ("EC Treaty") will be amended by the Treaty of Amsterdam, *supra* note 21, O.J. C 340/1 (1997). These amendments will be incorporated into the EC Treaty, and the articles of the EC Treaty will be renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 (not yet ratified) [hereinafter Consolidated EC Treaty], *incorporating changes made by Treaty of Amsterdam, supra*.

23. Consolidated EC Treaty, *supra* note 22, art. 3(2), O.J. C 340/3, at 182 (1997), 37 I.L.M. at 80 (ex Article 3(2)).

24. Proposal for a Council Regulation (EC) laying down general provisions on the Structural Funds (98/0090 (AVC)).

25. *Report of the Economic and Social Council for 1997*, U.N. GAOR, 52d Sess., U.N. Doc. No. A/51/322 (1997).

26. *Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System*, U.N. Doc. No. E/1997/66 (1997).

27. *Report of the Economic and Social Council for 1997*, U.N. GAOR, 52d Sess., U.N. Doc. No. A/52/3, ch. IV, sec. A (1997).

28. *Implementation of the Agreed Conclusions of the 1997 Coordination Segment of the Eco-*

with a further resolution in July 1998.²⁹

B. *National Developments on Mainstreaming*

There are several examples of "mainstreaming" policies at the national level, some in existence, some in early development. Without attempting to be comprehensive, such initiatives have been in place in the Netherlands for some years.³⁰ The Nordic Council of Ministers developed a project to develop methods of mainstreaming gender into labor market and youth policy.³¹ In Sweden, gender issues are considered in the formulation of government legislation and other policies prior to discussion by Cabinet.³² Mainstreaming initiatives have been developed in Denmark, Flanders, Portugal, and Finland as well.³³ In Ireland, the National Economic and Social Forum produced a report on equality proofing issues in 1996.³⁴ Local governments in several European countries also have experience in attempting to mainstream equality.³⁵

Outside the European Community, there are also significant developments. In Canada, mainstreaming has been adopted by at least one provincial government³⁶ and the federal

nomic and Social Council on Mainstreaming the Gender Perspective into All Policies and Programmes of the United Nations System, U.N. Doc. No. E/1998/64 (1998).

29. U.N. Doc. No. E/1998/L.32 (1998); see Christine Ainette Brautigam, *Mainstreaming a Gender Perspective in the Work of the United Nations Human Rights Treaty Bodies*, 91ST ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 389 (1997).

30. Emancipatieraad, *Van Marge Naar Mainstream: Adviesgrief Onderzoek Over Het Mainstreamen Van Emancipatie*, in ALGEMEEN BELEID (Adv. Nr. IV/51/96, 1997); see Mieke Verloo, *Planning for Public Space: A Gender Impact Assessment Analysis*, Paper for the International Conference on Women and Public Policy: The Shifting Boundary Between the Public and Private Domains (Dec. 8-10, 1994). The author is grateful to Elizabeth Meehan for supplying a copy of this paper. RAPPORTEUR GROUP, *supra* note 5, at 38-39; see TOM HADDEN ET AL., *EQUAL BUT NOT SEPARATE: COMMUNAL POLICY APPRAISAL* 25 (1997); *EQUAL OPPORTUNITIES*, *supra* note 13, at 17.

31. RAPPORTEUR GROUP, *supra* note 5, at 38-39.

32. *Id.* at 39; see HADDEN ET AL., *supra* note 30, at 25.

33. RAPPORTEUR GROUP, *supra* note 5, Part III.2.

34. See NATIONAL ECONOMIC AND SOCIAL FORUM, *EQUALITY PROOFING ISSUES NATIONAL ECONOMIC AND SOCIAL FORUM* (Feb. 1996); see also EQUALITY STUDIES CENTRE, *A FRAMEWORK FOR EQUALITY PROOFING: A PAPER PREPARED FOR THE NATIONAL ECONOMIC AND SOCIAL FORUM* (Apr. 1995).

35. EQUAL OPPORTUNITIES COMMISSION, *MAINSTREAMING GENDER IN LOCAL GOVERNMENT* (1997).

36. MINISTRY OF WOMEN'S EQUALITY, *THE GENDER LENS: POLICY ANALYST VERSION* (Feb. 1994) (B.C.).

government.³⁷ The latter has undertaken gender analyses of proposed measures³⁸ and produced a guide for gender-based analysis for policy-makers.³⁹ In Australia, a novel way of assessing the impact of government policies has been to produce a "women's budget statement" each year to accompany the budget proposals.⁴⁰ In New Zealand, guidelines for gender impact analysis were published in 1996.⁴¹

The Council of Europe ("Council" or "COE") convened a group of specialists on mainstreaming in February 1996 in the context of the activities of the Steering Committee for Equality Between Women and Men. The resulting report, in March 1998, presented a conceptual framework, a methodology for conducting mainstreaming, and a discussion of "good practice" in the area.⁴² In a useful intervention into the debate, mainstreaming was defined as "the reorganization, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-mak-

37. STATUS OF WOMEN CANADA, *SETTING THE STAGE FOR THE NEXT CENTURY: THE FEDERAL PLAN FOR GENDER EQUALITY* 16-17 (Aug. 1995).

38. See, e.g., HUMAN RESOURCES DEVELOPMENT CANADA, *EMPLOYMENT INSURANCE: GENDER IMPACT ANALYSIS* (Jan. 24, 1996) (submitted to House of Commons Standing Committee on Human Resources).

39. STATUS OF WOMEN CANADA, *GENDER-BASED ANALYSIS: A GUIDE FOR POLICY-MAKING* (Mar. 1996) (working document).

40. The first such statement was produced in 1984 and "provides a detailed report on the impact of all Federal Government programs and policies, including expenditure, on women." Committee for the Elimination of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Third Periodic Reports of States Parties*, U.N. Doc. CEDAW/C/AUL/2, at 6 (1995) (submitted by Australia); see OFFICE OF THE STATUS OF WOMEN, DEPARTMENT OF THE PRIME MINISTER AND CABINET, *AUSTRALIAN NATIONAL REPORT TO THE UNITED NATIONS FOURTH WORLD CONFERENCE ON WOMEN 61-62* (Sept. 4-15, 1995). In 1993, the Review of Government Policy Advice Mechanisms on the Status of Women concluded that "it is now of questionable value in making departments accountable for their performance on women." *REVIEW OF GOVERNMENT POLICY ADVICE MECHANISMS ON THE STATUS OF WOMEN, REPORT TO THE PRIME MINISTER BY SENATOR ROSEMARY CROWLEY* 18 (Oct. 1993). Since then the statement was re-designed as a "succinct statement of Government budget initiatives for women, and budget initiatives likely to affect women." Letter from Karen Barfoot, Assistant Secretary, Office of the Status of Women to the author, Mar. 20, 1996. The most recent statement is Honorable Judi Moylan, MP, Minister for the Status of Women, *Maintaining Our Commitment to Women* (May 12, 1998).

41. See MINISTRY OF WOMEN'S AFFAIRS, *THE FULL PICTURE: GUIDELINES FOR GENDER ANALYSIS* (1996); see also Robin McKinlay, *Gender Analysis of Policy: Discussion Paper* (Dec. 13, 1993).

42. Rapporteur Group, *supra* note 5, at 34, 38.

ing.”⁴³ The Committee of Ministers subsequently recommended that the governments of the member states of the Council “encourage decision-makers to take inspiration from the report in order to create an enabling environment and facilitate conditions for the implementation of gender mainstreaming in the public sector.”⁴⁴

II. *THE ORIGINS OF MAINSTREAMING IN NORTHERN IRELAND*

It is notable that none of the various studies, useful as they are, have identified developments in Northern Ireland as a suitable case study of the development of mainstreaming, of the problems that it encounters; or as providing a possible model of implementation. In particular, the Northern Ireland model is unusual, if not unique, in two respects. First, the mainstreaming undertaken goes beyond gender. Second, it is underpinned by a firm legal foundation. How did this come about? This Article now turns to this question. But to describe the development of mainstreaming in Northern Ireland fully, this Article begins the story much earlier, with the civil rights movement of the late 1960s.

Drawing its inspiration from the U.S. civil rights movement, a Northern Ireland civil rights campaign, established during the 1960s, focused on the need to eradicate discrimination between Catholics and Protestants.⁴⁵ This movement led to some action by the then Northern Ireland Government, but anti-discrimination legislation began its development only after the Northern Ireland Government was suspended in 1972 and “direct rule” was introduced.

A. *Constitutional Anti-discrimination Provisions*

As part of the arrangements for its first attempt to reform constitutional relationships in Northern Ireland, the Northern Ireland Constitution Act of 1973⁴⁶ (“1973 Act”) introduced

43. *Id.* at 6.

44. COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, RECOMMENDATION NO. R(98)14 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON GENDER MAINSTREAMING (Oct. 7, 1998).

45. DISTURBANCES IN NORTHERN IRELAND: REPORT OF THE CAMERON COMMISSION, Cmnd. 532 (1969).

46. Northern Ireland Constitution Act, 1973 (Eng.).

clear, if limited, legislative anti-discrimination requirements for the first time, replacing the uncertain provisions of the Government of Ireland Act of 1920.⁴⁷ The 1973 Act made it unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of persons on the ground of religious belief or political opinion. An act that contravened this prohibition was actionable in Northern Ireland at the instance of any person adversely affected by it. The court could grant damages and an injunction restraining the defendant from committing, causing, or permitting further contravention of this prohibition in certain cases. The 1973 Act also established the Standing Advisory Commission on Human Rights as an advisory body for government on human rights policy.

Two features of the 1973 Act's approach are important. First, although it was a constitutional anti-discrimination provision, its protection was confined to protection from discrimination only in the religio-political context. Second, the conception of discrimination that it incorporated was one that was largely confined to direct discrimination, that is discrimination that arises from an intentional act. There has, as a consequence, been little litigation under these provisions. The provisions of the 1973 Act have been reincorporated, substantially untouched, in the Northern Ireland Act of 1998.⁴⁸

B. *Fair Employment Legislation*

The second major anti-discrimination law development was in the area of employment discrimination. A government committee, the van Straubenzee committee, considered the question of discrimination in the private sector of employment in 1973 and produced a penetrating report.⁴⁹ Following this consideration, the Fair Employment Act of 1976⁵⁰ ("FEA 1976") was passed. The FEA 1976 only partially implemented the report, but applied also to the public sector of employment. A Fair Employment Agency was established to enforce the legislation in 1977.

47. Government of Ireland Act, 1920 (Eng.).

48. Northern Ireland Act, 1998, ch. 47 (Eng.).

49. WORKING PARTY ON DISCRIMINATION IN THE PRIVATE SECTOR OF EMPLOYMENT, REPORT AND RECOMMENDATIONS (1973).

50. Fair Employment Act, 1976 (Eng.).

This legislation, however, had little effect on employers' practices. Research carried out by the Policy Studies Institute in 1987 showed that the vast majority of employers believed that the FEA 1976 had made little, if any, impact on their behavior.⁵¹ Job discrimination was still thought to be justifiable in certain circumstances by a considerable number of employers. Informal recruitment and appointment procedures contributed to continuing levels of segregation. Too often, investigations by the Fair Employment Agency had little impact beyond the individual organization investigated. Very few establishments were formally monitoring the religious composition of the workforce. Indeed, very few establishments were carrying out any type of equal opportunity measure. Voluntary compliance remained the dominant approach.

The research by the Policy Studies Institute ("PSI") also confirmed the startling dimensions of the economic inequality between the two communities in Northern Ireland. According to the PSI study, for example, Catholic male unemployment, then at thirty-five percent, was two and a half times that of Protestant male unemployment. Catholic male unemployment continued at this level despite there being over 100,000 job changes a year.

From the mid-1980s, inequality of opportunity between Catholics and Protestants became again a key political issue, but largely due to pressure from outside Northern Ireland. A campaign in the United States was begun to bring pressure to bear on U.S. corporations, state legislatures, and municipal governments with investments in Northern Ireland to adopt a set of anti-discrimination principles called the "MacBride Principles."⁵² These principles sought to encourage employers to adopt affirmative action.⁵³ The MacBride campaign, despite opposition from the British Government, proved popular with U.S. state and city legislators. A number of states enacted legislation requiring U.S. companies in which they invested to ensure fair employment practices in their Northern Ireland subsidiaries. Though regarded by some as unlawful under Northern Ireland

51. DAVID SMITH & GERALD CHAMBERS, *INEQUALITY IN NORTHERN IRELAND* (1991).

52. For an extensive discussion, see Christopher McCrudden, *Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?*, OXFORD J. LEGAL STUD. (forthcoming).

53. In this context affirmative action means action designed to secure the increased representation of previously under represented groups.

law, a U.S. federal district court found them to be lawful.⁵⁴ This U.S. campaign began to fill, however partially and inadequately, the political vacuum caused by the failure of Northern Ireland's political institutions to address the issue adequately.

In 1986, the local Department of Economic Development proposed new legislation, which, while offering some hope of a more robust approach, still fell short of what was likely to be effective.⁵⁵ In particular, it emphasized voluntary compliance, and placed an ill-defined "merit principle" at the heart of its proposals for future legislation, shying away from effective affirmative action. It also suggested the possible amalgamation of the Fair Employment Agency and the Equal Opportunities Commission for Northern Ireland ("EOC-NI"), the principal bodies enforcing religious and gender discrimination legislation, respectively. The amalgamation of the agencies did not go ahead, due to a successful campaign by the EOC-NI, supported by local women's groups and trade unions. The Northern Ireland Government's proposals were thought to have provided a clear analysis of the problem but too weak a policy response.

The report did, however, succeed in concentrating the minds of others. The Standing Advisory Commission on Human Rights published a major report in October 1987.⁵⁶ This report provided the most comprehensive and authoritative analysis of the problem as well as a detailed set of proposals for legislation and other government initiatives. Most crucially, the report shifted the terms of the debate from concentrating on the eradication of prejudiced discrimination, to reducing unjustified structural inequality in the employment market, whether caused by discrimination or not. From its publication, the report has formed a benchmark against which the Government's responses to the problem are judged.

In December 1988, the U.K. Government responded by publishing new legislation. After significant amendments this

54. *See* New York City Employees' Retirement Sys. v. American Brands Inc., 634 F. Supp. 1382 (S.D.N.Y. 1986).

55. DEPARTMENT OF ECON. DEV., EQUALITY OF OPPORTUNITY IN NORTHERN IRELAND: FUTURE STRATEGY OPTIONS (1986)

56. RELIGIOUS AND POLITICAL DISCRIMINATION AND EQUALITY OF OPPORTUNITY IN NORTHERN IRELAND: REPORT ON FAIR EMPLOYMENT, 1987, Cm. 237 [hereafter REPORT ON FAIR EMPLOYMENT].

legislation was passed in July 1989.⁵⁷ The Fair Employment Act of 1989 ("FEA 1989") came fully into effect on January 1, 1990. This new Fair Employment Act marked a departure from previous approaches, emphasizing compulsory rather than voluntary compliance. In particular, it gave broader powers to the enforcement agency, the Fair Employment Commission, and required limited affirmative action and compulsory monitoring, among other things.

C. *The Limits of Anti-discrimination Law*

Although necessary, anti-discrimination law was gradually perceived as insufficient to achieve the substantial change that the Standing Advisory Committee on Human Rights ("SACHR") had defined as necessary. The 1987 SACHR Report was clear that anti-discrimination legislation could only be part, though a necessary part, of the process of government addressing the problem of employment inequality.⁵⁸ During the passage of the Fair Employment Bill in 1989, the Opposition tabled amendments based on this analysis. These amendments aimed to impose on the Industrial Development Board and Government departments more generally a duty to "secure that their various functions are carried out with due regard to the need to promote equality of opportunity," and would have imposed a requirement for published annual reports. No other specific mechanism for enforcing the proposed duty was envisaged. In its Second Report in 1990, SACHR had returned to the issue, arguing that government should establish machinery that would monitor the impacts of legislation, policy, and administration on equality of opportunity and on relations between the two sections of the community.⁵⁹

Another development involved the reform of "community relations" policy-making within the Northern Ireland Office.⁶⁰

57. See Christopher McCrudden, *The Fair Employment Bill in Parliament*, in *DISCRIMINATION AND PUBLIC POLICY IN NORTHERN IRELAND* (Robert J. Cormack & Robert D. Osborne, eds., 1991).

58. REPORT ON FAIR EMPLOYMENT, *supra* note 56, ch. 13.

59. STANDING ADVISORY COMM. ON HUMAN RIGHTS, RELIGIOUS AND POLITICAL DISCRIMINATION AND EQUALITY OF OPPORTUNITY IN NORTHERN IRELAND: SECOND REPORT 12 (1990).

60. This paragraph draws extensively from an unpublished memorandum by James O'Hara, Former Chairman of the Standing Advisory Commission on Human Rights (Sept. 1995) (on file with the *Fordham International Law Journal*).

