

## Dossier on Public Sector Equality Duties

Discrimination can be dealt with in various ways. One way focuses on making a stand against individual discrimination after it occurs. A second way tries to counteract discrimination by developing affirmative action policies specifically tailored to the discriminated groups. In order to systematically balance out discrimination in a third way, institutions are legally obliged to guarantee equality by integrating it into their policies. To this end, Northern Ireland, Great Britain and the Republic of Ireland have so-called public sector equality duties. They are an advancement of positive action and legally oblige public authorities to apply equality principles in the execution of their tasks. This means that equality has to be respected adequately in all of their actions, such as in the provision of services, in decision-making or in taking measures.

This dossier provides you with an introduction to public sector equality duties. It will present the legal basis of the duties and their execution in Northern Ireland, Great Britain and the Republic of Ireland.

Subsequently, we will delineate how public sector equality duties are implemented in South Africa

### 1. Introduction

Public sector equality duties developed as positive obligations from affirmative actions. These are actions, which give specific preferences to discriminated groups to improve situations, in which a real discrimination can be verified; these are situations where groups are disadvantaged or underrepresented due to previous or continuing discrimination. Equality duties therefore go beyond prohibitions of

Short definition: The public sector equality duty is a duty on public authorities to consider how their policies or decisions affect people with protected characteristics.

From: ‘What’s the public sector equality duty?’ on the British website Citizens Advice

Equality duties should be understood as developments from affirmative action. They demand proactive measures, instead of simply refraining, and aim at actively improving rather than worsening the situation and treatments of affected groups.

Cf. Corinna Mieth (2012): Positive und negative Pflichten in Bezug auf das Weltarmutsproblem

discrimination, such as in § 7 AGG (General Equal Treatment Act), since discrimination is meant to be counteracted preventatively and not reactively. They also go beyond affirmative action, such as in § 5 AGG, as they oblige public authorities to give preference to those potentially affected by discrimination in order to produce equal opportunities.

In order to make the design of public sector equality duties more understandable this chapter describes their history followed by a short introduction to the.

## 1.1 The Origins of Public Sector Equality Duties

Public sector equality duties originated in Northern Ireland, where in the 1990s it became clear that a comprehensive equalization of Catholics and Protestants had become indispensable for the settlement of the armed conflict between the two groups. At the end of the 1990s Great Britain also began to develop an approach towards an active prevention of discrimination instead of a mere prohibition or punishment.

“a general statutory duty to promote equality‘ ... is part of a new approach to the goals of non-discrimination that goes beyond prohibition of discrimination through the regulation of conduct ... and seeks to provide a positive duty to encourage change.”

From Maleiha Malik (2007): Anti-Discrimination Law in Britain, p. 153.

### 1.1.1 Origins in Northern Ireland

In order to settle the decades of bloody disputes between Protestants and Catholics in Northern Ireland, it was necessary to legally establish the equality of both groups. This consideration resulted from attempts to more effectively shape the non-legal initiative Policy Appraisal and Fair Treatment (PAFT) of 1994. It prescribed that all state action should be shaped by the principle of equality when it came to legal and administrative functions as well as the provision of public services. An examination of this initiative by the Standing Advisory Commission on Human Rights (SACHR) illustrated the general discontent with the PAFT guidelines. In fact, the guidelines had not been communicated to all institutions or had simply been ignored by them because they were not legally binding. Therefore the Commission recommended among others the introduction of legal obligations in the public sector in order to incorporate equality in all aspects and to promote it effectively in

“a particular priority [is], 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.

From the Good Friday Agreement 1998

this way. This recommendation was met by most Northern Irish parties, as well as the Irish and British governments, in their political agreement regarding a peace process, the so-called Good Friday Agreement or Belfast Agreement. This agreement was passed on 10 April 1998 and included a general legal equality duty for states and administrations, which was introduced in the Northern Ireland Act 1998.

### 1.1.2 Development in Great Britain

In Great Britain equality duties developed from the idea that discrimination could not only be fought through laws but that discrimination should also be actively prevented. This became obvious in 1999 when the Macpherson report regarding the murder of the black teenager Stephen Lawrence in April 1993 in London revealed a grave misconduct and multiple failures by the Metropolitan Police in the murder investigation.

Due to the resulting concerns about institutional racism in the public administration and particularly the police the Race Relations Amendments Act 2000 introduced a positive duty in 2001 for the first time. The so-called Race Equality Duty was imposed on all public authorities in order to proactively prevent discrimination on the basis of origin or ethnic characteristics and to positively promote equality.

This was followed by similar equality duties for characteristics such as disability and gender in 2006 and 2007 in order to achieve ongoing equality in institutions. In 2011 the three duties were consolidated in the Equality Act 2010, which covered all protected characteristics.

“Though widely misinterpreted to mean that all individuals in an institution should be regarded as racist, a close reading of the report shows that the idea behind the term was exactly the reverse: that even where there was good will and substantial effort by individuals to eliminate different kinds of discrimination, the rules, culture and habits of a particular body could frustrate efforts to stamp out disadvantage. To combat this, Macpherson proposed a new idea: a duty on the public sector to promote racial equality.” From: Fairness and Freedom: The Final Equalities Review, 2007, p. 35.

## 1.2 Introduction to Equality Duties

Public sector equality duties require state institutions in Great Britain to take into account how their measures and decisions influence those citizens' lives, who are affected by discrimination. The purpose of these equality duties is for these institutions to consider the discrimination and needs of disadvantaged people in their day-to-day business and to give more priority to the inclusion of diversity. As positive duties they are not focused on sanctioning individual discrimination but to eradicate and to prevent the structural and institutional causes for discrimination.

The following chapters will present the contents of the equality duties, their addressees and target groups, their effects and purpose.

Positive duties represent a new generation of equality laws. The term "new generation of equality laws" was introduced in an essay in 2001 by professor of law Sandra Fredman, who describes the imposition of positive duties for the purpose of equality promotion as an approach to actively promote the integration of marginalized groups.

### 1.2.1 Contents

Public sector equality duties in Great Britain consist of a number of legally established goals that state institutions should consider in the execution of their function and which shape the so-called general duty. In Great Britain this duty is reinforced by additional specific duties conducive to achieving the goals of the general duty. Northern Ireland, however, only has general duties. Examples for the goals of the general duty are the promotion of equality of opportunity or the improvement of the interaction between different groups of people. Specific duties for example include the definition of equality goals and their publication as well as the publication of equality data.

Equality duties in Great Britain consist of a general equality duty, which constitutes the superior requirement or substance, and specific duties, which are meant to support the adherence to the general equality duty.

### 1.2.2 Addressees and Target Groups

Equality duties mainly engage state institutions while in Great Britain organizations with public functions or service provisions are also subject to the legal duties. Addressees are thus for instance ministries, agencies, administrations, schools, universities, communities as well as health authorities. Private institutions and individuals are not subject to the duties.

The target groups that public authorities have to respect in their equality considerations are made up of citizens that potentially experience discrimination on the basis of one or

more protected characteristics. These are for instance age, disability, ethnic origin, religion, gender and sexual orientation. If a marriage or civil partnership leads to an indirect connection to one or more protected characteristics, these people must under specific circumstances also be considered by British public institutions. The situation is different in Northern Ireland, where the category ‘marital status’ is mentioned in the legal text as a protected characteristic.

### 1.2.3 Effects

Equality duties are particular in that they have an effect beyond prohibiting discrimination, since they are geared towards preventing discrimination. Therefore agencies and institutions with public functions must, in everything they do – that is in their decision making processes, development of measures, budgeting, procurement, provision of services and employment – actively search for ways in which they may achieve greater equality of opportunity and better interaction in order to prevent discrimination. Authorities are especially obliged to respect the needs of discriminated individuals when a measure has differing effects on various groups of people.

The term “public functions” stands for all activities of institutions and administrations and encompasses both their rights as well as their duties. The public sector equality duties may be more relevant for some functions than for others.

### 1.2.4 Purpose

The purpose of public sector equality duties is to incorporate equality considerations and the improvement of interactions into the work of public authorities by focusing on both of these aspects when it comes to the development, execution and revision of measures. This is meant to address inequalities and improve everyone’s quality of life. The adherence to the duties is also definitely useful for the institutions themselves. A public authority offering such services meeting the various needs of its users is able to execute their duties in a much more efficient way. Public services then become more appropriate and cost efficient, which increases satisfaction. The adherence to equality duties also leads to better informed decision making procedures, measure development and results. A supportive work environment also leads to a more productive workforce.

The equality duty is an instrument, which promotes transparency in order to back up measures with evidence and to be able to take decisions on a fair and clear basis.

## 2. Legal Basis

Equality duties of state institutions have a legal basis. However, there are differences between the respective legal bases in Northern Ireland and Great Britain. This is due to the Good Friday Agreement of 1998 which re-established decentralization in Northern Ireland, which led to the new founding of some Northern Irish constitutional bodies that were assigned specific powers. While Northern Ireland has various legal bases for equality duties, Great Britain and the Republic of Ireland have a single law streamlining such duties.

### 2.1 Legal Bases in Northern Ireland

Legally introducing public sector equality duties in Northern Ireland had the higher objective of including equality in all processes and making it a cross-sectoral issue. This approach is called ‘mainstreaming equality’ and refers to the integration of equality considerations - right from the start - in the day-to-day business of institutions falling under this duty. Such

“Mainstreaming is the (re)organization, 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 policymaking.”

considerations are part of decision making processes and the development of measures right from the beginning and should not be an afterthought when accusations of discrimination are already an issue. In this way, mainstreaming can help to improve processes by granting agencies, administrations etc. more responsibilities to consider citizens’ needs and their interactions with each other.

Northern Ireland has two legal bases obliging state institutions to equality, namely the Northern Ireland Act 1998 and the Disability Discrimination Act 1995, amended by the Disability Discrimination Order 2006.

#### 2.1.1 Northern Ireland Act 1998

The Northern Ireland Act 1998 is a law aiming at the implementation of the Good Friday Agreement, which had been adopted in order to eliminate conflicts between Protestants and Catholics as well as to reintroduce the devolved Northern Irish government that had been abolished by the Northern Irish parliament in 1972. It establishes the constitutional structure of Northern Ireland and came into force on 1 January 2000 leading to the founding of the Northern Ireland Assembly as well as the Northern Ireland Executive. In addition, the Northern Ireland Act 1998 (Section 75) introduced the equality duties mentioned in the chapter “Rights, Safeguards and Equality of Opportunity” of the Good Friday Agreement imposing such duties on public institutions for the first time.

The next chapter will present the legal obligations according to Section 75 of the Northern Ireland Act in a more precise way.

#### **2.1.1.1 Legal Obligations According to Section 75**

Section 75(1) and (2) of the Northern Ireland Act 1998 establish public sector equality duties in Northern Ireland. The first of these duties in Section 75(1) is the so-called equality of opportunity. It requires authorities to have due regard to the need to promote equality of opportunity in carrying out their functions. In order to ensure equality of opportunity preventive measures should be taken before and in addition to the elimination of discrimination.

Irrespective of the first obligation according to Section 75(1), the second obligation in Section 75(2) prescribes authorities to have regard to the desirability of promoting good relations between various groups in carrying out their functions. The Equality Commission for Northern Ireland (ECNI) uses the term “good relations”, for which it uses the following working definition: “the growth of relations and structures for Northern Ireland that acknowledge the religious, political and racial context of this society, and that seek to promote respect, equity and trust, and embrace diversity in all its forms” (Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities, 2010, p. 86).

The appropriate consideration of both objectives is meant to encourage institutions to deal with and tackle discrimination.

The next chapters will present the obligated institutions in Northern Ireland as well as the protected characteristics. Moreover the meanings of and relation between “due regard” and “regard” as well as the relation between the obligation of Section 75(1) and 75(2) will be explained.

##### **2.1.1.1.1 Obligated Institutions**

Section 75(3) (a)-(d) of the Northern Ireland Act 1998 establishes what is meant by “public authority”. According to the regulation it includes any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 and designated for the purposes of equality duties by the Secretary of State. Additionally it includes anybody (other than the Equality Commission) listed in Schedule 2 to the Commissioner of Complaints (Northern Ireland) Order 1996 as well as any department or other authority listed in Schedule 2 to the Ombudsman (Northern Ireland) Order 1996. It also includes persons named in an order made by the Secretary of State for the purpose of the duties mentioned in Section 75. Once established as a public authority for the purpose of equality duties, the authority is bound by the legal obligations in Section 75 and obliged to fulfil them.

### 2.1.1.1.2 Protected Characteristics

Section 75(1) (a)-(d) establishes which categories are protected by equality duties. For equality of opportunity these include: religious belief, political opinion, racial group, age, marital status, sexual orientation and gender. Additionally public authorities should advance equality of opportunity for persons with and without a disability as well as for persons with and without dependents.

Good relations should be promoted between persons of differing religious beliefs, political opinions and racial groups. Members of groups with other protected characteristics, such as disability, age or sexual orientation, are excluded from this.

Section 75 (1) (b) does not explicitly mention gender but states that equality of opportunity should be promoted between men and women in general. Gender diversity is not directly mentioned in the regulations.