In September 1987, Tom King, then Secretary of State for Northern Ireland, announced the establishment of a Central Community Relations Unit ("CCRU") within the Central Secretariat of the Northern Ireland Office. The purpose of this reorganization, according to his announcement, was to ensure "that at the very center of the decision-making process in Northern Ireland, the crucial community relations issues, in their very widest sense, are given the fullest possible consideration."⁶¹ The new unit would co-ordinate all Northern Ireland policy-making. SACHR had several discussions with the Northern Ireland Office in 1987 before the new initiative was announced. It was informed that it was intended that a senior officer in each Department would be made responsible for examining policies and proposals in relation to their community impact. If, in the view of that officer, any such policy or proposal might have a disparate community impact, then the matter would be raised with the Permanent Secretary (the highest-ranking civil servant in each development). In turn, that Permanent Secretary might bring the matter to one of the regular meetings of Permanent Secretaries for consideration. If there remained any doubt about the matter, then a Minister would act as chair of a meeting of Permanent Secretaries to give final consideration to the matter for submission to, and determination by, the Secretary of State.

More generally, indeed, British administrative policy was becoming more favorably disposed to attempts systematically to engage in "policy appraisal"⁶² and to "mainstream" other policies in government.⁶³ Since the 1980s, in particular, regulatory impact assessments have often been required throughout British government, as have occasional attempts to require cost/benefit analysis to be conducted of proposed projects, or to require

61. NORTHERN IRELAND INFORMATION SERVICE, SECRETARY OF STATE TAKES DIRECT RESPONSIBILITY FOR COMMUNITY RELATIONS MATTERS 1 (Sept. 8, 1987).

62. See HER MAJESTY'S TREASURY, ECONOMIC APPRAISAL IN CENTRAL GOVERNMENT (HMSO, 1991) (providing description). Some examples of attempts by administrative policy becoming more favorably disposed to attempts to engage in "policy appraisal" include DEPARTMENT OF HEALTH: POLICY APPRAISAL AND HEALTH: A GUIDE FROM THE DEPARTMENT OF HEALTH (1995) (health), and CABINET OFFICE DEREGULATION UNIT, REGULATION IN THE BALANCE: A GUIDE TO REGULATORY APPRAISAL INCORPORATING RISK ASSESSMENT (1996) (compliance cost assessment).

63. See RACHEL HODGKIN & PETER NEWELL, EFFECTIVE GOVERNMENT STRUCTURES FOR CHILDREN 48-51 (1996) (discussing children); Exec. Order No. 12,606, 52 C.F.R. 34188 (1987) (discussing family).

compliance cost assessments of regulatory proposals.⁶⁴ In addition, "proofing" government policy proposals to ensure compliance with certain obligations was becoming more common.⁶⁵ For example, in July 1987, the Cabinet Office issued two circulars to departments advising how to avoid legal challenges under administrative law and under the ECHR.⁶⁶ In particular, it stated that "[a]ll Cabinet Committee memoranda on policy proposals and memoranda for Legislation Committee should include an assessment of the effect, if any, of ECHR jurisprudence on what is proposed."⁶⁷ In 1988, a Ministerial Group on Women's Issues drew up model guidelines to enable Departments to "equal opportunity proof" proposals to avoid sex discrimination.

D. *The Arrival of PAFT*

All these elements contributed to a government announcement that a non-statutory policy of "equality proofing" would be introduced in Northern Ireland.⁶⁸ In 1990, the Government issued a circular giving advice to all Northern Ireland departments about the need to consider discrimination in relation to religious affiliation, political opinion, and gender.⁶⁹ This was coordinated with an initiative launched in the United Kingdom by the ministerial group on women's issues that encouraged all government departments to develop basic guidance on equality proofing throughout the United Kingdom. Consultations took place with SACHR, the EOC-NI Disability Action, and the Northern Ireland Committee of the Irish Congress of Trade Unions

64. See ROBERT BALDWIN, *RULES AND GOVERNMENT* ch. 7 (1995).

65. See CABINET OFFICE DEREGULATION UNIT, *IMPLEMENTING EUROPEAN LAW: A CHECKLIST* (ensuring compliance with European Community law); TREASURY SOLICITOR'S DEPARTMENT, *THE JUDGE OVER YOUR SHOULDER: BALANCING THE SCALES* (1994) (administrative law).

66. See A.W. Bradley, *The Judge over Your Shoulder*, 1987 PUB. L. 485; A.W. Bradley, *Protecting Government Decisions from Legal Challenge*, 1988 PUB. L. 1.

67. CABINET OFFICE, *REDUCING THE RISK OF LEGAL CHALLENGE* ¶ 8. See further DAVID KINLEY, *EUROPEAN CONVENTION ON HUMAN RIGHTS, COMPLIANCE WITHOUT INCORPORATION* 13 (1993).

68. This introduction was co-ordinated with an initiative launched in the United Kingdom by the ministerial group on women's issues, which encouraged all U.K. Government Departments to develop basic guidance on equality proofing.

69. EQUAL OPPORTUNITY PROOFING: GUIDELINES, CENTRAL SECRETARIAT, CSC1/90; see NORTHERN IRELAND INFORMATION SERVICE, *EQUAL OPPORTUNITY PROOFING OF POLICY MAKING* (Mar. 9, 1990).

("ICTU"), among others. There were several years of continuing controversy over their content, according to an internal Northern Ireland Office ("NIO") briefing, "on the grounds that they did not match the expectation that they would unambiguously set out and establish a positive and pro-active approach to equality of opportunity."⁷⁰ More extensively, SACHR reported subsequently:

[t]he NIO's guidelines were criticised for failing to cover areas such as race, disability and age, where both direct and indirect discrimination were possible. It was held also that the guidelines were 'inadequately positive', did not give sufficient emphasis to the potential for affirmative action and copied with only minor changes rules which had been devised for England and Wales.⁷¹

In February 1991, Richard Needham, then Minister, gave a commitment that the British Government would reconsider the guidelines.⁷²

In Britain, progress on using the "equal opportunity proofing" guidelines was reviewed in 1991. This review concluded that, although departments had issued internal guidance based on the model guidelines, their implementation had often not been a priority, and that there had been little training or other follow-up to ensure that staff were familiar with the process. Revised guidelines on "equal opportunity proofing" policy proposals for their gender effect were published internally in 1992.⁷³

In Northern Ireland, revised draft guidelines, renamed the Policy Appraisal and Fair Treatment guidelines ("PAFT"), were

70. BRIAN BLACKWELL, POLICY APPRAISAL AND FAIR TREATMENT (PAFT): AN INFORMATION PAPER (May 1996).

71. STANDING ADVISORY COMM. ON HUMAN RIGHTS, EMPLOYMENT EQUALITY: BUILDING FOR THE FUTURE, 1997, Cm. 3684, ¶ 5.5.

72. The commitment was given at a seminar organized by the CCRU. See *The Review of Employment Equality in Northern Ireland: Proceedings of a Seminar Organized by the Central Community Relations Unit* (1991).

73. Guidance on policy appraisal for different social groups was first circulated in 1992. DEPARTMENT FOR EDUCATION AND EMPLOYMENT, EQUAL OPPORTUNITIES INTO THE MAINSTREAM: GUIDANCE ON POLICY APPRAISAL FOR EQUAL TREATMENT 1 (Aug. 1996). This was updated and published in 1996. *Id.* A new initiative was launched on May 18, 1998. See Joan Ruddock, Speech at the EOC Conference (June 22, 1998) (visited Mar. 8, 1999) <<http://www.womens-unit.gov.uk/speeches/>> (on file with the *Fordham International Law Journal*). The new guidelines were published in November 1998, Policy Appraisal for Equal Treatment (Women's Unit, Cabinet Office, Nov. 1998). See EQUAL OPPORTUNITIES COMMISSION, 1997 ANNUAL REPORT ch. 2 (EOC, 1998).

circulated in January 1993, taking into account the parallel developments in the United Kingdom, but seeking to reflect local circumstances. This draft was further amended mainly to provide that the guidelines should apply to most public bodies in Northern Ireland (with the major exception of local government), and to extend the guidelines to service delivery as well as policy-making. The guidelines were finally issued in December 1993, to come into effect in 1994.⁷⁴ "Equality and equity," it said, "are central issues which must condition and influence policy making in all spheres and at all levels of Government activity"⁷⁵

PAFT was an attempt to establish a procedure within government decision-making by which those principles could be made effective. According to an assessment by the Central Community Relations Unit ("CCRU"),

[t]he aim of the PAFT initiative is to ensure that issues of equality and equity inform policy making and action in all spheres and at all levels of Government activity, whether in regulatory and administrative functions or in the delivery of services to the public. The guidelines identify a number of areas where there is potential for discrimination or unequal treatment and outline steps which those responsible for the development of policy and the delivery of services should take to ensure that, in drawing up new policies or reviewing existing policies, they do not unjustifiably or unnecessarily discriminate against specified sections of the community.⁷⁶

The groups coming within the scope of the guidelines went beyond the two religious communities, and included people of different gender, age, ethnic origin, marital and family status, and sexual orientation, as well as the disabled. We have seen, just as importantly, the final guidelines marked a substantial shift towards equality and away from a narrow pre-occupation solely with discrimination. Little detailed guidance, however, was given to departments or other public bodies as to how to accomplish this task. A commitment was subsequently given that the Annual Report on PAFT implementation by the CCRU would be

74. CENTRAL SECRETARIAT CIRCULAR 5/93 (Policy Appraisal and Fair Treatment, Dec. 22, 1993).

75. *Id.*

76. CENTRAL COMMUNITY RELATIONS UNIT, POLICY APPRAISAL AND FAIR TREATMENT, ANNUAL REPORT (1994), ¶ 1.2 (1995).

published, providing a degree of transparency to the process,⁷⁷ but no co-ordination.

E. *Enforcing PAFT*

There were several unresolved ambiguities at the heart of PAFT, which contributed to the difficulties the Northern Ireland Government encountered during the development phase of PAFT, and subsequently in their application. The first ambiguity was whether or not they were intended to be substantially anti-discrimination provisions, or whether their purpose was to go well beyond a limited anti-discrimination approach. As we have seen, the Guidelines originally started out as the former, and only after pressure became the latter in form. In the enforcement phase, however, it was never very clear that the importance of that change had been fully appreciated by government.

A second unresolved ambiguity was whether the Guidelines were intended to be symbolic or instrumental. The Council of Europe report identified several difficulties that might accompany attempts at mainstreaming equality, one of which is "the danger of talking about . . . gender mainstreaming without implementing it. Governments might take a decision saying that equality is to be integrated in all policies and then do nothing more about it or only superficially support gender mainstreaming initiatives."⁷⁸ PAFT is an excellent example of this in many respects. It was not accidental that the development of the Guidelines took place when there was substantial pressure on the U.K. Government to demonstrate in the United States in particular the government's commitment to equality. This emphasized the view that some had of the Guidelines as primarily window-dressing for the government, a necessary symbolic gesture, but not much more. On the other hand, there was some evidence that the Government was indeed bent on addressing the problem of Catholic disadvantage. Was PAFT, then symbolic reassurance, or meant to be a tool of radical change?

A third ambiguity went even further. On the assumption

77. CENTRAL COMMUNITY RELATIONS UNIT, POLICY APPRAISAL AND FAIR TREATMENT, ANNUAL REPORT (1994); CENTRAL COMMUNITY RELATIONS UNIT, POLICY APPRAISAL AND FAIR TREATMENT, ANNUAL REPORT (1995); CENTRAL COMMUNITY RELATIONS UNIT, POLICY APPRAISAL AND FAIR TREATMENT ANNUAL REPORT (1996); CENTRAL COMMUNITY RELATIONS UNIT, POLICY APPRAISAL AND FAIR TREATMENT, ANNUAL REPORT (1997).

78. Rapporteur Group, *supra* note 5, at 16.

that the Guidelines were meant to be more than symbolic and more than just a repetition of anti-discrimination requirements, what was the problem that the Guidelines were intended to address? On the one hand, a primary rationale for the Guidelines was the need to tackle Catholic disadvantage. This rationale meant that the function of PAFT was to ensure that policy making was fair across the two communities, and transparent. Indeed, from this perspective, PAFT could be seen as a central element in the promotion of “consociationalism” by the British Government. One feature of this policy is that there should be a degree of proportionality in the allocation of the benefits of public expenditure between the two communities.

That was not what PAFT actually said, however. The PAFT constituency went well beyond religion and politics and included gender, race, disability, and so on. One explanation of this inclusive approach may be that PAFT was thought likely to be more acceptable to both civil servants and the general public if the consociational element was wrapped up as part of a more broadly-based initiative. Hence, the stress placed within Government subsequently on the initiative originating from the U.K.-wide equality-proofing developments. In addition, the coverage of the groups extended well beyond the Catholic/Protestant division. And further, the reference to international human rights language and concepts is note worthy as it emphasized the universality of the principles espoused.

The problem, from the Government’s perspective, was the extent to which this inclusive, broad, and radical-sounding initiative raised expectations that it would be difficult for government to satisfy in practice. And so it proved to be. Those groups which stood to benefit from the initiative sought to translate the rhetoric of PAFT into reality. Unlike the equivalent Guidelines applicable in the rest of the United Kingdom, the PAFT Guidelines were available on request from government and were widely circulated by non-governmental organizations (“NGOs”). In particular, the Guidelines were drawn on by groups representing constituencies included in the guidelines. Perhaps rather naively, when informed of what the PAFT Guidelines said, they regarded them as promising fairness, and behaved accordingly. When that failed to be delivered, not surprisingly, they mobilized.

The Guidelines were soon embroiled in public controversy.

They first emerged into public prominence in the context of women's equality. This was largely due to the fact that Unison, the public sector trade union, saw an opportunity to use PAFT as a mechanism for challenging a government policy that was to the disadvantage of its members, particularly its women members. The policy that was in contention was the privatization of public services in Northern Ireland, a policy that had been operating in the rest of the United Kingdom for some time, but that had hitherto not been applied in Northern Ireland. When it finally arrived, and with it the realization that inequalities were likely to be increased for many members of the union working in services that were targeted for privatization, PAFT seemed to provide an opportunity for negotiations between the union representing the soon-to-be-privatized workforce and the government.

After the failure of these discussions, the union took judicial review proceedings against one of the public bodies that intended to privatize its services. The judicial review was ultimately unsuccessful.⁷⁹ But it was a pyrrhic victory for the Government. It was disclosed that the PAFT Guidelines had, mistakingly, not formally been issued to the public body concerned, which was a considerable embarrassment. Furthermore, the judge, in deciding the case, held that had they been issued properly, the public body would have been required legally to have taken them into account, thus appearing to give them a legal status, which had hitherto not been clear. A subsequent judicial review appears to have taken the same position.⁸⁰

The effect of these judicial decisions, particularly the first, was, politically, to raise the Guidelines' status, both in the eyes of public bodies and departments to which they applied, and in the eyes of the campaigning groups. Unison, and particularly its Northern Ireland regional secretary Inez McCormack, became centrally involved in attempting to make PAFT effective and remained centrally involved in the reform efforts described later. In a sustained attempt to encourage groups to use the guidelines, for example, the Committee on the Administration of Justice (or "CAJ"), a Northern Ireland human rights NGO, organized briefing sessions on the Guidelines for a range of interested

79. In the matter of an application for judicial review by UNISON against Down and Lisburn Health and Social Services Trust, Q.B.D. (1995).

80. *Casey v. Department of Education for Northern Ireland*, Q.B.D. (1996).

voluntary and community organizations.⁸¹ The NGOs responded with enthusiasm. A loose coalition was born.

In a separate development, the EOC-NI, the statutory agency responsible for enforcing sex discrimination law, initiated a formal investigation into the privatization policy. The EOC-NI's investigation resulted in a finding that aspects of the privatization program did more heavily impact on women. The Commission made heavy use of the PAFT guidelines, making several detailed recommendations for how they should be implemented in the future, again showing how the Guidelines could be of use in a legal setting without themselves being law.⁸² The Government's rejection of the main recommendations in the Report, however, underlined the tenuous legal status that the Guidelines enjoyed. They were to be taken into account, but once Departments did so, it would be difficult to contest their decision legally, whatever the result of that consideration.⁸³ In other words, the effect of the judicial review decisions discussed earlier was that PAFT was legally enforceable procedurally, rather than substantively.

Meanwhile, another factor was playing an important role in helping PAFT become a major focus of political interest. This factor was that, during the passage of the FEA 1989, government had committed itself to conducting a formal review of the operation of the legislation and other government policy in this area within five years of the commencement of the legislation. Originally, this task was given to the Central Community Relations Unit within the Northern Ireland Office, the government department responsible for Northern Ireland, but responsibility was later transferred to SACHR, which commissioned research into several areas of the operation of government policy as part of its fact-finding. Prominent among the research was a short but highly critical piece on the operation of PAFT, which showed that PAFT appeared to be largely ignored within sub-

81. *See, e.g.* COMMITTEE ON THE ADMINISTRATION OF JUSTICE, BRIEFING NOTES ON THE POLICY APPRAISAL AND FAIR TREATMENT GUIDELINES (May 1996).

82. EQUAL OPPORTUNITIES COMMISSION, FORMAL INVESTIGATION INTO COMPETITIVE TENDERING IN NORTHERN IRELAND (1996).

83. NORTHERN IRELAND INFORMATION SERVICE, EQUAL OPPORTUNITIES COMMISSION INVESTIGATION INTO THE EFFECTS OF COMPETITIVE TENDERING IN HEALTH AND EDUCATION SERVICES (Jan. 23, 1997); EQUAL OPPORTUNITIES COMMISSION PRESS RELEASE, EOC CRITICIZES GOVERNMENT RESPONSE TO COMPETITIVE TENDERING INVESTIGATION (Jan. 27, 1997).

stantial sections of the policy-making apparatus of government.⁸⁴ Increasingly, the focus of political attention shifted from concern about the operation of the Fair Employment Act narrowly conceived, to the ineffectiveness of the policy—PAFT—that had been seen as a necessary complement to the legislation.