### 2.1.1.1.3 Relation Between and Meaning of „due regard“ and „regard“

According to the legal equality duties in Section 75 (1) and (2) decision makers of public authorities should have due regard for the equality between groups of different protected characteristics and have regard for the promotion of good relations between them. This mainly means that both aspects have to be considered when executing functions in Northern Ireland. When doing this it must be ensured that the equality of opportunity and the promotion of good relations are weighed in relation to the function of the respective institution. Particularly the duty to promote good relations can be of a higher relevance for some functions than for others. This proportional approach is meant to ensure how significant the promotion of equal opportunities and good relations is for a particular measure or decision. Additionally, equality duties must be considered in advance and without bias and not shortly before or even after decisions are made. In this way the consideration of equality duties does not determine a positive or negative decision. Instead both duties are adequately considered in preceding processes.

“Public authorities must take both factors properly into account in the way they carry out their functions, giving the appropriate consideration (based on relevance and proportionality) to meet both the due regard and regard duties.” From Section 75, Northern Ireland Act 1998 and Section 49A, Disability Discrimination Act 1995

According to the law, ‘due regard’ exists when the degree of consideration is appropriate for the specific circumstances of the decision or measure. This can vary for different institutions. As a general rule, the consideration of the equality duty should be proportional to the relevance of the measure or decision.

The term ‘regard’ is defined by the law as the fact that the duty to promote good relations between individuals, who are potentially affected by discrimination, must be considered

properly and reasonably. It is not meant to be taken in absolute terms nor as a requirement to exactly comply with its provisions.

#### **2.1.1.1.4 The Relation Between the Duties of Section 75 (1) and (2)**

Although the duties “due regard” and “regard” are meant to be graded differently, public authorities should always consider both equality duties and weight them accordingly when carrying out their functions relating to Northern Ireland. Nevertheless they tend to concentrate more on the duty to promote equal opportunity than the duty to promote good relations. However, this duty is also a legal obligation. It is therefore imperative that it is taken seriously and that it is executed.

Both equality duties are equally important, valid under all circumstances and should always be recognized jointly. Meeting the provisions of one duty is neither an alternative to the other duty nor can they cancel each other out. Instead the duties of Section 75 should be prioritized as main duties and not subordinated. Additionally, the consideration of their interdependence is particularly important.

“[W]e regard equality of opportunity and good relations as complementary. There should be no conflict between the two objectives. Good relations cannot be based on inequality between different religions or ethnic groups. Social cohesion requires equality to be reinforced by good community relations. ... I repeat that we see no conflict between these two objectives.” – Dr Marjorie Mowlam (27 July 1998), House of Commons, Official Report col.109.

#### **2.1.2 Disability Discrimination Act 1995, amended by the Disability Discrimination Order 2006**

The Disability Discrimination Act prohibits the discrimination against people with disabilities, gives them enforceable rights and promotes their equality of opportunity. The purpose of the Act is to implement the equality of people with disabilities in Northern Ireland when it comes to work, access of goods, facilities and services, education and transport by equipping them with the appropriate legal instruments.

The Disability Discrimination Act 1995 defines a disability in Section 1 as “a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”.

The Act came into force in 1995 and has been amended multiple times since then. Section 5 of the Disability Discrimination Order 2006 added additional duties for public authorities regarding people with disabilities. These were added to Section 49A of the Disability Discrimination Act and are in effect since 1 January 2007.

The following chapter will deal with the content of the legal duties of Article 49A in a more detailed way.

### **2.1.2.1 Legal Duties According to Section 49A**

The Disability Discrimination Act 1995 Section 49A, amended by the Disability Discrimination Order 2006 Section 5, requires Northern Irish public authorities to have due regard to the need to promote positive attitudes towards disabled persons, and to the need to encourage participation by disabled persons in public life.

This can be achieved for instance by promoting a positive image of disabled people and deconstructing intolerance and prejudices against them. They should also have due regard to the need to encourage the participation of disabled persons in public life by including them in the decision-making processes and taking of measures. Their political participation, for instance as members of advisory committees, elected representatives or simple voters should be intensified.

According to Section 49A (6) of the Disability Discrimination Act 1995, the public authorities, which are bound by these legal obligations, are the same as those bound by the equality duties of Section 75 of the Northern Ireland Act 1998. The term “due regard” has the same meaning as in the duties of Section 75. The following section will deal with the reason for the two differing legal bases for equality duties of public authorities in Northern Ireland. Additionally it will present the similarities and differences between the duties according to Article 49A of the Disability Discrimination Act and the duties according to Article 75 of the Northern Ireland Act 1998.

#### **2.1.2.1.1 Historical Reasoning for the Separate Duties According to Section 49A**

The equality duties according to Section 49A of the Disability Discrimination Act 1995 were introduced in order to complement the duties according to Section 75 of the Northern Ireland Act 1998 for a more positive attitude towards people with disabilities and their integration in public life. This group of individuals had not been taken into account in Section 75 (2), which only includes the characteristics religious beliefs, political conviction and ethnic origin.

After the examination of the Disability Discrimination Act in 2003, the Equality Commission for Northern Ireland (ECNI) intended to add the legal duties to it, in order to avoid confusion in the public authorities and to simplify the process. At this point in time, however, the duties according to Section 75 were under examination as well, which would have delayed its execution by several years. After a discussion with the ECNI the Office of the First Minister and deputy First Minister (OFMdfm) then decided to introduce the disability duties as amendments to the Disability Discrimination

According to a 2007 guide of the ECNI the disability duties were introduced with the intent of making “a substantial and tangible difference to disabled people’s lives” by reducing prejudices against them and tackling their under-representation. This is meant to stop their “continuing inequalities and social exclusion”. From Effectiveness of the Disability Duties: Review Report

Act 1995 by the Disability Discrimination Order 2006. This is how the differing legal bases for the legal equality duties in Northern Ireland originated.

#### **2.1.2.1.2 Similarities and Differences to the Duties According to Section 75**

Just like the duties addressing equality of opportunity and better interaction, disability duties pursue a mainstreaming approach and aim at changing the processes of public authorities when it comes to their goals by taking appropriate measures and actively executing them. The difference is that the disability duties exclusively refer to people with disabilities whereas the equality of opportunity and better interaction duties include more protected characteristics.

The main difference between the duties according to Section 75 and those according to Section 49A lies in their execution. For the former, obligated authorities have to draw up an equality scheme, which has to be approved by the ECNI. For the latter they have to create and submit a disability action plan, which does not require approval by the ECNI. The assessment processes accompanied by these papers, however, are the same: for both, obligated authorities have to submit annual reports, and conduct a review every five years.

Despite the fact that the duties according to Section 75 and those according to Section 49A have some similarities, they are different types of duties in that they entail differing legal requirements. Nonetheless they should be understood as complementary and always be considered in relation to each other.

## **2.2 Unitary Legal Basis in Great Britain**

In contrast to Northern Ireland, Great Britain has one single law, which imposes equality duties on public authorities. This was introduced after a review of all laws in England, Scotland and Wales pertaining to anti-discrimination. The result of the review in 2007 had been that the various legal bases should be combined in order to simplify them and design them in a more coherent and result-focused way.

At the same time, the equality duties regarding ethnic origin, gender and disability, previously normalized in different laws, were combined and extended to further protected characteristics. This is because through the review of the law it had become clear that positive duties are an essential part of an effective protection against discrimination.

The following chapter will briefly present this unified Equality Act 2010.

### **2.2.1 Equality Act 2010**

The British Equality Act 2010, which came into force on 1 October 2010, combined all previously separate regulations pertaining to equality in Great Britain in one law. Simultaneously, for the sake of simplification and coherence, a single equality duty was introduced for all groups affected by discrimination. This focus shift from processes to concrete results was supposed to improve the designing of measures and provision of

services so that public authorities would aim more at equality and its facilitation. This is meant to prevent discrimination from happening in the first place.

This single equality duty came into force on 5 April 2011 in Great Britain by means of the Equality Act 2010 and contains two components: the general equality duty according to Section 149 and the separately regulated so-called specific duties according to Section 153 for England, Scotland and Wales.

### **2.2.1.1 General Equality Duty According to Section 149**

Section 149 of the British Equality Act 2010 describes the first general component of equality duties, which applies equally to all obligated authorities in England, Scotland and Wales. Its three goals represent the actual content of the duties. These are a necessary and overarching condition in order to comply with the general equality duty itself. According to its goals stated in Section 149, (1) (a) - (c) public authorities must have due regard to

- (a) eliminate discrimination, harassment and victimization
- (b) advance equality of opportunity and
- (c) foster good relations between persons who are affected by discrimination.

In relation to the advancement of equality of opportunity, Section 149 (3) of the Equality Act 2010 explains that in order to do so public authorities must have due regard to the following aspects:

- Removing or minimizing disadvantages suffered by persons affected by discrimination
- Taking steps to meet the needs of who share a relevant protected characteristic that are different from the needs of persons who do not share it, particularly with regard to the needs of disabled persons (Section 149 (4)) and
- Encouraging persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- The promotion of good relations between persons additionally includes the tackling of prejudice and the promotion of understanding (Section 149 (5))

Thus public authorities must consider how to take appropriate measures in order to fulfil these various needs and reduce inequality. The regulations do not prescribe specific procedures. In order to adhere to the duties, however, it is possible to treat some persons more favorably than others (Section 149 (6)).

The following chapter will show which institutions are bound by the equality duties of Section 149 and which characteristics are protected. Additionally it will explain the meaning of “due regard” according to the Brown principles as well as the exceptions of the equality duties application.

The difference between the equality duties in Northern Ireland and Great Britain result from the introduction of the Equality Act 2010.

#### **2.2.1.1.1 Obligated Authorities and Institutions with a Public Function**

In all of Great Britain the general equality duty applies to all public authorities named in Schedule 19 of the Equality Act 2010. These are essentially bodies of the health, transport and educational sector, local authorities and governments, the police as well as the armed forces. According to Section 149 (2), private or volunteer organizations must also abide by the general duty if they exercise one or more public functions. However, in this case the duty can only be applied to one specific function.

Whether an organization exercises a public function or not depends on several factors, such as whether they are financed by public funds, whether their powers are embedded in the law or whether they have a connection to the regional or central government. This means that a private security company can for example operate a prison on behalf of the government. The general equality duty only applies to its activities related to this but not their deployment of security personnel in a supermarket.

#### **2.2.1.1.2 Protected Characteristics**

Section 149 (7) determines which characteristics are protected by the general equality duty. The protected characteristics for all three goals of the general duty are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. In addition - considering the first goal (eliminating discrimination, harassment and victimization) -

Unlike the Northern Irish law, the British legal text of the equality duty mentions the characteristics of sex and gender reassignment. Unlike in Northern Ireland, however, the marital status does not fall under the general equality duty.

public authorities have to promote the elimination of discrimination on the basis of somebody’s marital status or their registered partnership. However, this only applies in relation to employment (see Part 5 of the Equality Act 2010). In the pursuit of the other goals, is the promotion of equal opportunities and good relations, this category does not have to be taken into account.

#### **2.2.1.1.3 Meaning of “due regard” According to the Brown Principles**

Generally “due regard” means that public authorities should confront the general equality duty according to Section 149 (1) in a conscious manner, consider the necessity of its

execution and integrate it into their daily activities. The precise meaning, however, is clarified in the so-called Brown principles. The six principles stem from the case *Brown, R v Secretary of State for Work and Pensions* [2008] EWHC 3158, in which the relevant court examined what an obligated public authority needs to do in order to recon to the duty of having “due regard” for the three equality goals. The resulting recognized Brown principles were recognized in later cases by other British courts and are now used to examine the adherence to the general equality duty. In addition, they may serve as guiding principles for Northern Irish authorities intending to meet equality duties.

According to the Review of the Public Sector Equality Duty of an independent steering group in 2013, the problem of “due regard” lies in the fact that it leaves space for and is subject to interpretation. The meaning of the term depends on the respective circumstances. Additionally only a court can confirm whether a public authority had due regard in a specific case.

According to the Brown principles, public authorities in Great Britain should ensure that

1. decision-makers are aware of their duty to have “due regard” for the identified aims,
2. they consider the general equality duty before and during discussions of a particular policy as well as at the time a decision is taken,
3. the equality duty is exercised in substance, with rigour and with an open mind,
4. the equality duty is not delegated to a third party,
5. the equality duty is constantly valid,
6. “good practice” records are kept when it comes to regard for the aims in order to prove that the general equality duty was fulfilled.

#### **2.2.1.1.4 Exceptions**

Admittedly there are some exceptions to the application of the general equality duty. Section 149 of the Equality Act 2010 mentions these exceptions and lists them in Schedule 18. The exceptions primarily refer to two areas, namely age and immigration. When it comes to the protected characteristic of age, the equality duty must not be adhered to when it comes to education and facilities in schools or the accommodation and supervision in children’s homes. This means that a school does not have to promote equality of opportunity and better relations between pupils of different ages. Nonetheless, schools should consider that it may be necessary to promote better relations between pupils of different ethnic origins and religions and to enable pupils with disabilities to have equal opportunities.

When carrying out their activities immigration authorities, too, need to take into account the second objective of the promotion of equal opportunities when it comes to age, religion and ethnic origin of immigrants. This means, for example, that civil servants do not need to pay attention to giving the same amount opportunities to people of different religions.

However, they should pay attention to the equal opportunities of applicants with different sexual orientations and persons with disabilities.

Furthermore, the equality duty does not apply to the execution of judicial functions.

Courts do not have to take the duty into account when ruling or taking procedural decisions.

There are a few additional institutions which, because of their public functions, would in fact also be subject to equality duty, but which are expressly exempt from it in Schedule 18, such as the House of Commons and the Security Service.

### **2.2.1.2 Specific Duties According to Section 153**

The general equality duty according to Section 149 of the Equality Act 2010 is supplemented with so-called specific duties that can be imposed on state institutions on the basis of Section 153. They are therefore the second component of equality duties in Great Britain. Their purpose is to generally help the obligated authorities to adhere to their duties and, in particular, to assist them in improving their implementation of the general duty such as by working in a more focused and transparent way. However, compliance with the specific duty does not mean that the general duty is automatically fulfilled as well.

Based on the decentralization of the United Kingdom, Section 153 (1) to (3) authorizes the English, Welsh and Scottish Ministers to impose additional specific obligations through secondary legislation on the institutions listed in Schedule 19 of the Gender Equality Act 2010.

Since these obligations can be determined independently and separately from the general equality duty, which applies equally to all, they differ from one region to another. But there are also similarities, such as when it comes to setting and publishing so-called equality duties as well as to publication of information about their employees.

Not all authorities named in Schedule 19 are necessarily subject to the specific duties. They are, however, listed separately in the attachments to the secondary legislature.

In the following, the various specific duties for England, Wales and Scotland will be considered in more detail.

#### **2.2.1.2.1 England**

The specific duties for English public authorities are set out in the Equality Act 2010 (Specific Duties) Regulations 2011 and entered into force on 10 September 2011. They require two things from the public authorities involved: First, according to Section 2 of the Regulations 2011, they are to publish appropriate relevant information showing that they comply with the equality duty. By collecting and using such equality information or even sensitive data the authorities can make more informed decisions, award targeted subsidies and provide services and thus have a greater impact. It can also make it easier for the public to understand which decisions the obligated authorities have to make.

For the first time, this equality information was meant to be published by 31 January 2012 and at least every year thereafter. Schools and Pupil Referral Units had time to publish this until April 6, 2012. In particular, they have to provide information about those persons who have one of the protected characteristics and are either employed by the public authority or affected by its decisions and activities. Excluded are public authorities with less than 150 employees.

Secondly, under Section 3 of the Regulations 2011, obliged public authorities (including schools and Pupil Referral Units) should set themselves one or more concrete, measurable equality objective which they consider to help them achieve the objectives of the general equality duty. These were meant to be published for the first time by 6 April 2012 and thereafter at least every four years.

The published equality information and objectives should be accessible to the general public and may be published either in a separate document or in an annual report or as part of a business plan.

#### **2.2.1.2.2 Wales**

The specific duties for authorities in Wales were adopted by the Welsh Regional Government in the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 and entered into force on 6 April 2011. Unlike England, the obligated authorities in Wales had not only two but thirteen specific duties imposed on them.

Like their English counterparts, they should not only define and publish equality information and objectives (see Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 Regulation 3 and 4 or 7 and 9) but also assess the likely impact of their proposed policies and practices (see (Wales) Regulations 2011 Regulation 8). In addition, their employees should be given appropriate training when it comes to the general equality duty and the specific duties (see (Wales) Regulations 2011 Regulation 10).

Also, under Regulation 14 and 15, each obligated authority should set up a Strategic Equality Plan, which sets out its equality objectives (including the objective of addressing

existing wage inequalities) and formulates how the progress of implementation may be monitored.

It should also show how equality information should be recognized, collected and published. An annual report is due on 31 March each year.

### **2.2.1.2.3 Scotland**

Scotland's public authorities were subject to ten additional specific duties imposed by the Scottish Government under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, which became effective on 27 May 2012. Like the English and Welsh authorities, they must collect and use information about their employees (see Equality Act 2010 (Specific Duties)(Scotland) Regulations 2012 Regulation 6) and, similarly to the equality objectives, define and publicize equality outcomes, of which they think that they help them to better implement the general duty to comply with the principle of equal treatment (see (Scotland) Regulations 2012 Regulation 4).

They should also submit a progress report showing that the general equality duty has become an essential element in the execution of their functions, which should also enable them to better comply with it Equality Act 2010 (Specific Duties)(Scotland) Regulations 2012 Regulation 3. They should also provide information on prevailing wage inequalities and give statements on how they intend to overcome them Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 Regulation 7 and 8.

All of Scotland's specific duties can be found in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

## **2.3 Equality Legislation in the Republic of Ireland**

In 1998, the Employment Equality Act replaced the Anti-Discrimination (Pay) Act 1974 and the Employment Equality Act 1977. The new law covers the areas of advertising, equal pay, access to employment, promotion, reclassification, dismissal and other aspects. This law only applies to the labor market, but forms the basis for further equality legislation in Ireland. In the years 2000 and 2004, the Equal Status Act was passed to secure the right to social participation for all. Under this law, the protection against discrimination is expanded and positive measures established. In this way, the law protects those affected by discrimination and at the same time sets equal treatment standards for business people, service providers, the school administrations and other educational institutions, and boards of private registered

The infographic 'IHREC's Journey' shows the development process of the Irish Human Rights and Equality Commission from the nineties to 2014 and thus provides a good overview of the merger processes, pre-existing institutions and legal actions.

associations.

In order to extend the protection against discrimination, the National Disability Authority Act was passed in 1999 under which the National Disability Authority (NDA) was launched. The tasks of the NDA include research, the production of relevant statistics, assistance in the development of better standards and the implementation and monitoring of the guidelines.

All of these laws are the precursors of the 2014 Irish Human Rights and Equality Commission Act.

### **2.3.1 The Irish Human Rights and Equality Commission Act 2014**

The Irish Human Rights and Equality Commission Act is the first of its kind in the EU. While other European countries, notably Northern Ireland and Great Britain, have for many years incorporated equality duties into their domestic law, the focus of the Irish law lies not only on promoting equal treatment but also on the protection of human rights. The aim of the law is to implement international human rights as well as European law.

In the following, the content of the legal obligations according to Section 42 of the law is described in more detail and it is explained which institutions are obliged by the law.

In 2011, the Equality and Rights Alliance (ERA), an Irish coalition of 170 groups and activists, published the paper 'Setting out the Case for a Public Sector Positive Duty', which sets out that a positive commitment of state institutions is the most effective way to promote equality of treatment and to ensure the protection of human rights. Since then, ERA has supported the introduction of such an obligation and the establishment of the Irish Human Rights and Equal Treatment Commission.

#### **2.3.1.1 Legal Duties According to Section 42**

Section 42 of the Irish Human Rights and Equality Commission Act provides the legal basis for equality duties in the Republic of Ireland by obliging public authorities in their daily work:

- (a) To eliminate discrimination,
- (b) Promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
- (c) Protect the human rights of its members, staff and the persons to whom it provides services.

In order to adhere to these obligations, all public bodies are required to take certain measures. First, 'Strategic Plans' are to be created. When developing these plans human rights and equality issues that may be relevant in their area have to be identified and assessed. When doing so the public function and its purpose as well as its size and the

resources of the institution must always be taken into account. Then the public institutions need to develop strategies to counter these problems. In the next step, they are

required to report annually on how successful the strategies developed have been.

In addition, Section 42 stipulates that the legally established Human Rights and Equal Treatment Commission

must assist and supervise the authorities in the implementation of their duties.

“The Irish duty is the first to have a combined equality and human rights focus. This represents both an opportunity and a challenge. The opportunity lies in the potential for Ireland to set a standard for the operation of a combined equality and human rights duty for public sector bodies. The challenge lies in avoiding a siloed approach to the duty, addressing equality and human rights concerns separately, but rather, for public bodies to develop an integrated approach when applying the duty, and in terms of any guidance and tools developed by the IHREC to assist public bodies to implement the duty.”

– Niall Crowley, A New Public Sector Equality & Human Rights Duty 2015

### 2.3.1.2 Obligated Institutions

According to Section 2 of the Irish Human Rights and Equality Commission Act, public authorities – thus required to implement equality duties – are ministries (the Ministry of Defense and the Defense Forces are explicitly excluded), local authorities, the Health Service Executive, universities and most schools, Education and Training Boards and institutes of technology.

Since private institutions are not included, private hospitals for instance are not required to implement the obligations under Section 42.

In addition the law applies to institutions, established by a public regulation or bylaw and financed in full or in part by a ministry, enterprises, in which a ministry owns a large part of the shares, and legal persons, organizations, groups or institutions, which are partly or fully financed by the Oireachtas.

## 3. Execution

While in Northern Ireland the authorities and the Equality Commission for Northern Ireland are jointly responsible for the implementation of public equality duties, in Great Britain the Equality and Human Rights Commission is responsible. In the Republic of Ireland, it is the task of the Irish Human Rights Commission to ensure the implementation of equality duties in Ireland.

### **3.1 Northern Ireland: Shared Responsibility of Bodies and the Equality Commission for Northern Ireland (ECNI)**

The Northern Ireland Act 1998 explicitly requires cooperation between the public authorities and the Equality Commission. The Equality Commission's function is to consult, inform and control. Through publicity campaigns, the Commission promotes greater awareness of equality and raises awareness among both the general public and public authorities and businesses about the implementation of equal treatment standards. Preventing and/or alerting to discrimination are also part of their campaigns. The Commission also has a policy advisory role, reviews legislative proposals and current legislation, and proposes improvements.

Businesses or authorities that breach the obligations under Section 75 of the Northern Ireland Law 1998 and are made aware of this by the Commission and/or staff may request assistance and advice from the Commission. This supports a constant exchange, which benefits both the Commission and the authorities, as it combines the theoretical understanding of the former with the practical implementation approaches of the latter.

Thus, while the concrete implementation of equality duties, for example the creation of an equality concept or a disability action plan, is the responsibility of the authorities, the Commission is responsible for overseeing the authorities.

#### **3.1.1 Tasks of Authorities**

The Northern Ireland Act 1998 requires public authorities and businesses to estimate in advance the likely impact of their policies and practices on equal opportunities. In order to take equal treatment into account in every aspect of management and recognize on, the Commission recommends reviewing all measures and carrying out an Equality Impact Assessment. An important part of implementing these responsibilities is to establish a working relationship between those who draft laws for the public sector and those who will be affected by these laws. This can best be achieved through regular consultation between the various actors and timely feedback to respondents.

It is of the utmost importance for legislators that businesses, authorities and individuals recognize that equality and the duty to establish good relations between individuals and groups are co-dependent and are both needed to create a society of equals and to avoid discrimination – Equality Northern Ireland, Outline Guide for Public Authorities.

The Equality Commission offers free training for employers to assist companies and public authorities in the implementation of equality duties. The conditions of participation for this training are deliberately low-threshold. Topics include a general introduction to the concept of equality as well as training for a fair recruitment policy and in cases of workplace harassment. More detailed information can be found on the website of the Equality Commission of Northern Ireland.

The tasks of the authorities also include the regular publication of data, the so-called screening, the implementation of a so-called Equality Impact Assessment, the development of an equality scheme and a disability action plan. In addition, each year, the authorities must submit a progress report to the Commission and review their equality policies and action plans every three years.

### 3.1.1.1 Evaluations through Screenings

For the evaluation of equality data and measures, there is no clear definition of the term 'screening'. Screenings are intended to identify actions likely to have an impact on equal opportunities and/or the establishment of good relations. It is therefore one of the methods that enables public authorities and/or companies to meet their legal obligations and to mainstream equal opportunities and good relations in their decisions and policies.

The Government of Northern Ireland has developed an official screening form that companies/authorities can use to guide and maximize the above effects.

The first step of a screening involves the regular evaluation of personal data and customer feedback. As far as possible, a screening should be carried out by all relevant employees and decision-makers. The focus should be on the possible side effects of the measures to be taken and should be carefully examined as to whether these measures affect or enhance the equality goals of the company and/or the authority – Northern Ireland Equality Commission, Guide for Public Authorities, page 51-53.

### 3.1.1.2 Equality Impact Assessment

In view of the obligation of public authorities, set out in Schedule 9 Section 4 (2) (b) of the Northern Ireland Act 1998, to regularly assess their directives when it comes to equality of opportunity and to seek advice the Equality Commission recommends the execution of an Equality Impact Assessment (EQIA).

An 'Equality Impact Assessment' refers to the process of viewing and assessing official practices and policies from the perspective of disadvantaged people. In this way fairness and involvement of persons with protected characteristics should be guaranteed and promoted. According to the rules of Section 75

Among other things, the specific duties of the authorities stipulate that companies employing at least eleven full-time employees measure the origin, gender, religious/ideological affiliation, sexual orientation and potential disabilities of all employees. These data form the basis for assessing the implementation of equality duties and also allow for the documentation of comparative data and progress - Information from the Equality Commission of Northern Ireland

of the Northern Ireland Act 1998, an Equality Impact Assessment should be an integral

part of the strategy and policy development process and thus be proactive and non-reactive. It should also be stressed that an EQIA is a continuous process that reviews existing practices and policies and identifies the need for further action.