III. AN ALTERNATIVE PROPOSAL EMERGES

A. *Mainstreaming Fairness*

The combination of the potential for a mainstreaming approach to impact significantly upon inequalities and the increasing evidence of the lack of such impact in practice contributed to a significant growth of interest in potential reforms to the system. Unison, the union involved in the initial judicial review, commissioned the author to prepare a study on reform of PAFT. A discussion paper was prepared setting out various options and raising various questions for further consideration.⁸⁵

A possible model for a statutorily-based PAFT was tentatively suggested for the purposes of stimulating debate. The proposals drew in particular on what was seen as a somewhat equivalent issue of environmental impact assessment in the United States and Europe.⁸⁶ This analogy was seen as particularly emphasizing the importance attached to the drawing up of environmental impact assessments and public participation.⁸⁷ The proposals envisaged that a statutory duty would be imposed on the Secretary of State to ensure that material inequalities between certain groups—probably the existing PAFT groups, though that was left open—should be progressively reduced. Any enactment,

84. Robert Osborne et al., *The Implementation of the Policy Appraisal and Fair Treatment Guidelines in Northern Ireland*, in POLICY ASPECTS OF EMPLOYMENT EQUALITY IN NORTHERN IRELAND (Eithne McLaughlin & Padraic Quirk eds., 1996).

85. CHRISTOPHER McCRUDDEN, COMMITTEE ON THE ADMINISTRATION OF JUSTICE, MAINSTREAMING FAIRNESS? A DISCUSSION PAPER ON "POLICY APPRAISAL AND FAIR TREATMENT" (Nov. 1996).

86. See CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW (1995) (proving particularly useful); see also Claude Lambrechts, *Environmental Impact Assessment*, in GERD WINTER, EUROPEAN ENVIRONMENTAL LAW: A COMPARATIVE PERSPECTIVE ch. 5 (1996); *Governing Council Decision 14/25: Goals and Principles of Environmental Impact Assessment*, United Nations Environmental Programme, U.N. Doc. No. EP/GC.14/17/Annex III (1987); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I, ch. 15 (1995).

87. William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 COLUM. J. TRANSNAT'L L. 337 (1995).

passed or to be passed, should be interpreted and administered to the fullest extent possible in accordance with this principle. It would be the duty of every public body to make appropriate arrangements with a view to securing that their various functions and responsibilities were carried out with due regard to the need to use all practicable means and measures to promote that principle. Additionally, every public body would have the duty to review each policy initially within three years and every five years thereafter.

Every public body would first have to make a preliminary assessment whether a proposed policy was likely to have a significant impact on material inequality between the groups identified. Where such an impact was identified, the public body would be required to include in any proposal for that policy an impact assessment. This assessment would identify the aims and purposes of the policy, the significant impacts, alternatives to the policy that had less significantly adverse impacts, a justification for the rejection of any such alternatives, proposals to mitigate any unavoidable adverse impacts, and the arrangements proposed for monitoring the impacts of the policy subsequently.

Every public body would also have a duty to ensure that impact assessments would be made available to the public within a reasonable time in order to permit consultations to take place between the public body, affected groups, and the existing statutory equality commissions. Financial assistance would be made available to enable effective comment by such groups on an impact assessment. The impact assessment and the results of the consultations should be taken into account by the public body in any decision to proceed with the policy. Such a decision, together with its reasons for proceeding, would be published.

In November 1996, the Committee on the Administration of Justice ("CAJ") circulated the paper extensively among opinion formers, trade unions, voluntary groups, lawyers, politicians, and civil servants in Northern Ireland, requesting comments. As part of a process of further consultation among these groups, the CAJ held several seminars as a method of stimulating further reflection and suggestions. The Advisory Group that oversaw the process, i.e., the Equal Opportunities Commission for Northern Ireland, the Fair Employment Commission, and the Northern Ireland Disability Council, was "impressed by the breadth and

depth of the response.”⁸⁸ The CAJ commented in the same report on the consultation that its work “as facilitator of the consultation process was made all the more easy by the obvious strength of feeling surrounding the perceived lack of progress with PAFT this far, and the genuine desire to see issues of fairness and equity mainstreamed into policy making.”⁸⁹

Significantly, one of earliest responses was in the form of an extensive discussion by one of the researchers within the SACHR.⁹⁰ This discussion developed the “Mainstreaming Fairness” proposal further, placing more emphasis on external consultations, and suggested the establishment of an Equality Board to oversee public sector application of equality proofing mechanisms. This suggestion was a major feature of the paper. The Equality Board was envisaged as having a wide remit in developing enhanced Guidelines and assessment methodologies, monitoring departmental performance, encouraging consultation and participation, determining the adequacy of assessments, resolving conflicts of interest, and reporting to Parliament. In some respects, Ministers would be answerable to the Equality Board, which would be separate from the existing equality commissions.

In early 1997, the Government itself responded with a detailed critique of both papers in the form of a joint commentary prepared by civil servants.⁹¹ Concerns had earlier been expressed by prominent civil servants at the pressure that was mounting for legislative force to be given to PAFT.⁹² Now, a sustained attack was mounted. The critique “drew attention to the serious administrative, financial, and policy implications of both

88. COMMITTEE ON THE ADMINISTRATION OF JUSTICE, MAINSTREAMING FAIRNESS: A SUMMARY OF A CONSULTATION PROCESS AROUND “POLICY APPRAISAL AND FAIR TREATMENT” (June 1997).

89. *Id.*

90. Nigel Hutson, Policy Appraisal and Fair Treatment in Northern Ireland: A Contribution to the Debate on Mainstreaming Equality (Nov. 1996) (SACHR Discussion Paper).

91. Commentary on ‘Mainstreaming Fairness?—A Discussion Paper on Policy Appraisal and Fair Treatment’ by Dr. Christopher McCrudden and on ‘Policy Appraisal and Fair Treatment in Northern Ireland: A Contribution to the Debate on Mainstreaming Equality’ (Feb. 1997) (unpublished critique, on file with the *Fordham International Law Journal*).

92. David Watkins, Comments, Equal Opportunities Commission for Northern Ireland, Working Towards Equality in the Twenty-First Century: Report of a Conference held on October 23, 1996 (May 1997).

sets of proposals.”⁹³ Three aspects of the concerns expressed are particularly worth exploring.

One concern related to the democratic legitimacy of the proposals. This concern had two aspects. First, the response argued, the proposal “effectively constitutionalizes the equality aspiration. Arguably this law would seek to dictate the socio-economic policies of future Governments, irrespective of electoral mandates or budgetary constraints.”⁹⁴ One of the implications of this criticism was that putting PAFT on a statutory basis could only be taken forward in a general revision of the Northern Ireland Constitution Act 1973, or in the context of a Bill of Rights for Northern Ireland.⁹⁵ A more general constitutional settlement would be required.⁹⁶

In addition, the government’s response argued that concentration on consultation and participation could undermine representative democracy.

Even allowing for the particular situation in Northern Ireland, it is important that highly-motivated lobby groups should not [usurp] the role of elected representatives, nor be given a disproportionate influence on the formulation of policy, nor encouraged to frustrate the wishes of a democratically-elected Government. Civil society is wider than non-governmental organizations and civil dialogue should take account of a greater public. Particularly when policy options have public expenditure implications, a Government has a duty to take account of the interests of those citizens who do not benefit from NGO representation, but who may ultimately be required to fund a proposal through taxes.⁹⁷

A second concern related to the bureaucratic burden and extra costs involved.

At a time when public sector running costs and staffing levels are severely constrained, the complexity of procedures and new structures proposed in both papers seem to have little connection with current realities Beyond the resource

93. CENTRAL COMMUNITY RELATIONS UNIT, POLICY APPRAISAL AND FAIR TREATMENT, ANNUAL REPORT 1996 (Apr. 1997).

94. Watkins, *supra* note 92.

95. *Id.* at 48.

96. At that time, however, the prospects for a more general constitutional settlement seemed bleak, and the critique therefore appeared conceived as a delaying tactic by the civil service.

97. Watkins, *supra* note 92.

costs, there is no doubt that the procedures proposed . . . would impose considerable delays in the development of policies, programmes, plans and projects. Administrative efficiency would suffer materially. In some circumstances, the urgency of decision-making simply does not leave scope for the proposed procedures.⁹⁸

A third concern was the inclusiveness of the protected groups. The paper concluded: "it is questionable whether Parliament would wish to initiate and legislate for equality policies in Northern Ireland radically different from those in Great Britain, save in the case of our unique problems of religious and political discrimination."⁹⁹

A somewhat different set of concerns was expressed by others, particularly Professor Tom Hadden, who questioned

whether equality or fairness in the general sense referred to in the PAFT Guidelines, or even in the more limited sense of employment equality between the two major communities, can be assumed as an overriding political objective. Many people . . . would give equal priority to fostering better community relations and reducing—or at least not increasing—the degree of separation between members of the two communities. Achieving these objectives . . . may require different policies from those which are designed solely to achieve greater equality on whatever front.¹⁰⁰

This Article will return to this point subsequently.

B. *The SACHR Report*

Despite these reservations, the "Mainstreaming Fairness" proposal was substantially taken up by SACHR and became one of its central recommendations on a revised role for government in promoting equality of opportunity in the future. SACHR reported in June 1997,¹⁰¹ making detailed recommendations on a revised PAFT scheme. One recommendation was that PAFT

98. *Id.*

99. *Id.*

100. See Tom Hadden et al., *Equal But Not Separate: Communal Policy Appraisal* (June 1998) (unpublished, distributed as a supplement to *Fortnight* 371, on file with the author); see also TOM HADDEN ET AL., *SEPARATION OR SHARING? THE PEOPLE'S CHOICE* (1996).

101. STANDING ADVISORY COMM. ON HUMAN RIGHTS, *EMPLOYMENT EQUALITY: BUILDING FOR THE FUTURE*, 1997, Cm. 3684 [hereinafter *SACHR REPORT*].

should henceforth be put on a statutory basis, so as to create an open and transparent model of equality proofing.

The SACHR report concluded that “the implementation of PAFT has been inadequate to the task of giving effect to the aspirations expressed for it,”¹⁰² and questioned the “effectiveness of the body with overall responsibility” for its operation, the CCRU.¹⁰³ SACHR “strongly believes that implementation of the policy to date has fallen far short of what might reasonably have been expected in an area of such importance.”¹⁰⁴

The report recommended, as a minimum, that a number of measures should be incorporated into the PAFT system. There should be “effective political control over, and responsibility for, the policy on both direct and indirect effects on equality generally and community differentials in particular.”¹⁰⁵ There should be “adequate monitoring of both the direct and indirect impacts of policy on community differentials, and other equality measures.”¹⁰⁶ The report recommended that there be “full consideration of alternative policies which might give effect to government objectives but reduce or avoid unwelcome effects on equality generally and community differentials in particular.”¹⁰⁷ The report also recommended that there should be “adequate consideration at UK level of the possible impacts on groups covered by the PAFT guidelines.”¹⁰⁸ Finally, the report suggested there be “greater transparency in the manner in which government policy is assessed” and “greater accountability in the manner in which the civil service and public bodies fulfil their remit to promote equality.”¹⁰⁹

More far-reaching still, the report recommended that the policy on PAFT should be given legislative form. Enforcement should be based on an internal NIO unit, such as a strengthened CCRU. The report suggested that there should be a “duty imposed on the Secretary of State to promote, in drawing up new policies, reviewing existing policies, and administering public

102. *Id.* ¶ 5.24.

103. *Id.* ¶ 5.19.

104. *Id.* ¶ 5.35.

105. *Id.* ¶ 5.32.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

services, full and effective equality between persons of different religious beliefs, political opinion, gender, marital status, having or not having a dependant, ethnicity, disability[,] age or sexual orientation.”¹¹⁰ The reference to “full and effective equality” drew explicitly on the terms of the, then, recently agreed Council of Europe Framework Convention for the Protection of National Minorities.¹¹¹

IV. THE GOOD FRIDAY AGREEMENT

This Article now considers the crucial impact of the Good Friday Agreement¹¹² on the development of these issues. Hitherto, the debate just described on PAFT had only indirect relevance for or input into attempts to seek a constitutional settlement to resolve the Northern Ireland problem. However, by 1997, a new politics was emerging in Northern Ireland that meant that previous approaches to resolving the problem were supplemented with a new concentration on equality. This change meant that the previously largely separate debate on equality issues, including PAFT, now became entangled in the larger constitutional negotiations. In particular, both the revision of the “Mainstreaming Fairness” proposal and the British Government’s response to SACHR which will be considered subsequently, have to be seen in the context of the peace negotiations, which ultimately culminated in the Good Friday Agreement. It is to these developments that this Article now turns.

The history of the Agreement remains to be written. In the absence of such a history, how the Agreement was constructed and agreed is somewhat speculative. In this part of the Article, all that will be attempted is a sketch of how the equality issues in the Agreement appear to have emerged. The crucial feature of the negotiations from the equality perspective was the constitutionalization of the concept of mainstreaming equality. In their analysis of public power in Northern Ireland, published in 1995, John Morison and Stephen Livingstone concluded a discussion of the Policy Appraisal and Fair Treatment (“PAFT”) Guidelines with the perceptive comment:

110. *Id.* ¶ 5.35.

111. Framework Convention for the Protection of National Minorities, Strasbourg, Feb. 1, 1995, ETS No. 157.

112. Good Friday Agreement, *supra* note 1.

At a rhetorical level PAFT is a powerful commitment to the idea that the value of equality constrains government decision-making. Though not a legal commitment it has the potential to be a significant *constitutional* principle in the organization of government in Northern Ireland, one that goes beyond the non-discrimination provisions of the Constitution Act. Certainly this seems set to be *the* significant idea which will underpin post-cease-fire public policy.¹¹³

And so it proved to be.

A. *The New Politics and Equality*

There were several features of the peace process that affected this ultimate outcome. First, in May 1997, a new Labour Government was elected. This Labour Government was committed to breathing new life into the constitutional talks, unencumbered by a unionist veto, and backed by a substantial majority in the House of Commons. Soon after, the IRA resumed its cease fire. It suddenly seemed as if a peace settlement might actually emerge. This period also saw intense preparations for the final attempt by Senator Mitchell to secure an agreement in multi-lateral talks. For the two Governments, equality issues were perceived as an important part of "confidence building" in the Catholic/Nationalist Community. From then on, policy proposals on equality were affected significantly by their integration into the multi-party discussions which culminated in the Agreement.

Second, earlier attempts at establishing peace in Northern Ireland had considered discrimination and human rights as one of the issues that was seen by the participants as necessary to address. The difference this time lay in the inclusion in the talks of political parties that had not participated previously and that viewed equality and human rights issues as particularly salient. These were Sinn Féin and the various fringe Loyalist parties, especially the Progressive Unionist Party ("PUP") that particularly emphasized social inclusion.¹¹⁴ For these parties, a failure to address human rights and equality issues of importance to their communities would make it much more difficult for them to

113. JOHN MORISON & STEPHEN LIVINGSTONE, *RESHAPING PUBLIC POWER: NORTHERN IRELAND AND THE BRITISH CONSTITUTIONAL CRISIS* 147 (1995).

114. See Beatrix Campbell, *United in Equality over Ulster's Fate*, *GUARDIAN* (London), May 20, 1998, at 2.

“sell” any agreement. Once human rights was identified as an area that was important, particularly to Sinn Féin, it then became important for those who wanted to keep Sinn Féin “on board” to include it for reasons of strategy as well as for reasons of principle in the final Agreement. The Social Democratic and Labour Party, Sinn Féin, and the PUP all embraced a reform of PAFT as a part of its strategy on equality. So too, the Women’s Coalition played an important role in keeping these issues to the fore in negotiations.

Third, outside the formal talks process, there developed what has been called a “parallel peace process,” by the distinguished journalist Mary Holland.¹¹⁵ Referring to disparity in employment between Catholics and Protestant, she wrote in March 1998:

Many people in Northern Ireland who are deeply committed to securing a lasting settlement know that these and other indices of inequality and social exclusion must be tackled. They are drawn from trade unions, community groups, the churches, and others who represent what Bea Campbell memorably described as ‘the constituency of the rejected’.

Together they make up what might almost be described as a parallel peace process—and one which is in many ways as important as the talks at Stormont. It is no coincidence that the same names and organizations crop up again and again when the issues of discrimination and social exclusion are discussed—the Commission [sic] for the Administration of Justice, the public service union UNISON, the Women’s Support Network and many others.