Particular attention within an EQIA is placed on possible unintended consequences of certain measures and/or guidelines. In order to prevent this or prevent damage already done, it is of utmost importance that the EQIA is not an individual but an overall task of the institution. Equality Impact Assessments, consultations, relevant data analyses and expertise from the Equality Commission ideally form the foundation upon which new measures are adopted and old ones are reviewed. In addition to an Equality Impact Assessment, Section 49A of the Disability Discrimination Act 1995 requires that the implementation of equality objectives requires the promotion of positive attitudes towards people with disabilities and their participation in public life.

### **3.1.1.3 Production of an Equality Scheme for the Duties According to Section 75**

Public agencies in Northern Ireland are required to submit a so-called equality scheme to the Equality Commission for Northern Ireland (ECNI). This is a statement by the authorities, which explains how they want to promote equal treatment and good relations among the different groups of people in the execution of their activities. The concept should also include a procedure that measures the success of the actions introduced.

Each equality scheme must include an assessment of compliance with the legal obligations under Section 75,

- an assessment and interview on the effect of internal regulations (regarding the people working for the institutions) and external regulations (in terms of the people who could receive or receive services of the institution)
- monitoring the adverse effects of measures to promote equality and equal opportunities and a way of advising those who might be likely to be affected by them
- Publishing such assessments
- training of staff
- ensuring and assessing public access to information and services provided by the authority

The ECNI recommends that public authorities in the framework of equality schemes also commit to drafting a report on the implementation of the concept every year by 31 August at the latest.

The obligations under Section 75 are not met by the submission of the equality scheme to ECNI. National institutions must also implement the measures presented in the scheme, once they have adopted it and once it has been approved by the ECNI.

#### **3.1.1.4 Creation and Submission of a Discrimination Action Plan for Duties According to Section 49A**

The Disability Discrimination Act 1995 stipulates in Section 49A that certain authorities and businesses are obliged to take into account in their decisions and policies the promotion of positive attitudes towards disabled people and their better integration into public life. This obligation is enhanced by the obligatory creation of a disability action plan. The plan should set out how the authority and/or company intend to implement its obligations with regard to persons with disabilities.

The disability action plans focus mostly on measures that make it possible for the obligations to be fulfilled in such a way that they have the greatest foreseeable effect.

In order to find out what these measures would be, it is advisable to consult with employees with disabilities, to work with other authorities, to create accessibility, to take positive measures to enable people with disabilities to participate more in society, to monitor the impact of these measures and to collect corresponding data.

The Equality Commission has provided information on who is responsible for the implementation of the measures and how employees can be involved in the process. This information can be found [here](#).

Another approach that could help in improving an inclusive work environment is addressing negative prejudices about people with disabilities and promoting positive role models through publications, accessibility of services and the placement of people with disabilities in public sector positions.

#### **3.1.1.5 Annual Progress Reports for Concepts and Action Plans**

Part of the obligations under Section 75 of the Northern Ireland Act 1998 is the annual drafting of a progress report, which must be submitted to the Equality Commission. The scope of this report is kept transparent and the creation is made easier for the authorities, who have to complete a report template. Part of this template is a series of self-assessment questions designed to identify existing measures and areas of improvement, and to further develop corporate policies and services.

The completed form must be submitted electronically and by post to the Equality Commission. Management must attach a signed cover letter to the report.

The report begins with an introductory summary and proposals for improving existing equality policies and action plans. Then it is divided into eleven sections. They chronologically deal with:

- the implementation of Section 75 duties of the Northern Ireland Act 1998,
- the examples of impact and outcomes of the implementation of these duties,
- the screening results,
- the Equality Impact Assessment (EQIA),
- the employee training measures taken and to be taken

- the communication measures,
- data collection and analysis,
- information and service provision
- the consultations held and planned
- and the implementation of the 'good relations' duty.

### **3.1.1.6 Triennial Reviews of Concepts and Action Plans**

As a result of a legislative change, since 2011 companies have been required to review and, if necessary, revise and update all their equality schemes every three years, rather than every five years. The timeframe was changed in order to adapt the equality scheme to the planning cycles of authorities.

This also means that the concept complies with the business plans and disability action plans - Revised Approach to the Equality Scheme, page 4, Northern Ireland Assembly, October 6, 2011.

The regular review and revision of equality policies and action plans ensures that equality policies and public authorities develop and demonstrate their efficiency and purpose over and over again.

### **3.1.2 Tasks of the ECNI (Equality Commission of Northern Ireland)**

The Equality Commission is a public institution established by the Northern Ireland Act 1998. The responsibilities of the Equality Commission include the consultation and assistance to individuals in potential lawsuits relating to anti-discrimination legislation. In addition, the Commission plays a central role in advising and guiding employers and service providers so that they carry out their duties in accordance with the law.

It is important for the work of the Commission to promote the public debate on equality, the provisions of informational material and the fight against inequalities and injustice.

The Equality Commission strengthens its public profile and awareness of its concerns through campaigns among other things. In 2012, their campaign 'Access for All – It's the Law' was launched across the UK for access and participation rights of people with disabilities.

Specifically, this includes the approval of equality schemes and the reporting to Parliament in case of failure to submit and action plan. Additionally, complaints may be filed against an authority at ECNI and it may initiate investigations if it considers that an authority is failing to comply with its equality duties.

### 3.1.2.1 Approval of Equality Schemes

All equality schemes must be submitted to the Equality Commission for approval. If the templates have been completed correctly and meet the legal standards, they will be approved. The Commission has developed a list as well as a notification schedule for the submission deadlines of the schemes. In addition, there is information material and instructions for authorities and/or companies that help in the creation. If the Commission does not accept a scheme, it will be forwarded to the Secretary of State for Northern Ireland. If so, the Northern Ireland Assembly (NI Assembly) will be notified of this process. Reporting to Parliament in the event of failure to submit an action plan is described in more detail in Annex 9 of the Northern Ireland Act 1998.

### 3.1.2.2 Reporting to Parliament in the Event of a Failure to Submit an Equality Scheme

If an authority does not submit an equality scheme or if this scheme does not meet the requirements of the Commission, the Commission can pass this scheme on to the Secretary of State. The Secretary of State then informs the General Assembly of Northern Ireland. The Secretary of State may then approve it, request the authority to submit a revised scheme or, if none exists and no steps are taken to create one, create an equality scheme for the relevant authority. However, if an authority does not comply with its obligations to create an equality scheme, no tough sanctions will be imposed.

At the individual level, complaints may be submitted if a person feels discriminated against or believes that the objectives and measures set out in the equality scheme are not achieved or implemented.

### 3.1.2.3 Complaints (Annex 9, Section 10 of the Northern Ireland Act 1998)

A complaint against an authority may be lodged if the complainant considers that the measures and directives contained in an approved equality scheme have not or poorly been implemented. In order to be recognized as a complaint, the reasons for the official failure must be specified accordingly. After the complainant has contacted the authority concerned, made his/her complaint and given the authority adequate time to reply, a formal written complaint can be sent to the Equality Commission. At this point, the legal text also refers to legal persons, which also means public bodies.

If the Commission decides not to investigate a complaint, it must provide concrete reasons. If the authority has decided to take action to improve the situation, or if the appropriate complaint is reevaluated, investigated, and eventually changed, this will contribute to a decision against an investigation. Investigations, Section 4.4, Northern Ireland Equality Commission.

The complaints must be submitted to the Equality Commission within a 12-month period and call on the Commission to initiate investigations.

#### **3.1.2.4 Investigations (Schedule 9 Section 11 of the Northern Ireland Act 1998)**

According to Section 11, the Equality Commission may also initiate investigations if there is no formal complaint, but the Commission itself considers that the authority has violated the measures and directives laid out in the equality scheme. This is an effective right of disposition, since only the view that the authority is doing insufficient work with regard to its equality scheme is a sufficient basis for investigation.

Both under Section 10 and Section 11, investigations only take place when there is a complaint and/or suspicion that the directives and measures laid out in the equality scheme are not properly implemented and not when the authority at a more general level does not have due regard for equality issues.

Before investigations are initiated, the complaint goes to the Investigations Team, which can advise both the complainants and the authorities concerned. According to Section 10, the investigation team forwards complaints to the Statutory Duty Committee. The committee then discusses and approves an investigation, after which the investigation team leads the investigations (Investigations, 2.1-2.2, Northern Ireland Equality Commission).

### **3.2 UK: Equality and Human Rights Commission**

The Equality and Human Rights Commission (EHRC) was established by the Equality Act 2006 and is an independent, statutory body. By law, it is Great Britain's national equality body and has been awarded an A-status as a National Human Rights Institution (NHRI) by the United Nations.

The declared aim of the Commission is to make Britain fairer and to safeguard and enforce laws. In addition, the EHRC is an advisory body that conducts research and analysis and, through its expertise, is a point of contact for policymakers, public authorities and businesses. Cooperation with other organizations plays an important role for the EHRC, but does not limit its independence and the enforcement of its core concerns. The Commission sees itself as a catalyst for positive change, as a mediator between different parties, as a source of information, as a lobbyist for a better and fairer equality policy and as a monitoring body ensuring the correct implementation of legal obligations.

One of the mechanisms by which the Commission controls and critically monitors equal treatment is through research. Intensive sociological research and the evaluation of equality data provide a basis for argumentation that makes it easier for the Commission to propose legislative changes.

The Commission may file investigations, initiate legal proceedings and assist the plaintiff in case of infringement and/or sue.

### 3.2.1 Monitoring Through Research

The Equality and Human Rights Commission (EHRC) and its research department regularly research and publish on equality issues in Great Britain. Its reports, all of which are freely available on the Commission's website, are based on data from the Office for National Statistics (ONS). The Commission addresses a wide variety of issues and questions, including salary equality, the treatment of migrants in Great Britain, the position of persons with disabilities in British society, and violent attacks that these individuals continuously experience, and much more.

The Commission's extensive research work creates an argumentative foundation that plays an important role in legal advice, litigation and policy advice. The Commission can therefore refer to issues that have already been discussed and provide decision-makers with relevant material. The search enables the Commission to obtain an overview of the current state of affairs and the situation of people experiencing discrimination. If laws, corporate practice, access to education and employment, etc. are critically analyzed, then this is a (desirable and progressive) monitoring and control mechanism.

By collecting and analyzing information/evidence regarding compliance with the duties, in particular the specific duties, the Commission can hold decision makers accountable and propose and/or propose improvements by means of concrete examples. Cooperation with organizations facilitates and, above all, promotes major projects of the Commission at the local level.

The Commission also conducts case studies to track the positive effects of equality duties

#### 3.2.1.1 Collection and Analysis of Information/Evidence Regarding Compliance with Duties, in particular Special Duties

One of the tasks of the Equality and Human Rights Commission (EHRC) is to review the equality information to be published by public authorities and businesses. Part of this review is to determine if the format, accessibility, and completeness of the information comply with the requirements set by the specific duties. If they do not, or do so only partially, the Commission will alert the respective authorities of their failures and, in the absence of response and/or self-correction, may take legal action against the authorities.

The information to be published serves to document the adherence to the general equality duty. The data is meant to provide information about the composition of service users and employees, present concrete measures to improve equality within the authority, and track whether and how these improvements are made. Publishing this information creates transparency and makes it easier for the authorities to be held accountable if their actions are inadequate and inconsistent with their duty.

The collection of information and reliable data is the responsibility of the authorities and certain businesses, which only in this way can guarantee the implementation of equality schemes and action plans. The Commission provides sufficient material to inform authorities and businesses on how to prepare the reports. It is important that the collection

and publication of data is a first step, but by no means enough to ensure the implementation of the duty.

It is the responsibility of the authorities and respective businesses to use the data to identify the need for action and to take action to remedy, or at least gradually reduce, the deficiencies.

The Equality and Human Rights Commission regularly publishes reports on England, Wales and Scotland with regard to the implementation of the general equality duty and the special duties. In Northern Ireland, reporting and feedback are part of equality duties in the public sector.

#### **3.2.1.1.1 Reports on England**

In 2012 the Equality and Human Rights Commission (EHRC) issued a report on the publication of equality information. According to the report, only about every second of 1,159 public authorities has published equality information according to plan. 78% of the investigated institutions partially fulfilled the regulations. The probationary services and police did very well with 71% and 69% respectively regarding the legitimate publication of the data. National organizations and NHS service officers were the worst performers, with 25% and 36%, respectively. In total, 6% of the assessed authorities did not publish any equality information. The Commission announced that it would turn to these authorities and ask them to remedy these abuses and fulfil their duties. If this does not happen, the Commission will use its legal capacity to enforce its obligations.

Another important finding of the report was that most authorities tend to publish data about their employees rather than data about their service users. On the one hand, this is understandable, since the data on their employees is already available. On the other hand, this should be improved as part of the adherence to the specific duties. Most information about employees was published in the categories of ethnicity, gender, age and disability (86%). Only just over half (56%) of all investigated authorities have also published information that takes into account religion or belief and sexual orientation (Report Publishing Equality Information: Commitment, Commitment, and Transparency, The Equality and Human Rights Commission, page 3-9). December 2012.

#### **3.2.1.1.2 Reports on Wales**

In 2015 the Equality and Human Rights Commission (EHRC) published a report on the implementation of public sector equality duties in Wales. In Wales legislation is more specific and comprehensive when it comes to the specific duties than in England. One of the specific duties is to publish all information on wage inequalities and to explain the reasons for these inequalities. In addition, training employees and creating a strategic equality plan are part of their duties.