These groups know that the people for whom they speak care far more about their prospects of getting a job and a fair deal for their children than about the exact words used to define nationality in the Irish Constitution. If they can see that this time around a period of peace will be accompanied by concrete social and economic change, then the likelihood of their supporting a return to violence will be enormously reduced.¹¹⁶

Acting largely outside the multi-party talks process, though with contacts inside (in particular, the Women’s Coalition members

115. Mary Holland, *Latest Plan to Tackle Inequality Crucial to North Peace*, IRISH TIMES, Mar. 12, 1998, at 16.

116. *Id.*

were part of this loose network) this parallel peace process nevertheless succeeded in setting at least part of the human rights and equality agenda inside the multi-party talks, both before and during the final frenzied days.¹¹⁷

Fourth, the new Labour Government was in general more comfortable with a strong "rights" approach than the earlier Conservative Government had been and somewhat more European and internationalist in its approach to human rights issues. The new government had already made clear its commitment to the incorporation of the European Convention on Human Rights into United Kingdom law. And, just to emphasize the international dimension to Northern Ireland issues again, in December 1997 the Committee on Economic, Social and Cultural Rights ("ESCR") reported on the United Kingdom's periodical report under the Covenant on Economic Social and Cultural Rights. In a comment specifically on Northern Ireland, it recommended "that consideration be given to the requirement that a Human Rights Assessment or Impact Statement be made an integral part of every proposed Legislation or policy initiative on a basis analogous to Environmental Impact Assessments or Statements."¹¹⁸ Moreover, the Secretary of State, whilst in Opposition, had supported draft legislation on equality, and was much closer to the "parallel peace process" than any of her predecessors had been. Before the election she publicly announced that she intended "to make it a statutory duty for government bodies to take equality of opportunity into account through more rigorous enforcement of the Policy Appraisal and Fair Treatment guidelines."¹¹⁹

The formation of the talks' agenda on equality took place largely in the months of December 1997 to April 1998. In January 1998, the British and Irish Governments attempted to move the process on, after the destabilizing effects of violence over the Christmas period. They published a joint statement, the so-

117. For a recognition of their importance in the peace process, see Mary Robinson, Keynote Address, in CAJ/UNISON, *EQUALITY AND HUMAN RIGHTS: THEIR ROLE IN PEACE BUILDING 5* (1999).

118. *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, Committee on Economic, Social and Cultural Rights, United Kingdom, U.N. Doc. No. E/C.12/1/Add.19, ¶ 33 (1997) (United Kingdom concluding observations).

119. Marjorie Mowlam, *Towards Genuine Consent in Ulster*, *INDEPENDENT*, Feb. 25, 1997.

called "Heads of Agreement Paper," setting out their best guess on the bare bones of a settlement in Northern Ireland. There was a particularly important paragraph on human rights and equality included in the statement. It envisaged provisions to safeguard the rights of both communities in Northern Ireland "to achieve full respect for the principles of equity of treatment and freedom from discrimination, and the cultural identity and ethos of both communities." The reaction to this language was mostly hostile both from nationalist commentators and human rights advocates, on the grounds of the ambiguity of the term "equity."¹²⁰ The hostile response appears to have resulted in much greater concentration by the Irish government on the details of the equality agenda, and a greater realization that not reflecting the concerns of these groups could itself have a destabilizing effect.¹²¹

B. *Benchmarks for Change*

In February 1998, the author prepared a revised proposal, taking into account the changed political circumstances, the results of the consultation exercise, and the SACHR Report, entitled "Benchmarks for Change."¹²² It was argued that, "[a]t this important time in the future of Northern Ireland, feasible, practical, inclusive and disciplined mechanisms should be adopted to ensure that the most disadvantaged groups in Northern Ireland society feel themselves stakeholders in the future governance of Northern Ireland." This Report, it was argued, required that no public authority should be able to discriminate unfairly, directly or indirectly, against anyone on any ground such as race, gender, sex, pregnancy, marital status, political or other opinion, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, nationality, national origin, or other status.

120. See Niall O'Dowd, *Delicate Balance Has Been Upset by Paper's Pro-unionist Slant*, IRISH TIMES, Jan. 15, 1998, at 16; Dick Walsh, *Time to Watch our Words on New Path to Peace*, IRISH TIMES, Jan. 17, 1998; Christopher McCrudden, *Replacing 'Equality' with 'Equity' Shows the Difference a Word Can Make*, IRISH TIMES, Jan. 22, 1998, at 14.

121. See An Taoiseach, Mr. Bertie Ahern, T.D., Speech at Trinity College, Dublin (Feb. 3, 1998); Statement of An Taoiseach, Mr. Bertie Ahern, T.D., on Northern Ireland, Dail Eireann, Feb. 4, 1998.

122. CHRISTOPHER MCCRUDDEN, COMMITTEE ON THE ADMINISTRATION OF JUSTICE, BENCHMARKS FOR CHANGE: MAINSTREAMING FAIRNESS IN THE GOVERNANCE OF NORTHERN IRELAND (Feb. 1998).

Yet discrimination was seen as only part of the problem. Public authorities should also be required, adopting the SACHR report's language, to promote "full and effective equality of opportunity" between all parts of the community in Northern Ireland in all areas of economic, social, political, and cultural life in which the public authority was involved. If the reality of continuing Catholic disadvantage was to be tackled effectively, then public authorities should, in particular, be required to ensure that economic inequalities between the Catholic and Protestant sections of the community in Northern Ireland should be progressively reduced. Public authorities should not consider these measures to be an act of unfair discrimination. Policies in which social need were targeted would disproportionately tackle Catholic disadvantage but would effectively also address Protestant disadvantage.

The language of non-discrimination and equality was necessary, but not sufficient, it was argued. Fairness and openness must be brought into the mainstream of decision-making, and put on a statutory basis. Public authorities should be put under a duty to create arrangements to ensure that their various functions and responsibilities would be carried out with due regard to the need to comply with equality and non-discrimination. Within three years, and once every five years after that, it should be the duty of every public authority to review the extent to which its various functions and responsibilities were carried out in a way which furthered non-discrimination and equality.

Public authorities would be required to prepare an impact assessment of any significant impact that a proposed action by it would have on the authority's ability to fulfil these duties. The consideration of alternatives was regarded as a crucial element in making a PAFT system effective. The policy-maker should consider whether reasonable alternative ways of meeting the objective were available. A consideration of the impacts of reasonable alternatives should also be undertaken. Justifications should be given if these reasonable alternatives were not accepted. This approach was already implicit in the PAFT guidelines, where the approach to justification of disparate impacts was based on the "necessity" of the particular approach adopted. This approach could only be adequately carried out if alternative approaches, which had a less adverse impact, were considered as well.

The consideration of the mitigation of adverse impacts was seen as intertwined with the consideration of alternatives. Mitigation could take three different forms: avoidance, e.g., using an alternative approach to reduce the adverse impact; reduction, e.g, lessening the severity of the impact; and remedy, such as compensation. During the PAFT process, participants should consider the mitigation of impacts. The PAFT report itself should include details of mitigation and its implementation.

Under the revised proposals, therefore, it would be the duty of every public authority to include in every impact statement information on:

- the aims and purposes of the proposed action;
- any significant impact that in its view the proposed action may have on its ability to fulfil its non-discrimination and equality of opportunity duties;
- alternatives to the proposed action, which may achieve the aims and purposes of the proposed action but may be less likely to have an adverse effect on its ability to fulfil these duties and which may achieve the aims and purposes of the proposed action but may be more likely to have the effect of enabling it to achieve better compliance with these duties;
- the justification for the rejection of any alternatives identified;
- proposals to mitigate any unavoidable impact of the action which would be likely to have an adverse impact on its ability to fulfil these duties, by recourse to accompanying social and economic measures; and
- a description of mechanisms to monitor the impact of the action, following its introduction.

Public authorities would be required to encourage and facilitate participation by those directly affected by these decisions. To enable this facilitation to happen, public authorities would be required to ensure that impact statements were made available to the public in good time to enable effective consultation to take place by the public authority with those directly affected by the proposed decision and the relevant statutory equality agencies. The impact assessment and the results of any consulta-

tions on it would have to be taken into account by the public body in any subsequent decision whether to proceed with the proposed action. The public body would be required to give its reasons for doing so.

In brief, the proposal involved replacing PAFT with a statutory obligation to promote equality of opportunity. There would be a strong mechanism within the Northern Ireland civil service to monitor and enforce this obligation. The mechanism amounted to a set of proposals to enable a high degree of engagement by those outside government to contribute to the assessment and development of equality issues within government, including the participation by those affected by policy proposals, and the statutory equality agencies. It received extensive support across the range of groups most affected.

C. The Government's White Paper Proposals

The Government's response to the SACHR Report was set out in the Government's White Paper, "Partnership for Equality,"¹²³ published in March 1998, just before the closing stages of the peace negotiations. From the perspective of what subsequently occurred, two proposals were particularly important. One was to create a new statutory duty on the public sector to promote equality of opportunity. The other, more surprising proposal, was to establish a new Equality Commission in Northern Ireland, and to amalgamate the existing equality agencies.

1. Statutory Duty

In the chapter of the White Paper dealing with the role of government in promoting equality of opportunity, the Government proposed that there should be a new statutory framework that would supersede the PAFT administrative guidelines. There would be a statutory obligation on Northern Ireland "public sector bodies." These would include District Councils and United Kingdom Departments operating in Northern Ireland. The duty would be to secure that "consistent with their other responsibilities," their various functions "are carried out with due regard to the need to promote equality of opportunity in those areas covered by the current PAFT guidelines."¹²⁴

123. PARTNERSHIP FOR EQUALITY, 1998, Cm. 3890 [hereinafter WHITE PAPER].

124. *Id.* ¶ 4.9.

Obligations in respect of categories where there are already existing statutory obligations—such as race, sex, religion/politics, and disability—“may be stronger . . . than for other categories.”¹²⁵ The White Paper also suggested, taking up the approach espoused by Professor Hadden earlier, as we have seen, that “a statutory obligation might extend to the promotion of good relations between people of different religious beliefs and political opinions, and people of different racial groups.”¹²⁶

The White Paper proposed that each public body might be required to adopt a statutory scheme setting out “how it proposed to take regard of its new statutory obligations in its day-to-day work.”¹²⁷ Such a scheme, it said, “might include,”

arrangements for the appraisal of policies . . . ; arrangements for consultation on policies; access to services by the public; arrangements for monitoring the uptake of services; the training of staff on the new statutory obligations; the impact of any grant schemes administered by the public body; a timetable for giving effect to the scheme; arrangements for publicizing the scheme.¹²⁸

The proposals envisaged, however, that the details of statutory schemes might vary considerably, “depending on the nature of a public body’s responsibilities.”¹²⁹ In its detail, therefore, the White Paper thus fell far short of the author’s and SACHR’s proposals on mainstreaming.

2. New Unified Equality Commission

Following this section on a proposed new legal duty on public bodies to promote equality of opportunity, the Government proposed, subject to public consultation, to create a new unified statutory authority bringing together the existing Northern Ireland equality agencies.¹³⁰ The possibility of an amalgamation of the statutory equality commissions had a long history. In brief, a proposal to this effect had first been made by government in the

125. *Id.*

126. *Id.*

127. *Id.* ¶ 4.10.

128. *Id.*

129. *Id.*

130. The Northern Ireland equality agencies are the Fair Employment Commission, the Equal Opportunities Commission, the Commission for Racial Equality, and the Northern Ireland Disability Council.

Consultation Paper on the revision of the fair employment legislation in the mid-1980s. The suggestion that the Fair Employment Agency—as it then was—should be amalgamated with the Equal Opportunities Commission,¹³¹ received a hostile response from many commentators. The proposal was not endorsed by SACHR in its 1987 report on fair employment; instead, it recommended that the issue be kept under review. SACHR had again considered the issue in the context of its more recent report on fair employment, and again concluded that the equality agencies should not be amalgamated but that the issue should again be kept under review.¹³²

It appeared from the government's White Paper to be fairly clear that the major reason in favor of the establishment of such a unified Equality Commission was the need to find some institutional mechanism for the monitoring and enforcement of the proposed statutory duty on public bodies to promote equality of opportunity. The reason given for the establishment of a body external to the civil service for carrying out these functions was the need for external assistance to enable the public bodies to implement the duty effectively. "It is doubtful whether public sector bodies would have the expertise to implement effectively these proposals without external assistance."¹³³ But because the necessary expertise was already to some extent present in the existing equality agencies, and a new equality body set up solely to monitor and enforce the new public sector duty "could not hope to duplicate this expertise,"¹³⁴ "[t]he most rational organization solution would be the creation of a unified Equality Commission, bringing together the existing statutory bodies."¹³⁵ The

131. The Fair Employment Agency and the Equal Opportunity Commission were the only two equality bodies then in existence.

132. In Britain, the issue was publicized separately in the context of the incorporation into U.K. law of the European Convention on Human Rights ("ECHR"), when the Independent Public Policy Research ("IPPR"), a think tank close to the Labour Party, announced prior to the General Election that it was considering making a recommendation that the amalgamation of the British CRE and EOC into a British Human Rights Commission. Following the victory of the Labour Party in the General Election and the decision to incorporate the ECHR, the issue of a Human Rights Commission was considered within government in the context of the drafting of the Human Rights Bill, but the Government announced that a decision had been taken not to establish such a body for the time being, pending further consultation with the statutory commissions.

133. WHITE PAPER, *supra* note 123, ¶ 4.11.

134. *Id.* ¶ 4.12

135. *Id.*

“main purpose” of the amalgamation would be to enable their work to be greatly extended into a new area, a positive engagement with the public sector to promote equality of opportunity in a broad sense.¹³⁶

The White Paper envisaged this unified Equality Commission possibly operating “on the basis of separate directorates for fair employment, gender, race and possibly (subject to decisions on a Disability Rights Commission) disability.”¹³⁷ Other directorates could implement the new functions associated with the new public sector equality duty: setting standards for statutory schemes, validating specific schemes, monitoring their implementation and investigating complaints that schemes had not been appropriately applied by public bodies.¹³⁸ If complaints were upheld by the new Equality Commission, “the Secretary of State might exercise statutory enforcement powers.”¹³⁹

D. *The Agreement Concluded*

One of the key issues urged on the parties to the peace negotiations was the centrality of the human rights and equality issues to the success of the peace process. Rather than restricting discussion within the talks process to a classical, narrow definition of rights as centering on political and civil rights, a consensus emerged that social, cultural, and economic rights should also be included. A key element in the equality area was the importance of procedures for mainstreaming equality. During the months of negotiation it emerged that there was significant support across the political spectrum for an approach to be adopted which reflected the author’s and SACHR’s proposals on the replacement for PAFT. It was thought likely that the British Government would seize the opportunity of the negotiations to bolster the equality proposals in the White Paper, with the authority of a peace agreement. Arguments were put to several of the parties to the negotiations to have stronger proposals on mainstreaming equality than those in the White Paper inserted in the final text, and to attempt to stop the amalgamation of the existing statutory equality agencies.

136. *Id.*

137. *Id.* ¶ 4.13.

138. *Id.* ¶ 4.11.

139. *Id.*

All this activity culminated first in the "Mitchell Document,"¹⁴⁰ which was presented by the Chairmen of the talks at the beginning of April as a draft paper for discussion. The bones, and much of the flesh of the ultimate Agreement, were in the Mitchell Document, including the sections on equality and human rights. Some significant changes regarding equality, however, were made to these aspects of the document in the run-up to final agreement on April 10, 1998.¹⁴¹ In some important respects, the Agreement departed from the White Paper proposals.

Two equality agendas were addressed in the Agreement. One agenda related to national equality between the two different allegiances, one Irish, the other British. Another related to social equality between communities defined by other characteristics: religion, ethnic affiliation, race, disability, gender, and so on. Both issues were recognized as requiring significant protection. The Agreement sought to enshrine both agendas, irrespective of whether there would be a united Ireland, or continued membership of Northern Ireland in the United Kingdom.

The national equality agenda was reflected in many of the institutional provisions such as the provisions attempting to ensure fair representation in the Assembly and Executive, and the establishment of North-South institutions. Beyond these arrangements, however, the parties affirmed a list of important rights: the right of free political thought, the right to freedom and expression of religion, the right to pursue democratically national and political aspirations, and the right to seek constitutional change by peaceful and legitimate means. A new Bill of Rights, supplementing the European Convention on Human Rights, was envisaged, to reflect the principles of "mutual respect for the identity and ethos of both communities and parity of esteem." In addition, there were new duties on government to encourage the use of the Irish language.

The Agreement was forthright and inclusive on social equality as well as national equality. The parties affirmed "the right to equal opportunity in all social and economic activity, regardless

140. Mitchell Document (visited Mar. 8, 1999) <<http://www.nuzhound.com/articles/mitdraft.htm>> (on file with the *Fordham International Law Journal*).

141. The following section is adapted from Christopher McCrudden et al., *Equality and Social Justice*, SUNDAY BUSINESS POST, May 10, 1998.

of class, creed, disability, gender or ethnicity; . . . and the right of women to full and equal political participation.”¹⁴²

Provisions governing Ministers in the new Executive Authority, in particular the Pledge of Office, required Ministers “to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination.”¹⁴³ This requirement was inserted in the last few days of negotiation. Under the Code of Conduct for Ministers, they were required to “operate in a way conducive to promoting good community relations and equality of treatment.”¹⁴⁴ Moreover, an individual “may be removed from office following a decision of the Assembly taken on a cross-community basis, . . . for failure to meet his or her responsibilities including, inter alia, those set out in the Pledge of Office,” which included the duty of equality and impartiality.

The reality of continuing disadvantage between the two religious communities was recognized by the inclusion of proposals for addressing need and promoting social inclusion. Pending the devolution of powers to a new Northern Ireland Assembly, the British Government committed itself to pursuing policies for sustained economic growth and stability in Northern Ireland and for promoting social inclusion. These policies included in particular community development and the advancement of women in public life. Subject to public consultation, the British Government would also develop a new regional development strategy for Northern Ireland, for consideration in due course by the Assembly. This strategy would aim to tackle the problems of a divided society and social cohesion in urban, rural, and border areas. The government also planned to introduce a range of measures aimed at combating unemployment and progressively eliminating the differential in unemployment rates between the two communities by targeting objective need.

A new Northern Ireland Human Rights Commission would be established, with membership from Northern Ireland “reflect-

142. Good Friday Agreement, *supra* note 1, Rights, Safeguards and Equality of Opportunity, Human Rights ¶ 1. The references to disability, ethnicity, and participation by women were inserted by the negotiators during the final days.

143. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Annex A: Pledge of Office.

144. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Annex A: Code of Conduct.

ing the community balance.” This Commission would be established “by Westminster legislation, independent of Government, with an extended and enhanced role beyond that currently exercised by the [SACHR].” This role would include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government, providing information and promoting awareness of human rights, considering draft legislation referred to it by the new Assembly, and “in appropriate cases,” bringing court proceedings or providing assistance to individuals doing so.¹⁴⁵ The new Human Rights Commission would be tasked specifically with consulting and advising

on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. . . . Among the issues for consideration by the Commission will be . . . a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.¹⁴⁶

In this respect, the Agreement kept open the possibility that a Northern Ireland Bill of Rights could include the concept of “indirect discrimination” in any new anti-discrimination duty applying to the actions of public bodies in Northern Ireland, an idea which was rejected in the earlier White Paper.

Turning to the issue of how equality was to be mainstreamed, the Agreement noted that:

[s]ubject to the outcome of public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation.¹⁴⁷

Under the Agreement, “[p]ublic bodies would be required to draw up statutory schemes showing how they would implement

145. *Id.*, Rights, Safeguards and Equality of Opportunity, Human Rights, New Institutions in Northern Ireland, ¶ 5.

146. *Id.*, Rights, Safeguards and Equality of Opportunity, Human Rights, United Kingdom Legislation ¶ 4.

147. *Id.* ¶ 3.

this obligation.”¹⁴⁸ As part of the equality duty, they would be required to include “arrangements for policy appraisal, including an assessment of impact on relevant categories”¹⁴⁹ The reference to impact assessment was added at a late stage of the negotiations. In this respect the Agreement went further than the White Paper.

The Agreement additionally proposed “arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland.”¹⁵⁰ The Assembly “may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights.”¹⁵¹ This proposal was not included in the White Paper. The Assembly “shall then consider the report of the Committee and can determine the matter in accordance with the cross-community consent procedure.”¹⁵² It would be “open to the new Northern Assembly to consider bringing together its responsibilities for these matters into a dedicated Department of Equality.”¹⁵³ These elements were also added at a late stage.

The Agreement noted that the British Government proposed to create a new statutory Equality Commission to replace the Fair Employment Commission, the Equal Opportunities Commission (Northern Ireland), the Commission for Racial Equality (Northern Ireland), and the Disability Council. Such a unified Commission would “advise on, validate and monitor the statutory equality obligation and will investigate complaints of default.” But this proposal was not agreed by the negotiating parties or by the Irish Government, being “[s]ubject to the outcome of public consultation currently underway,” a condition that had not been included in the original Mitchell document.

The new British-Irish Intergovernmental Conference was

148. *Id.*

149. *Id.*

150. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Safeguards ¶ 5(c).

151. *Id.*, Democratic Institutions in Northern Ireland, Strand One, Operation of the Assembly ¶ 11.

152. *Id.*

153. *Id.*, Rights, Safeguards and Equality of Opportunity, New Institutions in Northern Ireland ¶ 7.

given significant human rights responsibilities. Strand Three provided that:

[i]n recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters, on which the Irish Government may put forward views and proposals. These meetings, to be co-chaired by the Minister for Foreign Affairs and the Secretary of State for Northern Ireland, would also deal with all-island and cross-border co-operation on non-devolved issues.

The Conference . . . will address . . . the areas of rights . . . in Northern Ireland (unless and until responsibility is devolved to a Northern Ireland administration)¹⁵⁴

V. IMPLEMENTING THE EQUALITY ASPECTS OF THE AGREEMENT

A. Consultations

The period between the conclusion of the Agreement in April, and the publication of the Bill implementing the Agreement in July, saw the submission of the vast majority of comments on the White Paper.¹⁵⁵ All but two of the 123 comments on the White Paper were received after the Agreement was concluded and many took account of the Agreement in responding.¹⁵⁶ Roughly categorized, the responses came from eight District Councils, nine trade unions or professional bodies, twenty-seven statutory bodies, and fifty-six—nearly fifty percent—from the community and voluntary sector (mostly NGOs). Whilst most submissions endorsed the principle that equality of opportunity should be placed on a statutory basis, a substantial proportion of submissions questioned whether the government proposals would achieve their objective. Many submissions were con-

154. *Id.*, Strand Three, British-Irish Intergovernmental Conference, ¶¶ 5-6.

155. This section is adapted from an analysis of the responses by the Committee on the Administration of Justice. COMMITTEE ON THE ADMINISTRATION OF JUSTICE, PRELIMINARY ANALYSIS BY THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE OF RESPONSES TO THE WHITE PAPER "PARTNERSHIP FOR EQUALITY" (Sept. 30, 1998) [hereinafter PRELIMINARY ANALYSIS].

156. House of Commons, Official Report, vol. 318, July 13, 1998, cols. 40-41 (written answer).

cerned about the ability of the model of enforcement proposed by government to deliver mainstreaming effectively. Apart from concerns about the creation of a unified Equality Commission, several submissions from the community/voluntary sector had particular concerns about the absence of an effective internal as well as external mechanism for control. From a different perspective, several other submissions, most from public sector organizations, raised concerns about the burden this duty might place on public bodies. One public body wanted any statutory scheme "to be framed so as to ensure that the [body] can implement it without disproportionate adverse effects upon the [body's] ability to discharge its . . . functions on a economical and efficient basis."¹⁵⁷ Another thought that detailed appraisals "which may have to include an element of consultation" would considerably increase the burden on public bodies. It queried whether giving the role of equality scheme validation to a statutory body might not "give executive powers of veto to a body not directly involved in the day-to-day business of the organization."

The responses about the proposal to create a unified Equality Commission displayed a high level of interest. About ninety-eight out of the 123 submissions commented positively or negatively. Only eighteen could be said to have been unambiguously in favor of the proposal. Of those expressing a view, it was estimated by the government that fifty-five were broadly against.¹⁵⁸ Several expressed concern that a single commission would create a hierarchy of discrimination. In particular, many of these specifically indicated their concern that religious discrimination issues might get disproportionate attention. Many wrote of the risk of losing expertise accumulated over many years in the field of fair employment and gender equality, and the risk that relatively new initiatives in the field of race and disability rights might be undermined. Several of those who unambiguously supported the proposal did so on the basis that the new Commission could provide a "one-stop shop."

B. *An Alternative Proposal Presented*

In May, a alternative proposal to that adopted in the White

157. PRELIMINARY ANALYSIS, *supra* note 155.

158. *Id.*

Paper was submitted to the Secretary of State.¹⁵⁹ This proposal suggested—and the suggestions were taken up in several submissions—that, in the light of the Agreement and the results of the consultation on the White Paper, several features of the White Paper's proposals should be revised. The enforcement and monitoring of the equality of opportunity duty on the public sector should be carried out by establishing an effective *internal* monitoring and enforcement mechanism within the Northern Ireland Civil Service/Executive. This mechanism should be complemented by mechanisms for increased public participation and a role for the *existing* equality commissions. The proposed powers that the White Paper recommended for the Secretary of State to intervene where there is a breach of the equality duty by a public body should be strengthened and clarified.

Particular consideration might be given in this context to the proposition in the Agreement that a Department of Equality might be established within the Northern Ireland Executive. There were several useful functions that such a department might fulfil, perhaps the most important being to take over the functions that the White Paper allocated to the proposed Equality Commission in relation to the public sector equality duty. Placing these responsibilities in a new Department of Equality, with its own permanent secretary and Minister, would indicate the political importance of equality. As important, it would place those with responsibility for equality issues in the permanent secretaries' and Ministers' meetings as of right, a vital issue if equality was now to be at the heart of government.

The terms of reference of the SACHR report, it was argued, had been restricted to issues involving equality between the two communities in Northern Ireland defined in religious terms. The SACHR report was not tasked with investigating the mechanisms and reforms that were necessary for effectively delivering equality across other dimensions, such as gender, disability, and ethnic origin. Further research which assessed the effect of amalgamation of the existing commissions in this context was necessary before a decision was reached on whether the amalgamation of existing equality bodies into one equality body, or into a new Human Rights Commission, should take place.

159. CHRISTOPHER McCrudden, COMMITTEE ON THE ADMINISTRATION OF JUSTICE, EQUALITY: A PROPOSAL IN THE LIGHT OF MULTI-PARTY TALKS AGREEMENT (May 1998).

The Human Rights Commission could itself be given this rôle, in the context of the study it would be initiating under the terms of the Agreement to consider the terms of a new Bill of Rights for Northern Ireland. Consideration should also be given, again possibly in the context of the Human Rights Commission's research into a Northern Ireland Bill of Rights, for harmonization upwards of the different statutory obligations in the area of equality. Until this report was completed separate Commissions should remain in existence for each area as at present. Separate budgets should remain for each Commission. Existing statutory mandates should continue, with separate legislation.

The Commissions, however, should establish an Office of Equality Commissions on a non-statutory basis, which would be given the task of co-ordinating the functions of the different Commissions to the greatest extent possible, consistent with their separate policy and legal responsibilities. A secretariat should be established within the Office of Equality Commissions, in part to co-ordinate responses to government departments on the exercise of the equality duty, and in part to act as a referral center for public enquiries. There should also be provision made by the Commissions for common professional services to be set up in those areas in which the Commissions considered that these services would be useful—for example, administrative, financial, and statistical services provision. These common provisions should be funded by a contribution from each existing commission in proportion to their existing overall budgetary allocation. Consideration should also be given to bringing together the existing equality agencies in one building in central Belfast.

VI. *THE NORTHERN IRELAND BILL IN PARLIAMENT*

A. *The Politics of the Parliamentary Phase*

The Government introduced the Northern Ireland Bill, implementing the Good Friday Agreement, into the House of Commons on July 15, 1998. It received its second reading, which involves a debate on the principles underpinning the Bill, on July 20. Clause-by-clause consideration of the contents of the Bill took place, first in Committee, then at Report stage, between then and July 31 when the Bill was given its Third Reading. During the summer, further intensive consultations took place be-

tween the Government and interested groups, including the Northern Ireland political parties. The Bill was then given its second reading in the House of Lords on October 5, and again the debate focused on the principles underlying the Bill. This reading was followed by detailed clause-by-clause consideration by the Lords of the Bill at the Committee and Report stages on October 26 and November 10-11 respectively. The Lords Third Reading debate took place on November 17. The next day the Commons considered the Lords amendments, and agreed to them. The Bill received the Royal Assent on November 19, 1998 and became law.

The politics of the Bill's passage is important for an understanding of what transpired during the Parliamentary phase. The Government commanded a sizeable majority in the House of Commons and it was never in any doubt that it could push the legislation through in any form that it wished. There was also never any serious prospect that the Conservative majority in the House of Lords would have chosen the legislation implementing the Agreement as the basis for attacking the Government. Indeed, neither the Conservative opposition in the Lords nor in the Commons appear to have played much of a role in the negotiations surrounding the Bill's passage. The other principal actors on the Parliamentary stage, as regards the equality aspects of the Bill, were the Government ministers involved—Paul Murphy, MP in the Commons, and Lord Williams and Lord Dubs in the Lords—the Northern Ireland MPs in the Commons, and a few Labour back-benchers. In particular Kevin McNamara, MP in the Commons and Lord Archer of Sandhill in the Lords both played key roles. Finally, Lord Lester of Herne Hill led for the Liberal Democrat front-bench on those aspects of the Bill in the Lords.

Outside the Houses of Parliament, the main actors were the Northern Ireland political parties, the Irish Government, Paul Murphy of the statutory equality agencies, and the loose coalition—including the Northern Ireland Council on Ethnic Minorities, Unison, and Disability Action—that took its cue largely from the briefings of the Committee on the Administration of Justice. In practice, the equality agencies and the coalition constructed the agenda for debate and were seen by both the British and Irish governments as the main pressure groups with which they had to deal because of their influence on this issue. In the

main, this activity was carried out without publicity. (Only when the Bill was in its final stages was there any attempt to “go public” on these issues).¹⁶⁰ The CAJ and members of the coalition briefed influential figures in the U.S. Administration and Congress, British Parliamentarians, the Irish Government, and other NGOs, whilst also being consulted directly by Paul Murphy. Particular attention was paid by CAJ and the statutory agencies to constructing such a consensus across the Northern Ireland parties that it would be difficult for the Government to argue that it should not “take sides” between the parties on these issues. This resulted in several amendments being jointly supported by Ulster Unionists, the SDLP, and Liberal Democrats.

The Secretary of State gave Mr. Murphy the task of piloting the equality aspects of the Bill through, replacing Tony Worthington, MP. Behind Mr. Murphy stood the Central Community Relations Unit of the Northern Ireland Office, based in Belfast, and the Northern Ireland Office civil servants in London. Increasingly, however, on equality issues, London appeared to replace Belfast as the place where decisions were made.

The CAJ strategy was ultimately successful and bit-by-bit changes were introduced onto the face of the Bill that reflected the CAJ’s suggested approach. Where specific changes in the text of Bill were not forthcoming, the Government often gave interpretations of the provisions of the Bill in the course of the Parliamentary debates or in an exchange of letters which met the CAJ’s points. These interpretations were given in the full knowledge that the former at least were formal interpretations that could be used in any subsequent legal debate on the meaning of the Bill. As we shall see, these interpretative statements are important in clarifying some ambiguities in the text of the Bill.

B. *Principal Changes Introduced During the Parliamentary Phase*

In this section, the Article looks in somewhat more detail at the extent of the changes introduced during the Parliamentary phase. We need to start just before the formal introduction of the Bill into the Commons on July 15. In the two weeks before,

160. Kevin McNamara, *Inattention to Amendment Details Could Be Costly*, IRISH TIMES, Oct. 29, 1998, at 10.

consultation drafts of the Bill¹⁶¹ were, most unusually, made available to some interested parties. This availability gave some limited time to suggest amendments. In addition, the Secretary of State announced her decisions on the equality aspects of the Bill on July 10. The Bill as introduced came closer to the Secretary of State's announcement than the draft Bill had done, and it was clear that there was some delay between political decisions being made, and these being reflected in the legislative drafting, an issue which was to continue throughout the process.

The announcement from the Secretary of State made clear that the campaign to modify the Government's proposals on amalgamating the equality Commissions into a new Equality Commission had been unsuccessful. In an attempt to meet the various criticisms of the proposal that had been made, in particular that religious equality would dominate the working of the new body, the announcement indicated that the legislation would require the Equality Commission to devote appropriate resources to gender, race, and disability issues. It would also allow the Commission to establish consultative councils on these issues. A working party would be established, including representatives of the existing Commissions, and representatives of the groups most affected by the statutory duty—who were ultimately not included, in fact—to consider a new internal structure for the Commission.

Alternative proposals that would have delayed the establishment of the unified Commission were rejected. The possibility that a new Human Rights Commission should consider the future of the existing Commissions, perhaps even absorbing them into a single human rights and equality body was rejected on the ground that the Government saw "value in distinguishing between the functions of a Human Rights Commission and the executive responsibilities of an Equality Commission."¹⁶² A more gradualist approach to amalgamation such as bringing the existing bodies together only for certain purposes, or sharing common services, was rejected as contributing to uncertainty. Finally, the need for a single body which would be able to respond to complaints of failure by public authorities to apply the equal-

161. Northern Ireland Bill, July 6, 1998 (Eng.) (consultative draft).

162. SECRETARY OF STATE ANNOUNCES EQUALITY WHITE PAPER DECISIONS, NORTHERN IRELAND INFORMATION SERVICE (July 10, 1998).

ity duty was seen as crucial. The alternative of providing that the "primary" means of redress should be through the courts was thought likely to carry the "risk of creating disruption to efficient government at a time when the new administration will be finding its feet and attempting to develop innovative ways of working together."¹⁶³ Many bodies, particularly the Equal Opportunities Commission for Northern Ireland, continued to resist and argue that the decision should be reversed. This resistance led to extensive debate on this issue at the Commons Second Reading and Committee stages, in particular.