According to the Commission, each of the participating organizations reported at least one positive example regarding the implementation of the general duty. Most

organizations even named more than one example. One area in which most organizations desire improvements is the provision of practical information regarding the implementation of general and specific duties. In addition, many of the participating authorities found it difficult to collect equality information.

These concerns indicate that the quality of the data is improving, but at the same time data protection needs to be upheld – The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, Welsh Statutory Instruments, Regulation 20. One concern among the authorities was that increased interviews with all employees and service users could put undue stress on the respondents.

### 3.2.1.1.3 Reports on Scotland

In Scotland, it is part of the equality duties to publish a report on equality policies and their consequences every four years, collect staff data staff on diversity and make them available to the public. Every two years the authorities must publish information on gender inequality, make statements about pay inequality and publish them every four years. Equality criteria must then be included in public procurement. Thus, Scottish legislation includes duties that are not included in the English and Welsh legislation.

In a study published in 2013, the Equality and Human Rights Commission (EHRC) found that only one in three authorities published robust equality outcomes that were both clear and measurable. In June 2014, the Equality Commission launched a training program that directly assisted the most hopeful 45 authorities in assessing their equality policies. The program consisted of a combination of seminars, mutual support, targeted support from Commission staff and a self-assessment tool.

As part of its support to public authorities in the implementation of equality duties, the Scottish Government has set up a so-called Equality Evidence Toolkit, which is updated twice a year and provides links to key databases and current equality research.

As a reason for inadequate data, the Commission listed the general unfamiliarity with the computer systems used to collect and analyze staff data, a low rate of publication of employee data and difficulties in matching employee data with local population data. In addition, identified problem areas are a corporate culture that does not prioritize equality efforts, insufficient knowledge of equality policies, pay inequality, the labor market gender distribution and unequal treatment.

#### 3.2.1.1.4 Reports on Northern Ireland

Equality legislation in Northern Ireland as defined by the Northern Ireland Act 1998 differs in some respects from the Equality Act 2010. Therefore, the authorities in Northern Ireland are also subject to slightly different reporting and equality duties. For example, authorities with more than 50 employees have to register with the Equality Commission and submit an annual Return Monitoring report. It is the duty of employers to conduct a full so-called ‘Article 55

The 'Article 55 Review' is designed to regularly review the composition of staff and to reflect on whether both Catholics and Protestants are adequately represented. Regarding the history of Northern Ireland and the bloody conflicts, this review is very site-specific and should help to improve inter-denominational relations.

Review’ at least every three years with regard to the composition and recruitment of employees. In Northern Ireland too, it is the duty of the authorities to submit equality schemes and concrete action plans. One difference to the other UK countries is that, for example, there can be no legal action against discrimination in multiple areas, as the Northern Ireland Act 1998 does not provide any legal basis in this case.

#### 3.2.1.2 Joint Monitoring in Cooperation with Other Bodies

At the national level, monitoring cooperation manifests itself, inter alia, through cooperation with non-governmental organizations. For example, the Equality and Human Rights Commission (EHRC) in the UK launched a campaign to prevent hate crime against the lesbian, gay, bisexual and transgender (LGBT) communities. The campaign was supported by the LGBT Consortium, Stop Hate UK and Stonewall Housing, as well as by Leicester University’s Center for Hate Studies. These organizations help to research the topics, to develop solutions and above all to publicize and enforce the large-scale projects of the national commission at the local level. Precisely because the respective official anti-discrimination authorities are often based in the state capital, it is difficult to reach other parts of the country. With few incidents of discrimination being reported at all, it is important to support low-threshold counselling centers working with the official anti-discrimination agencies and to create as broad a network of assistance as possible. Some projects of the Equality and Human Rights Commission are also supported by private companies or unions, with the result that the gender equality legislation can be better implemented, because it is known by a wider public and there are more comprehensive enforcement mechanisms.

#### 3.2.1.3 Initiation and Conduct of Case Studies

As part of its mission, the Equality and Human Rights Commission (EHRC) provides case studies to track the positive effects of equality duties. These studies serve to show companies and authorities how concrete measures can look and how they can be realized.

The examples make it clear that the implementation of equality duties is often confronted with financial, organizational, social and individual benefits. Several case studies are presented on the Commission website. The Commission gives a brief overview of the situation to be improved for the organization, the authority and/or the company, presents the measures taken and shows to what extent these measures had a positive impact on the corporate culture or the efficiency or the provision of services.

These case studies have been carried out in health and social services, in local authorities, in schools and in companies, and show the versatility of equality. If needed, appropriate organizations that want to change something can contact the Commission and ask them for help. One measure that often seems to produce positive results is the consultation with people affected by inequality in the respective situation. If, for example, people with disabilities are asked for advice when developing urban planning projects, the risk of having to undertake costly retrofitting measures in retrospect is much lower - see Saving Money by involving disabled people in the decision-making process, Leicester City Council ; Financial Benefits, The Equality and Human Rights Commission.

### **3.2.2 Executive Powers According to the Equality Act 2006**

In the framework of the Equality Act 2006, the Equality and Human Rights Commission (EHRC) has specific duties to enforce the laws. On the one hand, the Commission must ensure that equality legislation is implemented and, on the other hand, work towards the elimination of discrimination and harassment. Legislative powers allow the Commission to require employers, service providers, educational institutions, public authorities and housing service providers to stop all discriminatory practices and policies and to make the necessary changes in corporate culture and its regulations to prevent future discrimination and non-compliance.

In many cases, the Commission is very successful in resolving cases of discrimination in an informal way. Where attempts fail to encourage the relevant authorities and/or companies to adhere to their duties, the Commission may use its formal enforcement powers. These formal steps include inquiries, formal investigations, unlawful act notices, conventions not to commit unlawful acts, actions to prevent or limit non-compliance or unlawful acts, assessments and compliance notices.

#### **3.2.2.1 Inquiries**

An inquiry according to Section 16 of the Equality Act 2006 is one way to learn more about respect for equality, diversity and human rights within a particular sector or topic.

The Commission may conduct inquiries on any matter relating to Section 8 and 9 of the Equality Act 2006. An initial suspicion is not necessary in order to conduct a survey. If the Commission conducts a survey, it has to publish terms of reference, it may require the organizations to provide information on the targets, it has then the right to further scrutinize the information available and it has to publish a report on the study results. Depending on the results of the report, the Commission may make recommendations for changes and improvements to the policies, practices and regulations of the respective organizations. The organizations are then obliged to follow these recommendations.

### **3.2.2.2 Formal Investigations**

Section 20 of the Equality Act 2006 describes what action the Commission can take if there is a suspicion that an organization has done or is doing something, which violates the Equality Act.

The different steps of an investigation may include providing written details of why the action of an organization may be unlawful, publishing the final terms of reference, which requires the respective organization to provide information, documents and oral evidence of its compliance and finally to publish them in a report.

This final report will clarify whether or not the organization has committed an unlawful act.

It should be noted that the final report will be presented to the respective organizations and they have at least 28 days to comment on it before its publication. At the end of the investigation, the Commission makes recommendations. Should the organization ignore these recommendations or otherwise fail to implement them, the Commission may file a notification of an unlawful act.

### **3.2.2.3 Unlawful Act Notice**

Under Section 21 of the Equality Act 2006, the Commission may publish a notice if, at the end of an investigation, it becomes clear that an organization committed an unlawful act. This notice provides detailed information on the extent to which the law has been broken and may also propose necessary measures to improve the situation and to prevent further breaches of the law. In addition, the organization may be required to prepare an action plan.

### **3.2.2.4 Agreement not to Commit Unlawful Acts**

The Commission may enter into a formal agreement with a person or organization pursuant to Section 23 of the Equality Act 2006 after it has been accused by the Commission to have committed an unlawful act. By entering into this agreement, the organization or person agrees to act in accordance with the law. These agreements may be entered into even if no formal investigation has taken place beforehand.

If, during the investigation, an organization agrees to enter into an agreement in accordance with Section 23 and develop an action plan, the Commission will terminate the investigation. If the organization then behaves lawfully, the investigation will not resume.

Once the agreement and an action plan have been established, the Commission will regularly report to the organization or person, who in turn will have to report on progress.

### **3.2.2.5 Legal Action to Prevent or Limit Non-compliance or Unlawful Acts**

If on the basis of Section 24 of the Equality Act 2006, the Equality Commission assumes that an employer, a service provider or an authority commits an act which is likely to be unlawful according to the Equality Act, it may apply to the respective country court (in England and Wales) or the respective sheriff (in Scotland).

The court or the sheriff will then be asked for a preliminary injunction or interdiction. These legal steps may also be taken if one of two parties to an agreement has not adhered to or is unlikely to abide by any part of the agreement. The judicial requests then require the respective legal entity to comply with legal requirements or to implement specific actions recommended by the courts or sheriffs.

On the website of the Equality and Human Rights Commission, you can find some examples of lawsuits brought against companies, public authorities and/or individuals due to violations of the Equality Act.

Section 25 of the Equality Act 2006 specifies the legal procedure to restrict cases of illegal advertising material and the instruction to discriminate. The Commission may take legal action in relation to the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

### **3.2.2.6 Assessments**

Section 31 of the Equality Act 2006 allows the Commission to carry out an assessment to determine to what extent or in what way an authority or a company complies with the duties.

This power allows the Commission to determine the approach of a specific authority in the implementation of public duties. This includes procedural guarantees set out in Annex 2 of the Equality Act, which the Commission must comply with while carrying out an assessment. This includes respecting the preparation and publication guidelines of the targets before the Commission even begins to assess it – Better Policy, Better Lives: Section 31 Assessment into Scottish Ministers' Progress in Meeting the Public Sector Equality Duties –

In 2010, the Equality Commission reviewed the expenditure of the Ministry of Finance in an assessment. The main purpose of this assessment was to determine to what extent the ministry's spending covers the needs of and impacts on protected groups.

Report of the Equality and Human Rights Commission, published in November 2011.

### **3.2.2.7 Compliance Notices**

Section 32 of the Equality Act 2006 refers exclusively to the authorities listed in Schedule 19, which are subject to the equality duty. This duty applies only to the public, not to the private sphere of action of the respective organization.

If the Commission considers that an authority does not comply with the equality duty, it has the option of formulating a compliance notice. This may include a request to comply or it may provide detailed measures to be taken to ensure compliance.

A notice may also require the organization to provide the Commission with further information to enable it to verify that the duty is being complied with. If the organization does not comply with the requirements listed in the notice, the Commission may apply to the courts. Should the organization fail to comply with a court order, this constitutes a criminal offence.

### **3.2.2.8 Judicial Review of the Equality Duty**

If the Commission believes that a public authority has taken a decision or acted in a manner contrary to the Equality Act 2010 or the Human Rights Act, it can initiate a judicial review under Section 30 of the Equality Act 2006. The court may then make a statement as to whether a decision, a directive, an act or non-compliance is legal. In addition, the court may suspend decisions or make a request or (in Scotland) a prohibition.

Examples of situations in which the Commission, rather than an interested party, make a claim include, inter alia:

- If the government proposes a legislative amendment that the Commission believes could contribute to the violation of human rights, the Commission may face a judicial review before the amendment is passed or within three months of its adoption.
- If there are several stakeholders whose experiences can be used to highlight a problem, but where a single legal claim by only one person in the group would be insufficient to illustrate the scale of the problem.
- In cases where actual or potential sufferers have no access to lawyers or cannot finance the action at their own expense.

## **3.3 Republic of Ireland: Irish Human Rights and Equality Commission**

Since the Irish Human Rights and Equality Act did not enter into force until 2014, no meaningful data on the adherence to public duties are yet available. Several publications by the Irish Human Rights and Equality Commission (IHREC) clearly mention that the data needs to be improved in order to bring about significant changes and improvements

in the status quo and to remedy concrete faults. However, there is no clear provision in Irish legislation regarding the collection of equality data. Although Article 42 of the Irish Human Rights and Equality Act provides that public authorities are subject to a proactive duty or responsibility, there is no need for specific figures to confirm that the relevant authority is complying with its duty. In order to check whether the authorities adhere to the equality duty, the Commission may review strategic plans or review annual reports. The Commission carries out information campaigns, devises tools for the implementation of the duties and initiates model projects dealing with specific topics or political issues in the context of equality efforts.

As the law is still new and the Commission has only recently begun work, the focus of the last annual report of the Equality Commission is on the implementation of public equality duties and the collection of equality data within the Commission itself. The measures that have been taken and the need for improvement can be deduced, which the Commission recommends to other authorities as necessary steps towards implementing the duty. For example, a key step in the implementation of equality is the consultation with employers, managers, trade unions, individuals and communities to identify where better support, information, data, etc. are needed and how the Commission can best empower stakeholders in the process of complying with the duty. The Commission has also developed a set of key performance indicators (KPIs) to measure the impact of their work between 2016 and 2018. All these measures must be implemented by public authorities and companies (often on a smaller scale) and the results must be regularly submitted to the Commission, which checks the compliance with the duty. In the course of its work, the Commission has repeatedly sought joint monitoring in cooperation with other institutions in order to develop more complex solutions and carry out a more detailed search.

The IHREC developed a campaign to attract more people for consultation and feedback on the work of the Commission. The 'Have your Say' campaign was one of the measures aimed at improving the implementation of the duties. The feedback will be collected, organized and taken into account in the preparation of the Strategic Plan 2016-2018.