Principal among the other outstanding issues that increasingly dominated discussions, was the form and content of the equality duty on public authorities. On this issue, the announcement from the Secretary of State was more responsive to the public consultations on the White Paper. Several criticisms of the proposals contained in the White Paper "were based on misapprehensions." It was not the intention "to leave substantial areas of discretion to those in the public sector." "To remove any ambiguity . . . , the requirements on the public sector to carry out appraisals of policies, including equality impact assessments, to consult with representatives of interests which might be affected, and to publish information on appraisals, will all be clarified in the Bill."¹⁶⁴ The announcement was also concerned to reassure critics that the White Paper proposals "seemed to pass responsibility for the promotion and oversight of the equality of opportunity obligation to an external body."¹⁶⁵ The announcement stressed the "need for strong mechanisms, both within and outside Government, to provide oversight and challenge in the implementation of that obligation."¹⁶⁶ The external structure envisaged by the White Paper, i.e. the Equality Commission, would be set up, but "internal arrangements for co-ordinating, promoting and monitoring the activities of Government Departments and public bodies must also be rigorous and effective."¹⁶⁷ The announcement by the Secretary of State continued:

I envisage that role being played at least initially by the Central Community Relations Unit of the Government's Central

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

Secretariat, though the new Assembly will, in due course, determine its own departmental structure, including which part of the administration will have internal responsibility for the equality of opportunity obligation. One possibility would be a Department of Equality, which is referred to in the Good Friday Agreement, but it would be for the Assembly to make the decision in this respect. Whatever structure is chosen will, I hope, ensure prominence for equality considerations at the heart of the new administration.¹⁶⁸

For campaigners, the main equality issue became how to translate what appeared to be a breakthrough at the political level into legislative text. This translation was to prove a difficult task.

Initially, three changes were made in the Bill as formally introduced into the Commons¹⁶⁹ from the consultative drafts made available before the Secretary of State's announcement. First, the statutory duty was rephrased to better reflect the Agreement's drafting. The consultative draft of July 6 had required public authorities only to "have regard"¹⁷⁰ to the need to promote equality of opportunity. The Bill, as introduced into the Commons, required public authorities to "have *due* regard"¹⁷¹ to the need to promote equality of opportunity. This change in language not only reflected the Agreement language, but also introduced a priority between the equality duty and the "good relations" duty,¹⁷² which public authorities only had to "have regard" to, not "due regard" to.

Second, a change was made in the way in which equality of opportunity was expressed as applying. In the July 6 draft a subtle, but potentially important change from the Agreement had been introduced. Whereas the Agreement referred to the need "to promote equality of opportunity in relation to religion . . .," the draft Bill provided for "the need to promote equality of opportunity between all persons regardless of . . . religious belief . . ."¹⁷³ Whereas the Agreement has a group dimension to it, the draft Bill was individualistic, an important conceptual difference. The Bill as introduced in the Commons met this point to

168. *Id.*

169. Northern Ireland Bill, Bill 229, July 15, 1998 (Eng.).

170. *Id.* cl. 58(1).

171. *Id.* cl. 61(1) (emphasis added).

172. *Id.* cl. 61(2).

173. *Id.* cl. 58(1)(a).

some extent by reintroducing a group dimension, but only in the context of gender. Whereas the individualistic approach was retained with regard to all other grounds, the Bill as introduced provided that public authorities should have "due regard to the need to promote equality of opportunity . . . between men and women generally" ¹⁷⁴

The third change made in the Bill as introduced related to the approach taken to the enforcement of the equality duty. As we have seen, the preferred approach in the White Paper was that the legislation should be restricted to setting out the bare bones of the enforcement procedure and this approach was reflected in the July 6 draft bill. Basically, the Equality Commission would have to request a public authority to submit a scheme showing how the public authority proposed to fulfil those duties in some or all of its functions. ¹⁷⁵ The scheme would have to conform to Guidelines as to form or content issued by the Commission with the approval of the Secretary of State. ¹⁷⁶ Few, if any, details were to be specified on the face of the Bill. The Bill, as introduced into the Commons, however, began to flesh out what, more precisely, the schemes should contain. In particular, it specified that a scheme would state the authority's arrangements for assessing its compliance, for publishing the results of assessments, and for consulting. ¹⁷⁷ This change was highly significant in indicating willingness on the part of government to flesh out the bare bones of the equality scheme approach in greater detail on the face of the legislation itself, rather than subsequently.

In the Commons Second Reading debate, considerable attention was given to the issue of amalgamation of the existing equality commissions, rather than the issues surrounding the equality duty on public authorities. What emerged most strongly from the debate, however, was a strong commitment, by both the Secretary of State and Mr. Murphy, to further consultations taking place during the summer months after the Bill had left the Commons and before the Lords considered it. It was clearly envisaged that the Government was expecting significantly to

174. *Id.* cl. 61(1)(b).

175. *Id.* sched. 9, ¶ 1(c).

176. *Id.* sched. 9, ¶ 2(2)(a).

177. *Id.* sched. 10, ¶ 2(2).

amend the equality aspects of the Bill in the Lords.¹⁷⁸

At the Commons Committee stage, several amendments were introduced by the Government to reflect points made in the Secretary of State's announcement regarding the Equality Commission. First, an amendment strengthened the duty of the Secretary of State to secure the representativeness of the Commission as a group.¹⁷⁹ A second amendment required the Commission to aim to secure an appropriate division of resources between the different equality areas. The Commission should also have regard to the advice of a consultative council, being a group selected by the Commission to advise in relation to the different equality areas or the implementation of the statutory duty.¹⁸⁰

Regarding the equality duty, significant amendments were also made by the Government. First, the Government accepted an SDLP amendment that provided that the duty on public authorities to promote good relations was subject to the duty to provide equality of opportunity. Second, an amendment was made, on the proposal of the Secretary of State, to clarify the statutory equality schemes that the Equality Commission would request the public authority to set up. It provided that the schemes should include provisions "assessing the likely impact of policies . . . on the promotion of . . . equality of opportunity." The Secretary of State reminded the Committee that in her announcement on July 10 she had said that statutory equality schemes should contain a requirement to assess the equality impact of policies.¹⁸¹ In a series of interventions by MPs, from several different parties, however, it was clear that this amendment was regarded as too limited to satisfy concerns. Instead, considerable support was given by speakers to the amendments proposed by Kevin McNamara, which would have spelled out in more detail a duty on public authorities to prepare and publish impact statements.¹⁸² While the Secretary of State would eventually indicate the general acceptability of the approach adopted in these amendments, at the time she resisted them. She envisaged

178. House of Commons, Official Report, vol. 316, July 20, 1998, col. 878 (Mr. Murphy).

179. House of Commons, Official Report, vol. 317, July 27, 1998, col. 98.

180. *Id.*

181. *Id.* col. 110 (Secretary of State).

182. Northern Ireland Bill, Bill 229, July 15, 1998, cls. 4, 5 (Eng.).

similar details be included in the guidance which would be forthcoming from the Equality Commission, however, rather than on the face of the Bill itself: "Those new clauses are crucial and I hope they will be very similar, if not the same as, the statutory Guidelines that will be drafted by the new Equality Commission. The [McNamara proposal] provides a comprehensive model for those guidelines."¹⁸³ Questioned further by Mr. McNamara, the Secretary of State made clear that she had thought that her own amendment

would achieve what people wanted, but there is clearly still a degree of dissatisfaction. We shall do all that we can over the summer to satisfy those folk who feel that more should be done. As I said at the beginning, we are listening carefully and we shall do everything possible to add where we can to the settlement Bill, but, however important equality issues are to us all, we shall be in difficulty if we go further than the Good Friday agreement¹⁸⁴

Whilst apparently open on some points, other amendments were resisted by Government with a degree of firmness which indicated that final decisions had been taken on the issues. An attempt to amend the Bill to use the more group-based language of the Agreement regarding the definition of those between whom equality of opportunity was to be promoted was resisted. To use the Agreement's language "would cause difficulties of interpretation if it were included on a statutory basis."¹⁸⁵

Attempts to expand the prohibition of unlawful discrimination to include "indirect discrimination," and an affirmative action exception were also all resisted. To some extent, the concept of indirect discrimination was covered already, said Mr. Murphy, because of the inclusion of the equality duty on public authorities.¹⁸⁶ To include a broader range of potential spheres of discrimination without an extensive list of exemptions would create a risk that "common administrative practices could become unconstitutional."¹⁸⁷ So too, a general affirmative action exception "would create great uncertainties in this complex

183. House of Commons, Official Report, vol. 317, July 27, 1998, col. 110 (Secretary of State).

184. *Id.* col. 111 (Secretary of State).

185. *Id.* col. 108 (Secretary of State).

186. *Id.* col. 118 (Mr. Murphy).

187. *Id.* col. 118 (Mr. Murphy).

legal field.”¹⁸⁸

During the summer, Paul Murphy consulted on the equality and human rights aspects of the Bill extensively with the political parties represented in the Assembly, the chairs of the existing equality commissions, the CAJ, members of the coalition, and others. As a result of these meetings, it became clear that the Government was prepared to introduce extensive amendments on the equality aspects of the Bill. The degree of cross-party support for this approach became public at the second reading of the Bill in the House of Lords at the beginning of October. During this it was clear that Lord Lester and Lord Archer in particular stood ready to engage in detailed debate on these issues in the subsequent Committee and Report stages.

On October 14, a few days before the Committee stage was to begin, Mr. Murphy announced the Government's response to the summer consultations on the equality issues in the Bill, and the type of amendments that it would support in the Lords.¹⁸⁹ First, during the summer, confusion had arisen as to the allocation of responsibility for equality issues once powers were devolved to the new Assembly and Executive. The Murphy announcement proposed that the provisions of the Bill on equality, basically the Equality Commission and the equality duty, would be reserved matters. That meant that the Secretary of State would continue to have responsibility, although the Assembly would be able to legislate on these issues with the permission of the Secretary of State. The existing bodies of law on fair employment, gender equality, race relations, and disability discrimination in Northern Ireland, however, would become transferred matters, on which the Assembly would have legislative responsibility. The Bill would be amended, in addition, to ensure that the Assembly would be kept more closely informed on the enforcement of the new statutory equality duty.

Second, it was indicated that there would be further clarification of the equality duty itself, in several aspects. The obligation would apply to United Kingdom government departments operating in Northern Ireland, including the Northern Ireland Office, as well as Northern Ireland Departments and other pub-

188. *Id.* col. 118 (Mr. Murphy).

189. Letter from Paul Murphy to Christopher McCrudden (Oct. 14, 1998) (on file with *Fordham International Law Journal*).

lic bodies. Public bodies would be placed under a direct requirement to produce such schemes, rather than being requested by the Equality Commission to do so, as had been the government's proposal until then. Greater detail would be included on what would be required in assessing the impact of policies on equality of opportunity. Such assessments would include, for instance, consideration of alternatives that would better promote equality of opportunity. Public bodies would also be required to review their equality schemes on a five-yearly basis.

Some of the amendments introduced by the government at the Committee stage reflected the Murphy announcement in a straight-forward manner. Amendments were proposed that ensured that the Assembly was kept informed when the Commission referred any difficulty with the public authority's equality scheme to the Secretary of State. Similarly, the Secretary of State was required to keep the Assembly informed of action taken after the Commission referred problematic scheme to the Secretary of State. In addition, Government amendments introduced a further change into the equality scheme provisions, introducing a duty to ensure that the schemes would have to specify arrangements for access to information. Other amendments proposed by the Government, however, differed somewhat from the implications of the Murphy announcement.

First, although the Government amendments had the effect that the legislation would specify a duty on most public authorities to produce schemes, an awkward provision was included whereby the Equality Commission would have to ask *new* public authorities to produce a scheme. Second, the Government amendments provided that the Equality Commission would be able to specify that only some functions of a public authority would be affected by the requirement to produce a scheme. Third, there were no amendments which required other aspects of impact analysis: specification of the aims and purposes of the policy under assessment, specification of alternatives, specification of measures in mitigation of adverse effects, specification of monitoring of adverse effects, specification of consultation procedures prior to decision-making, specification that the results of the consultation had to be taken into account, and specification of reasons for the policy eventually adopted by the authority. Nor did the Government amendments include any requirement of a five-yearly review by public authorities of the measures taken

to comply with the equality duty. Taken together, the Government's amendments seemed neither fully to reflect the summer consultations, nor the Murphy announcement.

Several other issues had arisen during the summer that appeared to need clarification and yet were not addressed either. The first was that consultations indicated that an amendment would be forthcoming which specified an affirmative action exception to the equality of opportunity duty on public authorities. There had been a concern that the "equality of opportunity" duty should not be able to be used to argue against measures that aimed at the reduction of disadvantage. There was some evidence that the PAFT Guidelines had been mistakenly interpreted by some government departments to undermine just such provisions.¹⁹⁰ There was also a precedent for such an amendment. The Fair Employment Act 1976, which included an equality of opportunity provision, was amended in 1989 to include protection for affirmative action measures. Yet no such amendment appeared to the Northern Ireland Bill. Second, on reviewing the Schedule that included the details of the enforcement procedures on the equality duty, an important point of clarification seemed necessary. It was potentially ambiguous whether the impact of *all* policies would have to be assessed, or just those policies specifically concerned with equality of opportunity.

The Lords Committee stage debate was therefore a detailed consideration of all the outstanding equality issues. The main challenge to the Government was led by Lord Archer and Lord Lester, both briefed extensively by the CAJ, the coalition, and the statutory agencies amongst others. The debates focused on several aspects of the Bill. The first, which generated a long debate, involved the issue of the responsibility for equality issues following devolution of powers to the Assembly. A second important debate took place on amendments by Lord Archer and Lord Lester that would have inserted into the equality duty on public authorities an exception for affirmative action.

The third issue on which there was debate concerned the content of the equality obligation on public authorities. Lord

190. DEPARTMENT OF HEALTH AND SOCIAL SERVICES, POLICY DEVELOPMENT AND REVIEW UNIT, REVIEW OF CHARGING POLICY FOR NON-RESIDENTIAL PERSONAL SOCIAL SERVICES annex 8 (1997).

Archer proposed amendments which would have fleshed out the requirements and made them more explicit and on the face of the legislation. His amendments, supported by Lord Lester, among others, would have required the Equality Commission to prepare an annual report on the operation of the equality obligation by public authorities. It would also have required public authorities preparing impact analyses to specify the aims and purposes of the policy, alternatives, proposals to mitigate adverse impact, monitoring, consultation with affected interests, and publication of reasons. His amendments also challenged the ability of the Equality Commission to exempt certain bodies or certain functions of public bodies from the duty to produce schemes and the exemption of new public bodies from the automatic requirement to produce schemes. In response, Lord Dubs indicated that further amendments would be introduced at the Report stage "which will reflect the noble Lords' new clause in several respects."

These are: a requirement on the commission to report on the promotion of equality of opportunity in its annual report, which will be laid before Parliament as well as the Assembly, and an expansion of the details of impact assessments . . . to include consideration of alternative policies, measures to mitigate adverse impact and monitoring the outcomes of policies after introduction.¹⁹¹

In response, Lord Archer welcomed the announcement, but pointed out that an essential constituent of the approach that needed to be included in the forthcoming amendments was a more explicit requirement of consultation.

The fourth major issue involved the definition of discrimination in the Bill. Both Lord Archer and Lord Lester argued for a much more expansive view of the concept of discrimination to be incorporated into the Bill. In particular, they urged, again, that the concept of indirect discrimination should be included, and that the grounds on which discrimination was prohibited should be expanded to include a wider group of protected grounds than just religious and political grounds. Again this was resisted by the government, but on somewhat different grounds than before. The Government did not now oppose an extension

191. House of Lords, Official Report, vol. 593, Oct. 26, 1998, col. 1735 (Lord Dubs).

of the concept of discrimination on principle, but more on the ground that this Bill was not the appropriate occasion on which to embark on a general review of anti-discrimination law. The intention was simply to reproduce the anti-discrimination provisions of the earlier Northern Ireland Constitution Act of 1973,¹⁹² and not to go beyond it. The Agreement did not require that the legislation should do so.¹⁹³

Between the Committee stage and the Report stage in the House of Lords, there was considerable effort made by Government to come up with amendments or statements that met the concerns of those arguing for a more explicit approach to the equality duty on public authorities. This effort resulted in a significant number of new amendments being introduced by the Government. Where the Government felt an amendment was unnecessary, interpretative statements by Ministers often indicated why that was so.

The Government introduced amendments that included United Kingdom departments within the scope of the equality duty, reversed the exclusion of new public authorities from the automatic duty to produce an equality scheme, and strengthened consultation with affected interests during the impact assessment process. Government amendments required public bodies to consider whether to produce a revised scheme each five years; required publication of any consideration given to measures that might mitigate any adverse impacts and alternative policies that might better achieve the promotion of equality of opportunity; required public authorities to take impact assessments and consultations into account in making decisions; required the Commission to report specifically on the operation of the equality duty; and required a copy of the Commission's annual report to be laid before both House of Parliament.

The Government also made important interpretative statements at the Lords Report stage and in the Commons consideration of the Lords amendments on affirmative action,¹⁹⁴ and on the circumstances under which it was envisaged that the Equality

192. Northern Ireland Constitution Act, 1976 (Eng.).

193. House of Lords, Official Report, vol. 593, Oct. 26, 1998, col. 1745 (Lord Williams of Mostyn).

194. House of Lords, Official Report, vol. 594, Nov. 10, 1998, col. 713 (Lord Dubs); House of Commons, Official Report, vol. 319, Nov. 18, 1998, cols. 1069-1070 (Mr. Murphy).

Commission would exempt a public body from producing a scheme or limit the functions covered.¹⁹⁵ The Government also made interpretive statements on its expectations that public authorities would provide the Equality Commission with the necessary information on their compliance with the statutory equality duty to enable the Commission to report on progress,¹⁹⁶ on those whom the Government expected to be consulted,¹⁹⁷ and on the range of policies to which impact assessment applied.¹⁹⁸

VII. MAINSTREAMING EQUALITY: THE LEGISLATIVE PROVISIONS ANALYZED

What, then, was the result of all these amendments and commitments? What does the Act, as finally passed, require? This Article now turns to a more systematic discussion of the equality provisions as they emerged from these debates into law.

A. *Equality Commission for Northern Ireland*

The Act establishes a new Equality Commission for Northern Ireland, to consist of not less than fourteen nor more than twenty Commissioners appointed by the Secretary of State.¹⁹⁹ The Secretary of State is to appoint one Commissioner as Chief Commissioner, and at least one Commissioner as Deputy Chief Commissioner. In making appointments, the Secretary of State is required, as far as practicable, to ensure that the Commissioners, as a group, are representative of the community in Northern Ireland.

The Commission takes over the functions of the Fair Employment Commission for Northern Ireland, the Equal Opportunities Commission for Northern Ireland, the Commission for Racial Equality for Northern Ireland, and the Northern Ireland Disability Council, which are abolished. In exercising its functions the Equality Commission is required to aim to secure an appropriate division of resources between the functions previ-

195. House of Lords, Official Report, vol. 594, Nov. 11, 1998, cols. 812-13 (Lord Dubs); House of Commons, Official Report, vol. 319, Nov. 18, 1998, col. 1069 (Mr. Murphy).

196. House of Lords, Official Report, vol. 594, Nov. 11, 1998, cols. 808, 812-13; House of Commons, Official Report, vol. 319, Nov. 18, 1998, col. 1067 (Mr. Murphy).

197. House of Lords, Official Report, vol. 594, Nov. 11, 1998, col. 810.

198. *Id.* cols. 810, 814.

199. Northern Ireland Constitution Act, 1976 (Eng.).

ously exercisable by each of these bodies. It is also required to have regard to advice offered by a "consultative council," which is a group of persons selected by the Commission to advise in relation to the functions previously exercisable by one of these bodies.

The Chief Commissioner may not be appointed for more than five years at a time. Other Commissioners may not be appointed for more than three years at a time. The salaries of the Commissioners come from Northern Ireland departmental funds. The Commission may employ such staff as the Commission considers necessary and employ the services of such other persons as the Commission considers expedient for any particular purpose, with the approval of its departmental pay masters. The costs of the Commission come from money appropriated by act of the Assembly.

The Commission is required each year to make a report on the performance of its functions during the year. The report is required, in particular, to give details of how resources have been divided between the functions previously exercisable by each of the former separate equality bodies that it replaces. The Department to which it reports is required to lay a copy of the report before the Assembly and send a copy of the report to the Secretary of State. The Secretary of State is required to lay a copy of the report before each House of Parliament.

B. Responsibility for Equality Issues

The Murphy announcement made clear that the provisions of the Bill on equality, basically the Equality Commission and the equality duty, would be made reserved matters for which the Secretary of State would continue to have responsibility, although the Assembly would be able to legislate on these issues with the permission of the Secretary of State. The existing bodies of law on fair employment, gender equality, race relations and disability discrimination in Northern Ireland, however, would become transferred matters, on which the Assembly would have legislative responsibility. The Bill was subsequently amended to reflect this demarcation of responsibility. In addition, further amendments were introduced to ensure that the Assembly would be kept more closely informed on the enforcement of the new statutory equality duty.

Lord Dubs, speaking for the Government, set out in greater detail the rationale for the Government's position as previously announced by Mr. Murphy.

Under the Good Friday agreement the Assembly is to exercise legislative and executive authority over matters within the responsibility of the Northern Ireland departments, with the possibility of taking on responsibility for other matters. Anti-discrimination laws on fair employment, gender, race, and disability have been the responsibility of the Northern Ireland departments . . . since they were enacted. That means that those areas of law and the current functions of the Fair Employment Commission, the Equal Opportunities Commission for Northern Ireland, the Commission for Racial Equality for Northern Ireland and the Northern Ireland Disability Council are transferred matters under the agreement.

[Government amendments] make clear that the references to the functions of the four bodies in the Bill do not affect their transferred status. Those amendments also clarify that the bulk of [the equality provisions in the Northern Ireland Bill, viz the Equality Commission, the equality duty on public authorities and the anti-discrimination prohibition on the Assembly and public bodies] are reserved matters. The equality of opportunity obligation and the equality commission did not exist at the time of the Good Friday agreement. The Secretary of State will have policy responsibility for the equality of opportunity obligation and a number of specific functions in relation to equality schemes

The existence of the equality commission is a reserved matter. The bulk of its day-to-day activities will continue to be concerned with the existing anti-discrimination legislation, so it will be funded by the Assembly and it will be under the departmental oversight of the Department of Economic Development. That makes the Commission something of a hybrid. But the Bill achieves a balance which preserves an important role for the Secretary of State.

Local Northern Ireland politicians will have to co-operate in the Assembly. The Bill contains checks and balances and built-in protection which will encourage consensus rather than division in the Assembly. Local institutions must be allowed the opportunity to play their role in the field of equality.²⁰⁰

200. House of Lords, Official Report, vol. 593, Oct. 26, 1998, cols. 1694-95 (Lord Dubs).

Concern was expressed particularly by Lord Lester that the ability of the Assembly to legislate on the substance of anti-discrimination requirements, including by amending existing anti-discrimination law could lead to a situation where the protections against discrimination were different, and potentially weaker, in Northern Ireland than in the rest of the United Kingdom. “[We] want to be sure that there cannot be any weakening of the equality code dealing with any of those forbidden grounds of discrimination.”²⁰¹ He proposed, therefore, that the substance of the anti-discrimination requirements should be a reserved or excepted matter, rather than a transferred matter. This proposal was resisted by Lord Dubs, speaking for the government who attempted to reassure Lord Lester that the Bill included important safeguards.²⁰²

There are, indeed, important safeguards included in the Act. Any legislation in the equality area may be made subject to cross-community support. Also, the Assembly cannot legislate in a way that is incompatible with rights under the European Convention on Human Rights or European Community law, which is particularly relevant to gender discrimination issues. Nor may the Assembly legislate in a way that discriminates directly on grounds of religious belief or political opinion. In addition, if the Assembly legislates in a way incompatible with the United Kingdom’s international obligations, the Secretary of State may decide not to submit such a Bill for Royal Assent.

C. Statutory Duty on Public Authorities

1. An Outline of the Statutory Duty

Section 75 provides that each “public authority” is required, in carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity between certain different individuals and groups. The relevant categories between which equality of opportunity is to be promoted are between persons of different religious belief, political opinion, racial group, age, marital status, or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without. Without prejudice to these ob-

201. *Id.* col. 1698 (Lord Lester).

202. *Id.* col. 1713 (Lord Dubs).

ligations, a public authority in Northern Ireland is also, in carrying out its functions, to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. Schedule 9 makes detailed provision for the enforcement of these duties.

2. Preparation of an Equality Scheme

All public authorities included within the definition of public authority are required before the end of the period of six months beginning with the commencement of Schedule 9 or, if later, the establishment of the authority, to submit an equality scheme to the Equality Commission.²⁰³ Only where a public authority has been notified in writing by the Commission that it does not need to, is it exempted from producing such a scheme.²⁰⁴ The Commission may subsequently request a public authority, which it had notified that it did not need to make a scheme, to make a scheme.²⁰⁵ A public authority shall respond to this request by submitting a scheme to the Commission before the end of the period of six months beginning with the date of the request.²⁰⁶

In Parliament, concern was expressed at the apparently open-ended power of exemption granted to the Equality Commission. In response, the Government made it clear the limited circumstances in which it envisaged such exemptions being granted by the Commission either to a body entirely, or with regard to particular functions of a body:

We intend the exception to be used only in rare circumstances—for instance, when public authorities' activities in Northern Ireland are minimal, and the effort involved in preparing the scheme involved, and having it validated by the commission, would be disproportionate. In other circumstances, it might make sense to exempt a public authority. For instance, all sub-committees of district councils are defined as public authorities. Provided that their activities were fully covered by district council's own equality schemes, an exemption could avoid each sub-committee having to draw

203. Northern Ireland Bill, Bill 229, July 15, 1998, sched. 9, § 2(1) (Eng.).

204. *Id.* § 2(1).

205. *Id.* § 3(1)(a).

206. *Id.* § 3(2).

up its own scheme.²⁰⁷

Where it thinks appropriate, the Commission may request any public authority to make a revised scheme.²⁰⁸ A public authority shall respond to this request by submitting a scheme to the Commission before the end of the period of six months beginning with the date of the request.²⁰⁹ If a public authority itself independently wishes to revise a scheme, then it may submit a revised scheme to the Commission.²¹⁰

3. Content of Equality Schemes

An equality scheme shall show how the public authority proposes to fulfil the duties imposed by Section 75 in relation to the relevant functions,²¹¹ and to specify a timetable for measures proposed in the scheme.²¹² As we have seen, the preferred approach adopted by the CCRU, and set out in the White Paper, was that the legislation should be restricted to setting out the bare bones of the enforcement procedure.

Basically, the Equality Commission would have had to request a public authority to submit a scheme showing how the public authority proposed to fulfil those duties in some or all of its functions.²¹³ The scheme would have had to conform to Guidelines as to form or content issues by the Commission with the approval of the Secretary of State;²¹⁴ but few, if any, details were specified on the face of the original Bill.

As introduced, the Bill began to flesh out what, more precisely, the schemes should contain. As the Parliamentary consideration continued, the Schedule became more and more detailed. The Schedule now specifies particular elements that an equality scheme must contain in order to be in compliance, without being exhaustive.²¹⁵

207. House of Commons, Official Report, vol. 319, Nov. 18, 1998, col. 1069 (Mr. Murphy).

208. Northern Ireland Bill, Bill 229, July 15, 1998, sched. 9, § 3(1)(b) (Eng.).

209. *Id.* § 3(2).

210. *Id.* § 8(1).

211. *Id.* § 4(1). "The relevant functions" means the functions of the public authority or, in the case of a scheme submitted in response to a request that specifies particular functions of the public authority, those functions. *Id.* § 4(4).

212. *Id.* § 4(3)(b).

213. *Id.* § 1(c).

214. *Id.* § 2(2)(a).

215. *Id.* § 4(2).

- A scheme shall state the authority's arrangements for assessing its compliance with the duties under Section 75.²¹⁶
- A scheme shall state the authority's arrangements for consulting on matters to which a duty under that section is likely to be relevant, including details of the persons to be consulted.²¹⁷
- A scheme shall state the authority's arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity.²¹⁸ This Article will return to this issue subsequently in more detail.
- A scheme shall state the authority's arrangements for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity.²¹⁹ Again, this Article will return to this issue in more detail in a moment.
- A scheme shall state the authority's arrangements for publishing the results of such assessments and such monitoring.²²⁰
- A scheme shall state the authority's arrangements for training staff.²²¹
- A scheme shall state the authority's arrangements for ensuring, and assessing, public access to information and to services provided by the authority.²²²

In addition, an equality scheme shall conform to any Guidelines as to form or content that are issued by the Equality Commission. These Guidelines are subject to the approval of the Secretary of State.²²³ The scheme must also include details of how the equality scheme will be published.²²⁴

216. *Id.* § 4(2)(a).

217. *Id.*

218. *Id.* § 4(2)(b). "Equality of opportunity" means such equality of opportunity as is mentioned in section 75(1). *Id.* § 4(4).

219. *Id.* § 4(2)(c).

220. *Id.* § 4(2)(d).

221. *Id.* § 4(2)(e).

222. *Id.* § 4(2)(f).

223. *Id.* § 4(3)(a).

224. *Id.* § 4(3)(c).

4. Consultation on Draft Equality Schemes

Before submitting a scheme to the Equality Commission, a public authority shall consult, in accordance with any directions given by the Commission, with representatives of persons likely to be affected by the scheme,²²⁵ and with such other persons as may be specified in the directions.²²⁶

5. Consideration by the Equality Commission

What happens after a scheme is submitted for approval to the Equality Commission depends on what type of public body is involved. A distinction is made between Northern Ireland departments and public bodies, and United Kingdom-wide public bodies. A "public authority" is defined to include any department, corporation, or body listed in Schedule 2 to the Parliamentary Commissioner Act of 1967²²⁷ and designated for the purposes of this section by order made by the Secretary of State. The inclusion of these latter bodies, being mainly United Kingdom-wide government departments, has resulted in special arrangements being devised relating to the procedures regarding equality schemes with which they must comply.

This Article first describes what happens in the former case. On receipt of a scheme, the Commission shall either approve it²²⁸ or refer it to the Secretary of State.²²⁹ Where the Commission refers a scheme to the Secretary of State, the Commission is required to notify the Northern Ireland Assembly in writing that it has done so and send the Assembly a copy of the scheme.²³⁰

When a scheme is referred to the Secretary of State, he or she has three options: to approve the scheme, to request the public authority to make a revised scheme, or to make a scheme for the public authority.²³¹ A public authority shall respond to a request to make a revised scheme by submitting a scheme to the Commission before the end of the period of six months beginning with the date of the request.²³² Where the Secretary of

225. *Id.* § 5(a).

226. *Id.* § 5(b).

227. Parliamentary Commissioner Act, 1967, sched. 9 (Eng.).

228. *Id.* sched. 9, ¶ 6(1)(a).

229. *Id.* ¶ 6(1)(b).

230. *Id.* ¶ 6(2).

231. *Id.* ¶ 7(1).

232. *Id.* ¶ 7(2).

State requests a revised scheme, or makes a scheme himself or herself, he or she shall notify the Assembly in writing. Where the Secretary of State has made a scheme for the public authority, he or she is required also to send the Assembly a copy of the scheme.²³³

Certain of these provisions do not apply in the case of United Kingdom-wide departments. On receipt of a scheme submitted by a United Kingdom government department the Commission shall approve it or *itself* request the department to make a revised scheme.²³⁴ A public authority shall respond to this request by submitting a scheme to the Commission before the end of the period of six months beginning with the date of the request.²³⁵ Where such a request is made, the government department shall, if it does not submit a revised scheme to the Commission before the end of the period of six months beginning with the date of the request, send to the Commission a written statement of the reasons for not doing so.²³⁶ The provisions relating to notification of the Assembly do not apply.²³⁷ Nor do the provisions empowering the Secretary of State to make schemes for the public body directly.²³⁸ The latter is intended to "avoid a situation where the Secretary of State must reach a decision or issue a direction in a case involving her Department or that of a Cabinet colleague."²³⁹

6. Impact Assessment and Participation

An equality scheme is required to state the authority's arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity.²⁴⁰ Does this require a scheme to state the arrangements for assessing the likely impact of policies that relate to the promotion of equality or for assessing the likely impact on the promotion of equality of all policies? If the former, then only policies designed to promote equality

233. *Id.* ¶ 7(3).

234. *Id.* ¶ 12(2).

235. *Id.* ¶ 3(2).

236. *Id.* ¶ 12(4).

237. *Id.* ¶ 6(2).

238. *Id.* ¶ 7(1).

239. House of Commons, Official Report, vol. 319, Nov. 18, 1998, col. 1068 (Mr. Murphy).

240. Parliamentary Commissioner Act, 1967, sched. 9, ¶ 4(2)(b) (Eng.).

need to be assessed; if the latter, then all of an authority's policies will need to be assessed. In the Parliamentary debates, the Government made clear that the latter was what was intended.

Paragraph 4(2)(b) refers to the inclusion in an equality scheme of arrangements for assessing the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of the equality of opportunity mentioned in [section 75]. There has been some comment that the subparagraph is ambiguous. . . . To clarify the position, I should state that it is the Government's intention that impact assessments should relate to the general run of a public authority's policies. It is not intended that the assessments should be restricted only to policies aimed at promoting equality of opportunity.²⁴¹

In addition, an equality scheme shall state the authority's arrangements for publishing the results of such assessments.²⁴² The legislation details with some specificity what is required.

In publishing the results of such an assessment, a public authority is required to state the aims of the policy to which the assessment relates.²⁴³ A public authority is also required to publish details of any consideration given by the authority to measures that might mitigate any adverse impact of that policy on the promotion of equality of opportunity,²⁴⁴ and alternative policies that might better achieve the promotion of equality of opportunity.²⁴⁵

In making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority is required to take into account any such assessment and consultation carried out in relation to the policy.²⁴⁶ The Government made clear that it expected consultation "to embrace those directly affected by a policy as well as non-governmental organizations and relevant statutory bodies."²⁴⁷

This requirement does not lay down a duty to mitigate and to consider alternative policies, but an authority that did not do

241. House of Lords, Official Report, vol. 594, Nov. 11, 1998, col. 814 (Lord Dubs).

242. Northern Ireland Bill, Bill 229, July 15, 1998, sched. 9, § 4(2)(d).

243. *Id.* § 9(1).

244. *Id.* § 9(1)(a).

245. *Id.* § 9(1)(b).

246. *Id.* § 9(2).

247. House of Lords, Official Report, Nov. 11, 1998, col. 810 (Lord Dubs).

so would be likely to run into difficulty. An authority would have to say in terms in its assessment that it had not considered these matters. If it said that, or was simply silent on the issue in the published impact assessment, then its failure to consider issues that were clearly sign-posted in the legislation could be commented upon in response to the consultation on the assessment. The authority is bound then to take such responses into account in reaching a decision.