In 2018, initial valid statements on reporting requirements and the implementation of positive measures in Ireland are expected to be available.

## 4. Public Sector Duties in South Africa

In this digression we will present you the legal framework of Public Sector Duties in South Africa as well as the implementation of measures.

### 4.1 Legal Framework in South Africa

Unlike in the United Kingdom, South Africa does not have one specific act that encapsulates all public sector equality duties. In fact, the term ‘public sector equality duty’ is seldom used within South Africa’s legislation; reference is rather made to ‘Affirmative Action Measures.’ Nonetheless there exists an expansive legal framework which has been instilled with the aim of eliminating discrimination within the public sector. The goal of such action is to speed up the creation of a representative and equitable Public Service and to build an environment that supports and enables those who have been historically disadvantaged by unfair discrimination to fulfil their maximum potential. Consequently, the Public Service may derive the maximum benefit of their diverse skills and talents to improve service delivery.

Provisions within the newly enacted Constitution of the Republic of South Africa 1996 lay the provisions for public sector equality duties and provide the stimuli for the enactment of related legislation. The Employment Equity Act 1998 (EEA), the Promotion of Equality and Prevention of Discrimination Act 2000 (PEPUDA), and the Broad-Based Black Economic Empowerment Act 2003 (B-BBEEA) combined can be said to make up the legal framework for South Africa’s public sector equality duties. Each act contains an expansive framework within which provisions for public sector duties can be discerned.

While the EEA focuses on equality in the workplace and the labor force, the PEPUDA was assented to cover issues non-work related and to facilitate compliance with international conventions ratified by South Africa. The B-BBEEA can be said to widen the provisions set forth in the EEA.

What is a Public Sector Equality Duty? The essence of public sector equality duties is the enactment of legislation that ensures that public authorities - national or local governmental governed agencies and institutions - are aware of the role they are required to play in providing preventative measures against discrimination, and employing active measures towards equality.

### 4.1.1 Constitutional Provisions

Given South Africa's legacy of Apartheid and injustice, the enactment of a new constitution in 1997 marked a significant event in the history of human rights within the country. Subsequent to detailed and inclusive negotiations held by an all-inclusive constitutive assembly between 1994 and 1996, the South African Constitution took effect from 4 February 1997.

Currently heralded as one of the most progressive constitutions in the world, its contents lay the foundation for public sector equality duties. From the offset, the Preamble notes that South Africa is "united in [their] diversity" and that "every citizen is equally

The foundational basis for public sector equality duties are found in Chapter 2, Section 9 'Equality' of the Constitution of the Republic of South Africa, 1996. The relevant section can be read online

protected by law." Chapter 2 of the Constitution encompasses the *Bill of Rights* - the cornerstone of democracy in South Africa - and affirms the democratic values of human dignity, equality and freedom. Section 9: Equality within the Bill of Rights provides the foundation for the enactment of public sector equality duties.

#### 4.1.1.1 South African Constitution: Chapter 2, Section 9 Equality

Section 9 (1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9 (2) defines equality as the full and equal enjoyment of all rights and freedoms. In order to promote the achievement of equality, legislative measures may be taken to "protect or advance persons, or categories of persons, disadvantaged by unfair discrimination."

Sections 9 (3) and 9 (4) provide that no person or the State may directly or indirectly unfairly discriminate against anyone on one or more grounds. These grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Section 9 (4) further states that national legislation must be enacted in order to prevent or prohibit unfair discrimination. This provision provided the stimuli for the enactment of the EEA, the PEPUDA, and the B-BBEEA.

### 4.1.2 Employment Equity Act 1998 (EEA)

With the legacy of Apartheid, South Africa understood that discriminatory laws could not simply be repealed. Instead, laws obligating equal treatment had to be instilled. The EEA was therefore enacted through parliament in 1998 with the aim of eliminating unfair discrimination in employment and creating a framework for the implementation of affirmative action measures.

The EEA applies to all persons defined as an ‘employee’ or ‘employer’ within the context of the Labour Relations, and to job applicants. Accordingly, Section 213 of the Labour Relations Act provides that an employee is:

- (a) any person, excluding an independent contractor, *who works* for another person or *for the State* and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

According to Article 5 of Chapter II of the EEA - *The Prohibition of Unfair Discrimination*- every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. These are the so called affirmative action measures and they refer to the procedures in place that aim to ensure that equally qualified individuals from designated groups have equal opportunities in the workplace, and are equitably represented in all occupational categories and levels in a work force.

In addition to the 16 prohibited grounds of discrimination listed within the Constitution, Article 6 (1) of the EEA further includes the following three grounds: family responsibility, HIV status, and political opinion. Article 6 (3) additionally provides that harassment is a form of unfair discrimination.

The EEA provides that the following are prohibited grounds of unfair discrimination: Race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family responsibility, HIV status, and political opinion.

Chapter III- *Affirmative Action* - of the EEA lays out the provisions for affirmative action measures in greater detail.

#### **4.1.2.1 The EEA: Provisions for Affirmative Action Measures**

Chapter III of the EEA provides the framework for affirmative action measures and applies only to designated employers. This category is defined as consisting of (i) employers with 50 or more workers, (ii) employers ordered to comply by a bargaining council agreement, (iii) any employers who volunteer to comply, (iv) municipalities, and (v) organs of the State. An organ of the State is defined in the South African Constitution to mean:

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation.

Thus, all nationally and locally governed agencies and institutions (the public sector) would be deemed designated employers in terms of the EEA, and all provisions for affirmative action measures would apply.

Section 13 of Chapter III outlines the obligations conceived for designated employers in order to achieve employment equity. Firstly, the employers must implement affirmative action measures for individuals from designated groups. Such measures include consulting with employers, as outlined in Section 16, on matters concerning the conducting of an analysis as required under Section 19, preparing employment equity plans, and reporting on progress made with the implementation of the plan as detailed by Section 20 and 21.

The EEA defines affirmative action measures as “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in a workforce of a designated employer.” (EEA, Chapter III Section 15(1))

In sum, Section 15 provides that the affirmative action measures implemented in the context of designated groups must include:

- (a) Measures to identify and eliminate employment barriers;
- (b) Measures to further diversify the workplace;
- (c) Making reasonable accommodation to ensure that equal opportunities are enjoyed and that equitable representation is present in the workforce in all occupational categories and levels; and
- (d) Implementing appropriate training measures to retain and develop people from designated groups and to help develop their skills.

#### **4.1.2.1.1 The EEA Legal Obligations According to Section 19**

Under Section 19 of the EEA designated employers, which include the public sector, are required to collect information and analyze employment policies, practices, procedures, and their working environment with the aim of identifying employment barriers which may serve to negatively affect individuals from designated groups.

In sum, Section 19 ensures that employers are actively made aware of both discrimination and the risks posed for discrimination within the workplace. The analysis must include an overview of the employer’s workforce within each occupational category and across all levels in order to determine the degree of underrepresentation of people from designated groups.

The analysis is then paired with the equity plan and progress, whose details are outlined in Section 20 and 21. Together, the analysis, plan and notes on progress create a report submitted to the Director-General of the Department of Labour. The Commission for Employment Equity collates the reports from the employers to conduct their own analysis.

Red box: Section 16 and 17 of the EEA provide that in creating employment equity plans, conducting analysis, and compiling reports, employers must take reasonable steps to consult and reach agreements with employers and their representatives. This includes both designated, non-designated employers, and trade unions.

#### **4.1.2.1.2 The EEA Legal Obligations According to Section 20 and 21**

Section 20 of the EEA outlines the way in which designated employers, which include those in the public sector, must create a plan which will allow for reasonable progress towards employment equity in their respective workforce.

Accordingly, the plan must contain yearly objectives, and the specifics of the affirmative action measures that are required to be implemented in accordance with Section 15. In the case where the analysis has shown underrepresentation of suitably qualified individuals from designated groups, a strategy and timetable must be planned to achieve equitable representation of each occupational category and level in the workforce. Additionally, the strategy, which must be between one and five years long, should contain a plan for each year that works towards equitable goals.

The plan must also outline those responsible for the monitoring and evaluating of the progress being made towards the implementations and any internal procedures to resolve disputes concerning interpretation and implementation of the plan.

In accordance with Section 21, the progress made must be reported to the Director General of the Department of Labour within six to 12 months (depending on the number of employees after which the employer became a designated employer) and then proceed to submit progress reports on a yearly or bi-yearly basis. All reports are to be made publically available.

The reports are then analyzed on an annual basis by the Commission for Employment Equity, who then compile their own annual report after having conducted an analysis of all the reports received from designated employers.

#### **4.1.2.2 The EEA: Designated Groups**

In Chapter I Definitions- of the EEA it is provided that designated groups refer to black people, women, or people with disabilities. 'Black people' refer to "Africans", "Colored" and "Asians". In a landmark decision in 2008 from the High Court in Pretoria, Chinese South Africans who were living within South Africa during the era of Apartheid were declared to "fall within the ambit of the definition of 'black people' in Section 1 of the Employment Equity Act 55 of 1998". The driving force of the decision was the purpose of accessing affirmative action benefits.

### **4.1.3 The Promotion of Equality and Prevention of Discrimination Act 2000 (PEPUDA)**

The PEPUDA was assented two years after the EEA in the year 2000 to give greater effect to Chapter 2, Section 9 of the Constitution and covers issues non-related to work further facilitating compliance with internationally ratified Conventions.

In accordance with Chapter I, Section 5 (1), the PEPUDA is binding on the State and applicable to all persons. Furthermore, Chapter II, Section 6 provides that neither the State nor any person may unfairly discriminate against any person. While attention is placed upon the prohibition of unfair discrimination on grounds of race, gender and disability, all of the following are expressly prohibited grounds for discrimination: race, gender, sex, pregnancy, family responsibility or status, marital status, ethnic or social origin, HIV/AIDS status, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Within the PEPUDA, discrimination is defined as any act or omission, including a policy, law, rule practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantages; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds. Furthermore hate speech, harassment and dissemination, and publication of information that unfairly discriminates are prohibited.

In order to eliminate discrimination, Chapter V of the PEPUDA outlines Affirmative Action Measures. Additional legal obligations are specified under Sections 26 and 28.

#### **4.1.3.1 The PEPUDA: Affirmative Action Measures**

Public sector equality duties can be extrapolated from the provision within the PEPUDA as many of the affirmative action measures focus on public authorities. The sectors include: Labour and employment, education, health care, insurance services, pensions, partnerships, professions and bodies, provision of goods, services and facilities, and club sports and associations.

Chapter V of the PEPUDA provides that the State and all persons have the duty and responsibility to promote awareness of the PEPUDA and achieve equality. This includes actions such as developing and implementing programs, codes of practice, trainings and action plans to attain equality, further existing

The PEPUDA provides that the State includes

- a) any department of State or administration in the national, provincial or local sphere of government;
- b) any other functionary or institution
- c) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- d) exercising a public power or performing a public function in terms of any legislation or under customary law or tradition.

legislation, and carry out information campaigns. Where necessary Chapter 9 Institutions shall assist the State ministers must additionally create 'equality plans' which are submitted to the South African Human Rights Commission for review.

Chapter V, Article 26 and Section 28 of the PEPUDA explicitly refers to public sector equality duties by outlining the 'responsibilities of persons operating in public domain to promote equality'.

#### **4.1.3.2 The PEPUDA: Chapter V, Article 26 and 28**

Article 26 and 28 of Chapter V of the PEPUDA together make up the direct source of public sector equality duties in South Africa.

Article 28 (3) (a) provides that the State and institutions performing public functions have the duty and responsibility to eliminate discrimination on the grounds of race, gender and disability and to promote equality in respect of race, gender and disability. In carrying out these duties the State, institutions performing public functions and, where appropriate and relevant, juristic and non-juristic entities, must

- (i) audit laws, policies and practices with a view to eliminating all discriminatory aspects thereof;
- (ii) enact appropriate laws, develop progressive policies and initiate codes of practice in order to eliminate discrimination on the grounds of race, gender and disability;
- (iii) adopt viable action plans for the promotion and achievement of equality in respect of race, gender and disability; and
- (iv) give priority to the elimination of unfair discrimination and the promotion of equality in respect of race, gender and disability.

Article 26 provides that it is the responsibility of any person directly or indirectly contracting with the State or exercising public power to promote equality by

- (a) adopting appropriate equality plans, codes, regulatory mechanisms and other appropriate measures for the effective promotion of equality in the spheres of their operation;
- (b) enforcing and monitoring the enforcement of the equality plans, codes and regulatory mechanisms developed by them; and
- (c) making regular reports to the relevant monitoring authorities or institutions as may be provided in regulations, where appropriate.

#### **4.1.4 Broad-Based Black Economic Empowerment Act 2003 (B-BBEEA)**

The B-BBEEA was assented in January 2004 to establish a legislative framework with the aim of directly increasing the meaningful participation of black people in the economy and is binding upon the public sector, particularly governmental departments, public entities or State-owned enterprises and organs of State, including national or provincial departments, municipalities, Parliament, provincial legislatures and public entities.

The B-BBEEA defines ‘black people’ as a generic term which refers to Africans, People of Color, Indians, and, as of a court decision in 2008, Chinese. The economic empowerment is targeted at women, workers, youth, disabled persons and those in rural areas. In addition to participation in the economy, the B-BBEEA includes other objectives, such as achieving change in the racial composition of ownership, management structures, and in skilled occupations of existing and new enterprises, and in increasing access to economic activities and skills training for all ‘black’ workers.

The B-BBEEA further establishes a Black Economic Empowerment Advisory Council and authorizes the Minister of Trade and Industry to issue codes of good practice in order to promote purposes of the Act. In accordance with Section 10, the codes must be applied by the public sector, thereby inadvertently creating public sector duties which play a role in advancing the constitutional goal for equality of opportunity.

Red box: The Broad-Based Black Economic Empowerment Act can be viewed online.

##### **4.1.4.1 B-BBEEA: Legal Obligation According to Section 10**

According to Section 10 of the B-BBEEA, every organ of state and public entity must take into account and as far as is reasonably possible, apply any relevant code of good practice issued in terms of the Act in:

- (a) Determining qualification criteria for the issuing of licenses, concessions or other authorizations in respect of economic activity in terms of any law;
- (b) Developing and implementing a preferential procurement policy;
- (c) Determining qualification criteria for the sale of state-owned enterprises;
- (d) Developing criteria for entering into partnerships with the private sector; and
- (e) Determining criteria for the awarding of incentives, grants and investment schemes in support of Broad Based Black Economic Empowerment.

Red box: The aim of the B-BBEEA is to directly increase the meaningful participation of black people in the economy. The B-BBEEA defines ‘black people’ as a generic term which refers to Africans, People of Color, Indians, and Chinese.

## **4.2 South Africa: Implementation of Measures**

The measures providing forms of public sector equality duties are implemented in a number of different ways. Firstly, Chapter 9 of the South African Constitution outlines the provisions for state institutions which support constitutional democracy. Many of these institutions are involved in providing, monitoring and evaluating compliance with public sector equality duties, and are referred to as ‘Chapter 9 Institutions’.

The public sector equality duties derived from the EEA, PEPUDA and B-BBEEA are accomplished through separate commissions, committees and codes of good practice. The implementation of the EEA, the implementation of the PEPUDA and the implementation of the B-BBEEA result in an array of public sector equality duties being active within South Africa.

### **4.2.1 Chapter 9 Institutions**

Chapter 9 of the South African Constitution lists institutions established with a purpose of safeguarding and strengthening the constitutional democracy within South Africa. The institutions are independent and impartial, subject only to the Constitution and the law. Yearly, they must report on their activities to the National Assembly.

The institutions consist of the Public Protector, the South African Human Rights Commission (SAHRC), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality (CGE), the Auditor-General, and the Electoral Commission.

In terms of public sector equality duties, the SAHRC, and the CGE play their own unique role, specifically in enabling the realization of provisions set forth by the PEPUDA. According to Section 25 (3) of the PEPUDA, the institutions are competent to conduct investigations into cases, make recommendations, and request reports regarding cases and their outcomes from the Department of Justice and Constitutional Development.

### **4.2.2 Implementation of EEA**

The implementation of the EEA is primarily overseen by the Commission for Employment Equity, A statutory body that was established under Chapter IV, Section 28 of the EEA. The Commission’s role is to advise the Minister of Labour on the implementation of the Act and to monitor and ensure compliance with its provisions.

#### **4.2.2.1 The EEA: Commission for Employment Equity**

Section 28 of the EEA established the Commission for Employment Equity, a statutory body whose roles include advising the Minister of Labour on matters concerning the

EEA. This includes making policy recommendations and advising on issues concerning the implementation towards achieving the EEA's objectives.

After receiving the reports compiled by designated employees who have already conducted their own analysis based upon the implementation of their employment equity plan, the Commission for Employment Equity conducts its own analysis. In 2016 there was a slight increase in the number of employment equity reports received in comparison to the previous year, which may be due to the increase in the awareness of EEA compliance amongst designated employers. The Commission then submits an annual report containing the results to the Minister of Labour. The annual reports contain an analysis that is done according to race, gender, and disability as well as being split between provinces, sector and business type.

The reports additionally include the key initiatives taken by the Commission in the previous year to meet their strategic objectives for improving employment equity within South Africa.

The Commission additionally plays a key role in advising the Department of Labour on what Codes should be issued. On advice given, codes, such as the 2002 Code of Good Practice on the Employment of People with Disabilities, and the Code of Good Practice on the Implementation, and Monitoring of Employment Equity Plans are produced.

#### **4.2.2.1.1 Key Initiatives of the Commission for Employment Equity**

At every commencement of the Commission's new term in December, key strategic objectives are set forth which guide the activities for the following year.

Section 2 of the 2016-2017 Annual Report notes the 'Highlights for the Period,' writing of the following initiatives: engagements with stakeholders both strategic partners and representatives from key sectors of the economy; review of the Code of Good Practice on the Employment of Persons with Disabilities and the review of the Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans. In addition, the Commission deemed it urgent to instill the promulgation of Section 53 of the EEA to trigger financial consequences for noncompliance with the EEA.

Section 2 of the 2016-2017 Commission for Employment Equity Report outlines the initiatives taken by the Commission in the past term to meet their objectives for achieving employment equity.

##### **4.2.2.1.1.1 The EEA Improving compliance, Section 53: State Contracts**

In the 17 years since the EEA was enacted, Section 53 of the EEA had never been promulgated. The section provided that every employer wishing to make an offer to conclude an agreement with any organ of state for the "furnishing of supplies or services

to that organ of state or for the hiring or letting of anything,” must at the minimum comply with Chapter II of the EEA. For designated employers (the public sector), compliance with Chapter III is additionally required. To prove compliance, either of the following must be provided:

(i) a certificate issued by the Minister confirming compliance with relevant chapters of the EEA; or

(ii) a declaration by the employer that it complies with the relevant Chapters of this Act, which must be verified by the Director-General before being considered to confirm compliance.

At sectoral engagements conducted by the Commission for Employment Equity requests were made to promulgate Section 53 in the hope that it would expedite transformation, increase compliance levels and simultaneously trigger financial consequences for non-compliance with the EEA.

A designated employer consists of employers with 50 or more workers, employers ordered to comply by a bargaining council agreement, any employers who volunteer to comply, municipalities and organs of the State.

#### **4.2.2.1.2 Code of Good Practice on the Employment of People with Disabilities**

The Code was issued in August 2002 by the Department of Labour with the aim of guiding, educating and informing employers, employees and trade unions to understand their rights and obligations and to promote and encourage equal opportunities and fair treatment of people with disabilities.

The Technical Assistance Guidelines on the Employment of People with Disabilities (TAG) was then issued to complement the Code, with the intention of assisting with the practical implementation of aspects of the EEA relating to the employment of people with disabilities in the workplace. It builds on the Code to set out practical guidelines and examples for employers, employees and trade unions on how to promote equality, diversity and fair treatment in employment through the elimination of unfair discrimination. The TAG includes non-discrimination and affirmative action measures and provides guidelines on how to implement

The Technical Assistance Guidelines on the Employment of People with Disabilities (TAG) defines disability as People who: Have a physical or mental impairment, have a long-term or recurring impairment, have an impairment; which substantially limits their prospects of entry into; or advancement in employment. A summary of the TAG can be read online

it.

#### **4.2.2.1.3 Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans**

In 1999, after having been advised by the Commission for Employment Equity, the Department of Labour issued the ‘Code of Good Practice for the preparation,

implementation and monitoring of employment equity plans'. Although not imposing any legal obligations, the Code must be taken into account by designated employers. Additionally the Department of Labour issued a 'User Guide to the EEA;' a document detailing how the employment equity plan can be prepared and implemented in ten steps.

Sections 8.3 of the Code of Good Practice provides examples of affirmative action measures which can be implemented to achieve employment equity. Such measures included range from investing in communities to instilling bridging programs, and from creating an enabling environment for disabled workers and those with family responsibilities, to providing flexible working hours or accessible working areas.

### 4.2.3 Implementation of PEPUDA

While the monitoring and implementation of measures issued by the PEPUDA are said to be handled by the Equality Review Committee, 'Chapter 9 Institutions' play a greater role in the monitoring and the implementation of affirmative action measures in the realm of public sector equality duties.

Article 28 (3) (a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 provides that the State and institutions performing public functions have the duty and responsibility to eliminate discrimination, and promote equality, in respect of race, gender and disability.

The main institutions which work closely in realizing the aims of the PEPUDA include the South African Human Rights Commission, whose focus is on the discrimination of persons based on disability, gender and race, and the Commission for Gender Equality.

#### 4.2.3.1 Equality Review Committee

Article 32 of the PEPUDA laid the foundations for the establishment of the Equality Review Committee. The function of the committee is to review legislation and advise the Department of Justice and Constitutional Development. The Minister of Justice and Constitutional Development is further advised on the operation of the PEPUDA as well as other pieces of legislation that impact on equality.

#### 4.2.3.2 South African Human Rights Commission (SAHRC)

The SAHRC is the national institution and it is committed to promote respect for, observance of, and protection of human rights for everyone without fear or favor.

The Commission has the powers, as regulated by the national legislation, necessary to perform its functions, including the power to investigate and report on the observance of human rights, take steps to secure appropriate redress where human rights have been violated, carry out research and educate. The SAHRC has dedicated itself to monitoring

and assessing the observance of human rights, while educating and training on human rights and seeking redress for violations.

Article 25 (5) (a) of the PEPUDA prescribes the submission of equality plans to the SAHRC to be dealt with in the prescribed manner, in consultation with the Commission on Gender Equality and in accordance with Article 28 (2), the SAHRC must assist in lessening the extent to which unfair discrimination on the grounds of race, gender and disability persists in the country, the effects of such discrimination and recommendations on how to address the problems.

The SAHRC have 'Equality' as one of their main focus areas and in terms of public sector equality duties, the SAHRC plays an educational role in promoting public sector duties in relation to the inclusion of disabled persons, ensuring equality between genders and between people of different races.

#### **4.2.3.2.1 SAHRC: Educational Role in Promoting Public Sector Duties**

The SAHRC have five strategic objectives. The third strategic objective is to 'deepen the understanding of human rights to entrench a human rights culture.' Within this objective are the aims to raise awareness and understanding of human rights, and to advocate for the adoption of human rights by ensuring their accessibility.

Such an example is the disability toolkit - a 'Quick Reference Guide and Monitoring Framework.' The guide contains information on the rights of disabled people, compiling the rights accorded from the EEA, the B-BEEA, and the Code of Good Practice on the Employment of People with Disabilities. Furthermore, guidelines are listed on how to provide reasonable accommodation, creating inclusive cultures for people with disabilities, and developing a workplace disability strategy.

#### **4.2.3.2.2 SAHRC: Race- Affirmative Action Measures for Public Sector**

In accordance with the SAHRC's constitutional mandate to promote the protection, development and attainment of human rights, eradicating unequal treatment and discrimination based on race is a main area of focus. On the 14 - 15 of March 2016, the SAHRC convened a multi-sectoral stakeholder's conference on racism in Midrand, Johannesburg. The conference resulted in the Midrand Declaration Against Racism 2016, which sets out some aims for the public sector.

The Department of Justice and Constitutional Development (DoJ&CD) has spearheaded the development of a draft National Action Plan 2016-2021 (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, in collaboration with various other role-players which include civil society. The draft will inform a plan which provides the basis for the development of a comprehensive public policy against racial discrimination, xenophobia and related intolerance. It brings stakeholders together to discuss the challenge of combating all forms of intolerances. The SAHRC will play a monitoring and evaluating role in overseeing the implementation of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.

The NAP defines racism as the belief that someone of a different skin color/race or ethnic group is in a position of power over others on the basis of physical and cultural attributes, as well as economic wealth, involving hierarchical relations where the 'superior' race exercises domination and control over others. Racism is a denial of people's basic human rights, dignity and respect. Its expression ranges from small, everyday acts of discrimination, through to barriers and omissions that may be inadvertently established at an institutional level, to acts of threatening behavior and violence.

#### 4.2.3.2.2.1 Public Sector Aims: Midrand Declaration Against Racism 2016

The Midrand Declaration Against Racism, adopted on 15 March 2016, includes the following points aimed at the public sector:

- Calling upon the South African government to continue to implement sound economic policies to encourage growth and equitable distribution in order to address racial inequalities in South African society
- Calling upon the South African government and other critical role players to review the educational curriculum in order to eliminate propagation of racism through the education system.
- Calling upon the South African Parliament to consider gaps in policy and legislation in order to improve legal responses to address overt racist conduct.

The South African Human Rights Commission convened a multi-sectoral stakeholder's conference on racism from 14 - 15 March 2016 in Midrand, Johannesburg. Stakeholders declared to work with the Commission to foster a united, equal society free of racial discrimination.

#### 4.2.3.2.2 National Action Plan 2016 – 2021

The National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) confirms South Africa's commitment to combatting racism and aims to provide South Africa with a comprehensive public policy to combat and eliminate racism, racial discrimination, xenophobia and related intolerance.

The NAP places the right to equality and non-discrimination based on race, color, descent, or national or ethnic origin in the context of public policy, that is, setting practical goals, devising programs and activities to ensure the achievement of these goals, engaging all relevant sectors of government and society, and allocating sufficient resources, all with the aim of eliminating racial discrimination.

Racial discrimination is defined, in the NAP, as any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on, or withholds benefits, opportunities or advantages from, any person on prohibited grounds of race, ethnic or social origin, color, culture, language and birth.