7. Complaints and Investigations

If the Commission receives a complaint, made in accordance with certain formalities,²⁴⁸ of failure by a public authority to comply with an equality scheme approved by the Commission or made by the Secretary of State, then it is required to investigate the complaint,²⁴⁹ or to give the complainant reasons for not investigating.²⁵⁰ The formalities that complaints must comply with are that the complaint must be made in writing by a person who claims to have been directly affected by the failure.²⁵¹ A complaint must also be sent to the Commission during the period of twelve months starting with the day on which the complainant first knew of the matters alleged.²⁵² Before making a complaint, the complainant must bring the complaint to the notice of the public authority²⁵³ and give the public authority a reasonable opportunity to respond.²⁵⁴

In addition to investigating on the basis of a complaint, it appears that the Equality Commission itself has power to carry out an investigation into the compliance by a public authority with a scheme without having received a valid complaint. Although not without doubt, the power to carry out such an investigation appears to be derived from the Equality Commission's general duty to keep under review the effectiveness of the duties imposed by Section 75. Paragraph 11 of the Schedule, in addition, provides explicitly for the same conditions to be applied to investigations that arise from complaints as investiga-

248. Northern Ireland Bill, Bill 229, July 15, 1998, sched. 9, § 10(2)-(4) (Eng.).

249. *Id.* § 10(1)(a).

250. *Id.* § 10(1)(b).

251. *Id.* § 10(2).

252. *Id.* § 10(3).

253. *Id.* § 10(4)(a).

254. *Id.* § 10(4)(b).

tions that are "carried out by the Commission where it believes that a public authority may have failed to comply with a scheme" ²⁵⁵

What happens to the results of these investigations again depends on the type of public authority involved. A distinction is drawn between Northern Ireland and United Kingdom-wide public bodies. In the case of the former, the Commission is required to send a report of both types of investigation to the public authority concerned,²⁵⁶ the Secretary of State,²⁵⁷ the Assembly,²⁵⁸ and the complainant.²⁵⁹ If a report recommends action by the public authority concerned and the Commission considers that the action is not taken within a reasonable time, then the Commission may refer the matter to the Secretary of State.²⁶⁰ The Secretary of State may give directions to the public authority in respect of any matter referred to him or her.²⁶¹ Where the Commission refers a matter to the Secretary of State it shall also notify the Assembly in writing that it has done so.²⁶² Where the Secretary of State gives directions to a public authority, he or she shall notify the Assembly in writing that he or she has done so.²⁶³

Somewhat different provisions apply in the case of United Kingdom-wide bodies. Again, certain of these provisions do not apply, particularly the provisions empowering the Secretary of State to give directions to the public authority in respect of a public authority's failure to present a scheme.²⁶⁴ Instead, the Commission may lay before Parliament and the Assembly a report of any investigation regarding compliance with an equality scheme by such a department.²⁶⁵

8. Five-year Review

A public authority is required, before the end of the period of five years beginning with the submission of its current

255. *Id.* § 11(1)(b).

256. *Id.* § 11(2)(a).

257. *Id.* § 11(2)(b).

258. *Id.* § 11(4)(a).

259. *Id.* § 11(2)(c).

260. *Id.* § 11(3)(a).

261. *Id.* § 11(3)(b).

262. *Id.* § 11(4)(b).

263. *Id.* § 11(5).

264. *Id.* § 11(3)(b).

265. *Id.* § 12(5).

scheme, or the latest review of that scheme, whichever is the later, to review that scheme and inform the Commission of the outcome of the review.²⁶⁶

VIII. AN ASSESSMENT OF MAINSTREAMING IN NORTHERN IRELAND

A. *Lessons from Northern Ireland?*

The major part of this Article has been a detailed case-study of the development of a legal approach to mainstreaming equality in Northern Ireland. Can we draw any general lessons from this experience that may be of wider relevance in other jurisdictions? In general, I suggest that we can. Although mainstreaming in Northern Ireland developed out of a unique context, the experience is of more general relevance. One lesson immediately suggests itself. Developing a mainstreaming strategy is likely to prove difficult, time-consuming and highly political. For it to succeed, there must be constant attention paid to both the big picture, and to the minutiae of public policy and public administration. The devil is in the detail. Somewhat tentatively, this Article suggests that three further lessons may be drawn.

1. The Need to Complement a Traditional Anti-discrimination Legislation Approach

One of the ways in which governments in North America, Western Europe, and the Commonwealth have sought to address the position of ethnic groups, women, and other disadvantaged groups has been by developing anti-discrimination law in specific areas such as employment or housing, particularly in the *private* sector. In all countries of Western Europe, and much of the Commonwealth, such legislation is now in place. In addition, of course, many jurisdictions also have a constitutional provision relating to non-discrimination and sometimes equality. These *constitutional* non-discrimination provisions generally apply primarily, if not exclusively, to the actions of the state, across a broad range of state activity. To that extent, they attempt to apply equality principles to governmental policy making generally. The Northern Ireland experience suggests that while such legislation is necessary, it is insufficient by itself. The legislation

266. *Id.* § 8(3).

is essentially negative. It aims, usually, to prevent discrimination, rather than positively to promote equality.

There is growing concern in many countries about the extent to which these traditional mechanisms of securing non-discrimination in the public and private sectors are adequate.²⁶⁷ The implementation studies there have been emphasize the limited extent to which countries make anti-discrimination norms effective in practice. This emphasis has led, in turn, to the development of additional mechanisms to ensure greater compliance.²⁶⁸ In several countries, specialized bodies are tasked with enforcement, supplementing the individual complaints process. But a specific agency, or other enforcement body, dedicated specifically to equality issues may be viewed by government as satisfying concerns about inequality, yet have little effect on the large decisions of government which have the greatest impact on the life chances of women and minorities. In addition, therefore, there have been attempts to develop policies that bring the weight of government to bear more directly. One example that links anti-discrimination law with the more direct use of governmental power is the use of government contracts and grants to require the private sector that deals with government to introduce equality policies. There is now significant experience with the operation of such policies, but their influence touches only a limited sphere of activity.

What we have been examining in this Article is an attempt to go several steps further, by requiring that government and public bodies should attempt to weave policies of equality and non-discrimination into the fabric of decision-making across *all* spheres of government—in short, to “mainstream” fairness issues in public policy. This attempt is a particularly important issue if the problem is defined, as it increasingly is, as involving not only the problem of “discrimination,” but the larger issue of unacceptable inequalities affecting women and particular minority groups, whether caused by discrimination or not.

How, then, does mainstreaming differ from traditional anti-discrimination approaches? Mainstreaming concentrates on

267. See, e.g., ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 326 (1993).

268. See, e.g., ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *WOMEN AND STRUCTURAL CHANGE: NEW PERSPECTIVES* ch. 6 (1994) (“Equal Opportunities Policies on the Labour Market in the 1980s”).

government pro-actively taking equality into account. It does not concentrate primarily on discrimination as the problem to be resolved. Mainstreaming approaches are intended to be anticipatory, rather than essentially retrospective, to be extensively participatory, rather than limited to small groups of the knowledgeable and to be integrated into the activities of those primarily involved in policy-making.

Mainstreaming is not inconsistent with traditional legal approaches to dealing with discrimination. Indeed, the Northern Ireland experience supports the view that mainstreaming is a natural extension of these approaches. Even before the Good Friday Agreement, Northern Ireland had one of the most extensive systems of anti-discrimination law in Western Europe. Despite this, mainstreaming was considered necessary to complement and reinforce this system.

Underlying the Northern Ireland attempts at mainstreaming is an important perception: 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 sidelined. Mainstreaming, by definition, attempts to address this problem of sidelining directly, by requiring all government departments to engage directly with equality issues.

2. The Importance of Impact Assessment and Public Participation

An important technique has been developed to make the idea of mainstreaming effective in practice. Most countries that have adopted mainstreaming have required that some form of "impact assessment" be carried out as part of the process of considering proposals for legislation or major policy initiatives.²⁶⁹

269. For a discussion of the concept of impact assessment generally, see Peter Boothroyd, *Policy Assessment*, in FRANK VANCLAY & DANIEL A. BRONSTEIN, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT ch. 4 (1995).

Put simply, the idea of an impact assessment involves an attempt to try to assess what the effect of the legislation or policy is, or would be, on particular groups, such as women or minorities. As the Council of Europe report on mainstreaming observed: "The advantage of [gender impact assessment methods] lies in the fact that they draw a very accurate picture of the effects of a given policy" ²⁷⁰

Mainstreaming should, thereby, encourage greater transparency in decision-making since it necessitates defining what the impact of policies is at an earlier stage of policy making, more systematically and to a greater extent than is currently usually contemplated. And, to the extent that mainstreaming initiatives can develop criteria for alerting policy makers to potential problems before they happen, it is more likely that a generally reactive approach to problems of inequality can be replaced by pro-active early-warning approaches. Current government policy in many countries in the area of equality has often been criticized as tending to be too reactive to problems that might well have been identifiable before they became problems. We have seen that in Northern Ireland, too, impact assessment is a central part of mainstreaming approach.

An important feature of the mainstreaming experience to date in Northern Ireland, however, is the extent to which groups inside and outside the mainstream political process have attempted to use impact assessment as part of a strategy to construct a more participatory approach to public policy debate. In short, groups have used the mainstreaming process to become involved in influencing governmental decision-making. ²⁷¹ From this perspective, mainstreaming should not only be a technical mechanism of assessment within the bureaucracy, but an approach that encourages the participation of those with an interest. It is common place, of course, that good decision-making should require policy-makers to seek out the views of those potentially affected by the decisions. All democracies do this. Unlike more traditional mechanisms of consultation, however,

270. Rapporteur Group, *supra* note 5, at 26.

271. For an interesting discussions of participation in the context of impact assessment and cost-benefit analysis, see Allan P. Dale & Marcus B. Lane, *Strategic Perspectives Analysis: A Procedure for Participatory and Political Social Impact Assessment*, 7 *SOC'Y & NAT. RESOURCES* 253 (1994), and GREGORY A. DANEKE ET AL., *PUBLIC INVOLVEMENT AND SOCIAL IMPACT ASSESSMENT* (1983).

mainstreaming as now practiced in Northern Ireland does this by requiring impact assessments of a degree of specificity which establishes a clear agenda for discussion between policy makers and those most affected. We can see, therefore, the inter-linked nature of the two crucial features of mainstreaming: impact assessment and participation.

One of the most far-reaching “by-products” of mainstreaming becomes the development of a crucial link between government and “civil society.” This development encourages greater participation in decision-making by marginal groups, thus lessening the democratic deficit. Again, the Council of Europe report makes the point well: “Development of democracy is one of the most important targets [of mainstreaming]”²⁷²

There are various methods by which such mainstreaming could take place, but it is arguable that all require significant input of information and analysis of the impact of proposed policies from sources external to government. Non-governmental organizations such as community groups, pressure groups, and unions may wish to assist in supplying such information. This is not to say, of course, that the involvement of such groups is unproblematic, raising issues of the competence of such groups in this field, due to lack of information and lack of resources. In principle, however, a major argument in favor of mainstreaming is that it may contribute to increased participatory democracy—what the European Commission currently terms “civil dialogue.”

In a recent speech, the U.N. High Commissioner for Human Rights said that “Northern Ireland seems to have come up with some important and ground-breaking models in this regard that will be of much wider interest.” She continued:

In particular, it is clear . . . how crucial to the concept of rights is the concept of participation. People should not be just docile subjects of rights: rights are never “given” to people. Rights must be asserted, and they must be asserted on one’s own behalf and on behalf of all other human beings, without distinction. The alliance has produced an understanding of participation which allows people to become agents of their own change.²⁷³

272. Rapporteur Group, *supra* note 5, at 30.

273. Mary Robinson, *supra* note 117, at 6.

3. The Need for Mainstreaming to Have Clear Lines of Responsibility, Accountability, and a Legal Status

There are dangers in mainstreaming. In particular, mainstreaming may result in the over-fragmentation of equality policy, especially if it were to become an alternative to traditional anti-discrimination and other equality mechanisms. If all public bodies have responsibility, then there is the danger that none will regard it as an important part of their function. There needs, therefore, to be some centralized responsibility within government to ensure that mainstreaming is consistently applied, according to common standards.

Despite all of the arguments for mainstreaming, one should not overlook the fact that building such a requirement into civil service decision-making will require considerable cultural change. Apart from practical issues, there are the problems of departmental exclusiveness and collective responsibility. Mainstreaming may well cut across the working practices, and even, potentially, the ethos, of the civil service bureaucracy. The dismal experience in Northern Ireland of the non-statutory PAFT approach to mainstreaming before the reforms introduced by the Northern Ireland Act 1998 are eloquent testimony to this.

This means, therefore, that a strong political commitment to mainstreaming is absolutely crucial and must drive the new approach to be taken by Departments and other public bodies. But it means more than that. It means also that the legal status of mainstreaming needs to be considered. It is noticeable that many of the jurisdictions that have introduced mainstreaming, discussed in the first part of this Article, have done so without according it any clear legal status. Mostly, mainstreaming has been introduced administratively, by circular, and without any formal legal underpinnings. At best, the status of mainstreaming in many countries is that of "soft law." The Northern Ireland experience suggests that this strategy may need to be rethought if mainstreaming is to be taken seriously by administrators, at least in some jurisdictions. What we have seen in Northern Ireland is the inadequacy of a "soft law" approach. My estimation is that in other jurisdictions the legal aspects of mainstreaming have been ignored to too great an extent. Whether a "hard law" approach will be any more successful in Northern Ireland remains to be seen, of course. It is to that issue that we now turn.

B. *Prospects for Successful Implementation in Northern Ireland*

What are the prospects of the legal mainstreaming approach adopted in Northern Ireland being effective? The provisions of the Act are promises, not reality. They are a necessary part of the process of achieving substantive equality, fairness, and justice. But neither the provisions of the Agreement nor the Act itself delivers such change directly. This delivery will require political will at all levels. The provisions of the Act, in other words, represent the potential for change. The provisions will reframe the debate. But we must ensure that change actually occurs, particularly in those areas of disadvantage where equality has been far too slow in coming in the past.

These provisions will need to be put into effective operation. And in this context there is a real difficulty. Ultimately, those who will have to operate this system day-to-day are the civil service and other public servants. The response of parts, and I stress *parts*, of the public service to these initiatives has been problematic in the past. Often it has been ungenerous and lacking in imagination. Sometimes, it seems that it has been actively opposed to necessary change. If, as the vast majority of the population have shown they want, the Agreement marks a new beginning for Northern Ireland, then all institutions have the obligation to change and adapt. The public service cannot be an exception to this obligation, however difficult it must be for some to give up the almost unrestrained power they were able to exercise for a generation. For its own sake, as well as that of Northern Ireland as a whole, the civil service must not be seen as obstructive to this aspect of the Agreement. The Equality Commission can no doubt play a role in assisting the public service to adapt, but ultimately the responsibility will lie with the public service itself, the members of the Executive, and, of course, the Assembly.

The Assembly can provide an important forum in which the successes and problems of the approach adopted in the Northern Ireland Act can be monitored. It will be vital to build up a co-operative relationship between the Assembly and the major statutory body in the area, the Equality Commission, as well as with the various constituencies directly. The relationship between the Assembly and the Commission will be of considerable importance in the future. At several points there will be signifi-

cant contact: the funding for the Equality Commission will come from Northern Ireland Departmental budgets overseen by the Executive and the Assembly. The Equality Commission will be reviewing the schemes which public bodies, including those overseen by the Executive and the Assembly, produce.

The relationship between the Assembly and the Commission has considerable potential for problems. Two possibilities suggest themselves. On the one hand, a confrontational attitude can develop in which the Assembly sees the Commission as hostile and a threat, and a war of attrition against it develops. On the other hand, the Assembly can regard the Commission as actually rather useful to it, forewarning it of problems that have not yet turned ugly, and enabling it to tackle them in a sensible way out of the glare of hostile publicity, or international pressure. I suggest that the second, co-operative approach is the sensible way forward. For it to work, the Assembly's relevant committees need to develop a harmonious working relationship with the membership of the Commission, one based on a mutual respect and recognition of the different roles that each plays in the overall structure.

There is also the question of appointments to the new Equality Commission. Much will depend on the quality of people appointed. When the Equality Commission is up and running, much will depend on the Commission's effectiveness in managing the transition from four separate bodies into one. Initially, the workings of the new equality duty on public authorities will be affected by the Equality Commission's Guidelines on the criteria that will guide public authorities on how to comply with the statutory equality duty. Thereafter, it will be important to ensure in particular that these Guidelines are adhered to by public authorities in practice, day-to-day. There will be substantial opportunity for the affected groups to insert themselves in the policy-making process to ensure this.

How far the promise of the Agreement's equality provisions is delivered will depend upon the commitment, the determination, and the skill of all the parties in the Assembly, a strong, well-financed, and independent Equality Commission, effective NGOs, and, crucially, the political will to place equality at the heart of decision-making. Using the new tools will be a challenge. For politicians, to ensure that equality and equality

remain central to political life. For the civil service and public authorities, to incorporate a culture of equality into administration. For civil society, to use these tools imaginatively and persistently. A lasting peace depends upon them all.