#### 4.2.3.3 Commission for Gender Equality (CGE)

The Commission for Gender Equality is a constitutional entity instituted to strengthen constitutional democracy by focusing on the attainment of gender equality in all spheres of life. Section 187 (1) of the Constitution of South Africa reads: "The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality." Section 187 (2) additionally provides the CGE "the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality".

For the attainment of such equality the CGE recognises that positive action is required by both the State and private actors. The Commission for Gender Equality Act provides the powers and functions of the CGE, from which implications for the public sector can be discerned.

The existence of "systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy" has been recognised by South Africa. Thus the CGE plays a significant role in promoting and eliminating discrimination based on gender. (PEPUDA, 4 (2) (a))

#### **4.2.3.3.1 CGE: Powers and Functions Relating to the Public Sector**

Section 11 of The Commission for Gender Equality Act (CGEA) provides the powers and functions of the CGE. Subsections (a), (b) and (c) of Section 11 are directly linked to the public sector, and can be read here. In sum, they empower the CGE to monitor and evaluate all organs of the state, acts of Parliament passed, and systems of law in place or being proposed. The monitoring and evaluation focuses on the likelihood of gender equality being affected and whether recommendations can be made in order to promote gender equality.

Rather than the explicit issuing of public sector equality duties, implicit public sector equality duties can be discerned. As organs of the State are aware that they are being monitored and evaluated in terms of their adherence and promotion of gender equality, they will be more likely to implement.

##### **4.2.3.3.1.1 CGEA: Section 11, Subsections (a), (b), and (c)**

Subsections (a), (b), and (c) of Section 11 of The Commission for Gender Equality Act read:

The Commission for Gender Equality,

(a) shall monitor and evaluate policies and practices of organs of state at any level, statutory bodies or functionaries, public bodies and authorities, and private businesses, enterprises and institutions, in order to promote gender equality, and may make recommendations that the Commission deems necessary;

(c) shall evaluate any Act of Parliament, any system of personal and family law or custom, any system of indigenous law customs or practices, or any other law in force at the commencement of this Act, or any law proposed by parliament or any other legislature after the commencement of this Act, affecting or likely to affect gender equality or the status of women, and make recommendations to parliament or such other legislature with regard thereto;

(d) may recommend to parliament or any other legislature the adoption of new legislation which would promote gender equality and the status of women.

#### **4.2.4 Implementation of B-BBEEA**

The B-BBEEA provided a legislative framework that, in order to be implemented, required an issuing of a Code of Good Practice. In accordance with Section 9 (1) of the B-BBEEA, the Minister of Trade and Industry, Mandisi Mpahlwa issued the Codes of Good Practice on Black Economic Empowerment in 2007. The codes provide a standard framework for the measurement of broad-based black economic empowerment across all sectors of the economy.

#### 4.2.4.1 B-BBEEA: Codes of Good Practice on Black Economic Empowerment 2007

The Codes of Good Practice, issued by the Minister for Trade and Industry in 2007, builds upon the legislative framework provided by the B-BBEEA. The Codes specify the interpretive principles of the B-BBEEA and outline measurable elements of broad-based black empowerment, providing a guide on how it can be measured using a scorecard.

Firstly it is noted that the Codes of Good Practice apply to the following entities:

- I. all public entities listed in schedule 2 or schedule 3 (Parts A and C) of the Public Finance Management Act;
- II. any public entity listed in schedule 3 (Parts B and D) which are trading enterprises, and which undertake any business with any organ of state, public entity or any other Enterprise;
- III. any enterprise that undertakes any business with any organ of state or public entity; and
- IV. any other enterprise that undertakes any business, direct or indirect, with any entity listed above, and that is seeking to establish its own B-BBEE compliance.

The Codes provide the following seven elements of broad-based black economic empowerment to be measured: effective ownership, management control, employment equity, skills development, preferential procurement, enterprise development, socioeconomic development and specific contributions.

Companies are judged on the above elements using a scorecard explained within the codes. Based on the scores attained via specific measurements, verification is then granted. In accordance with Section 10 of the B-BBEEA, a legal onus is placed on organ of the state to procure goods and services from companies with a good B-BBEE status. This has a trickle-down effect which applies pressure on all suppliers and service providers to meet these standards. The impact that this cascading implementation has on procurement in general is the increase in market access for black companies.

Organs of state and public entities must take an entity's BEE status into account when:

- I. determining qualification criteria for the granting of licenses and concessions;
- II. developing and implementing a preferential procurement policy;
- III. determining qualification criteria for the sale of state-owned enterprises; and
- IV. developing criteria for entering into partnerships with the private sector.

The B-BBEEA defines 'black people' as a generic term which refers to Africans, People of Color, Indians, and, as of a court decision in 2008, Chinese. The economic empowerment is targeted at women, workers, youth, disabled persons and those in rural areas.

#### 4.2.4.1.1 B-BBEEA Scorecard

The Codes of Good Practice provide a generic scorecard for entities to measure their elements of black economic empowerment and receive a B-BBEE status. Each element has a specific weighting and a reference guide within the codes that can be referred to. Effective ownership and preferential procurement have a weighting of 20 points each, while employment equity, skills development, and enterprise development have a weighting of 15 points. Socio-Economic development initiatives weigh five points.

Based on the collation of points, a B-BBEE status is given correlating to the type of qualification received and the level of B-BBEE recognition. For example, a very low score may produce the status of ‘non-compliant contributor’, giving a qualification of less than 30 points on the generic scorecard and a recognition level of 0%.

Various criteria appear throughout the codes which advance the interests of certain categories of ‘black’ people. These include: black women who should form 40-50% of the beneficiaries of all Elements of the Generic Scorecard, and black people with disabilities, black youth, black people living in rural areas and black unemployed people who must form 2 and 3% of the beneficiaries of all Elements of the Generic Scorecard.

Paragraphs 8 and 9 of the Codes of good Practice layout the Generic Scorecard in more detail. The Generic Scorecard follows a broad-based approach in that it allows businesses the flexibility to score points in areas such as Ownership, Management Control, Employment Equity, Skills Development, Preferential Procurement, Enterprise Development and Socio Economic Development.

#### 4.2.4.1.2 B-BBEEA: Measurements

The following factors are measured for each element;

- I. ownership element measures the effective ownership of enterprises by black people;
- II. the management control element measures the effective control of enterprises by black people;
- III. the employment equity element measures the initiatives intended to achieve equity in the workplace;
- IV. the skills development element measures the extent to which employers carry out initiatives designed to develop the competencies of black employees;
- V. the preferential procurement element measures the extent to which enterprises buy goods and services from suppliers with strong B.BBEE procurement recognition levels;

- VI. the Enterprise Development Element measures the extent to which Enterprises carry out initiatives intended to assist and accelerate the development and sustainability of other enterprises; and
- VII. The Socio-Economic Development and Sector Specific Contributions Element measures the extent to which enterprises carry out initiatives that contribute towards Socio-Economic Development or Sector Specific initiatives that promote access to the economy for black people.

The Codes of Good Practice provide more detailed information on the measures and how to calculate their points in Code series 100 - 700.

#### 4.2.4.1.3 B-BBEEA: Verification

The B-BBEE status set upon entities must be verified by an agency who has accredited qualification to carry out such verification. Verification involves verifying and validating that the score and status awarded to a Measured Entity is a result of individual scorecard elements supplied by a Measured Entity, and to evaluate BEE transactions in order to provide an indicative B-BBEE score and Certification based on principles with the Codes of Good practice.

In order to be accredited, verification agencies must conform to the minimum requirements of the Verification Manual and ensure that the necessary standards are maintained and upheld. A report must be issued by the agency to provide detailed scores of each element reflected in the Verification Certificate and the awarded status. The status will determine the extent to which the company can function in the public and private sector. Companies with a good rating will obviously be able to benefit more from public sector work and procurement policies or as role players further down in the supply chain.

The Department of Trade and Industry gazetted the Broad-Based Black Economic Empowerment (B-BBEE) Verification Manual on 18 July 2008, for purposes of accreditation and verification of B-BBEE-related reporting by the South African National Accreditation System (SANAS) and BEE Verification Agencies.

## 5. Links and material

This dossier has been created with information from the following publications, online material and websites.

### Northern Ireland

Article 55 Review, Report Structure, For Small Organizations, Equality Commission for Northern Ireland

Delivering Equality, Investigations, Equality Commission for Northern Ireland

Departmental Equality Scheme, Response to Consultation, Northern Ireland Office, January 2014

Equality Commission for Northern Ireland (2012): Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities. An Outline Guide.

Equality Commission for Northern Ireland (2009): Effectiveness of the Disability Duties: Review Report.

Equality Commission for Northern Ireland (2010): Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities.

Equality Commission for Northern Ireland (2014): Section 75, Northern Ireland Act 1998 and Section 49A, Disability Discrimination Act

Equality Commission for Northern Ireland (2015): Disability duties.

Equality Commission for Northern Ireland (2015): Section 75 duties

Equality Scheme Approval Committee, Equality Commission for Northern Ireland, November 28, 2012

Equality Schemes, Equality Commission for Northern Ireland

Information for Employers, Service Providers, and Public Authorities, Equality Commission for Northern Ireland

Investigation under Paragraph 11, Section 9, Northern Ireland Act 1998, Newry and Mourne District Council, Final Investigation Report, Equality Commission for Northern Ireland, March 2014

Investigations: The Equality Commission of Northern Ireland

Monitoring, Equality Commission for Northern Ireland -

Northern Ireland Act 1998

Northern Ireland Screen Equality Scheme, Annual Progress Report 2011-12

Outline Guide for Public Authorities, Equality Commission for Northern Ireland  
Research and Information Service Briefing Note, Revised approach to the Equality Scheme, Northern Ireland Assembly

Role of the Equality Commission, Equality Commission for Northern Ireland

Vincent & David's Story, Case Outcome, Equality Commission for Northern Ireland

## **Great Britain**

Better Policy, Better Lives: Section 31 Assessment, Equality and Human Rights Commission

Briefing, Anti-discrimination law in Northern Ireland, Equality Challenge Unit

Citizens Advice (2015): What's the public sector equality duty?

Citizens Advice (2016): Must public authorities always comply with the public sector equality duty?

Compliance and Enforcement Policy, Revised in August 2012 to reflect the Commission's Strategic Plan 2012-15, Revised in January 2015, Equality and Human Rights Commission

Disability Discrimination Act 1995, 1995 Chapter 50, UK Government

Equality Act 2010: Schedule 19 (consolidated), April 2011, UK Government

Equality Evidence Toolkit For Public Authorities, Scottish Government, March 27, 2015

Equality and Human Rights Commission (2015): Public Sector Equality Duty.

Equality and Human Rights Commission (2013): Equality Act 2010: Technical Guidance on the Public Sector Equality Duty England.

Equality and Human Rights Commission (2014): The Essential Guide to the Public Sector Equality Duty

Financial Benefits, Equality and Human Rights Commission

Government Equalities Office (2011): Equality Act 2010: Specific Duties to Support the Equality Duty What do I Need to Know? A Quick Start Guide for Public Sector Organisations

Government Equalities Office (2013): Review of the Public Sector Equality Duty: Report of the Independent Steering Group.

Independent Review of the Equality and Human Rights Commission's Statutory Disability Committee, Agnes Fletcher, June 2013

Inquiries, Investigations and wider powers, Equality and Human Rights Commission

Investigation into Metropolitan Police Service, Equality and Human Rights Commission

Judicial Review, Equality and Human Rights Commission

Legal Cases, Equality and Human Rights Commission

List of All Our Research Reports, Equality and Human Rights Commission

Monitoring and Enforcement, Equality and Human Rights Commission

Race Relations Act 1976, 1976 Chapter 64, UK Government

Reading Lists, Equality and Human Rights Commission

Written Statement, The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 & The Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011, Government Wales

Sex Discrimination Act 1975, 1975 Chapter 65, UK Government

Strategic Litigation, Equality and Human Rights Commission

The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, UK Government

The Equality Act 2010 (Specific Duties) Regulations 2011, Equality and Diversity Forum

The Essential Guide to the Public Sector Equality Duty: An overview for listed public authorities in Wales, Equality and Human Rights Commission

The response of the Equality and Human Rights Commission to the independent review of the Disability Committee, Equality and Human Rights Commission

The Section 31 Assessment final report, Equality and Human Rights Commission

### **Republic of Ireland**

A New Public Sector Equality and Human Rights Duty

Annual Report 2015, The Irish Equality and Human Rights Commission

Artikel 42, Irisches Menschenrechts- und Gleichbehandlungskommissionsgesetz, 2014, Republic of Ireland

Employer Training Programme, Equality Commission for Northern Ireland

Employers and Service Providers, Awareness Raising, Equality Commission for Northern Ireland

Employment Equality Act 1998, Republic of Ireland

Equal Status Act, 2000, Republic of Ireland

Irish Human Rights and Equality Commission Act 2014, Republic of Ireland

Irish Human Rights and Equality Commission, Public Consultation Leaflet

National Disability Authority Act 1990, Republic of Ireland

New public sector equality and human rights duty marks an important evolution in our legislative framework, Rachel Mullen

New public sector equality and human rights duty marks an important evolution in our legislative framework, Rachel Mullen