

Unequal Relations?

Policy, the Section 75 duties and
Equality Commission advice: has 'good relations'
been allowed to undermine equality?

Committee on the Administration of Justice (CAJ)

May 2013

Unequal Relations?

**Policy, the Section 75 duties and Equality Commission advice: has
'good relations' been allowed to undermine equality?**

Committee on the Administration of Justice (CAJ)

May 2013



Promoting Justice / Protecting Rights

© Committee on the Administration of Justice May 2013

The material may be reproduced, free of charge, in any format or medium without specific permission, provided the reproduction is not for financial or material gain. The material must be reproduced accurately and not used in a misleading context. If the material is to be republished or issued to others, acknowledgement must be given to its source, copyright status, and date of publication.

This publication is available on our website.

CAJ

Committee on the Administration of Justice

2nd Floor, Sturgen Building

9-15 Queen Street

Belfast

BT1 6EA

Tel: 028 9031 6000

Fax: 028 9031 4583

info@caj.org.uk

www.caj.org.uk

ISBN 978 1 873285 52 7

What is CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organization affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights for Northern Ireland.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON. The organization has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Contents

	Page
Executive Summary	i
1. Introduction	
Background and methodology.....	1
Acknowledgements.....	2
2. From ‘parity of esteem’ to ‘good relations’: the Belfast/Good Friday Agreement and the duties	
What did the Agreement actually provide for and did Government disregard it?.....	3
Equality law, human rights compliance and the ‘parity of esteem’ duty.....	6
The ‘Good Relations’: the alternative proposal.....	9
3. Legislating for and interpreting ‘Good Relations’	
Section 75 of the Northern Ireland Act 1998.....	12
Where public sector good relations duties came from.....	12
The 1998 Act: concerns the ‘good relations’ duty could undermine equality.....	15
The subsequent policy environment, towards a ‘Shared but Unequal Future’?	17
How should the duty be interpreted? Human rights and legal framework.....	22
4. Equality Commission guidance on the ‘good relations’ duty	
What did the ECNI draw on to define the parameters of ‘Good Relations’ duty?.....	26
Good relations, the law and the Equality Impact Assessment Process (EQIA).....	27
The ECNI decision to recommend Equality <i>and Good Relations</i> Impact Assessments.....	29
Was there a legal basis for Equality and Good Relations Impact Assessments?.....	32
5. Equality Commission advice to public authorities: case studies	
Case Study 1: The Good Relations duty and flag flying.....	35
Case Study 2: The Good Relations duty and the Irish language.....	40
Case Study 3: The Good Relations duty and socio-economic inequality.....	48
6. Further analysis and recommendations	56

EXECUTIVE SUMMARY

Background Narrative

On 23 May 2013 the Office of the First and deputy First Minister (OFMdfM) published the 'Together: Building a United Community Strategy.' This document confirmed a proposal, leaked earlier to the press in January 2013, to rename the Equality Commission the 'Equality and Good Relations Commission' and grant the body additional community relations powers. The strategy also envisages an augmented 'good relations' impact assessment. This move has brought an additional focus on long standing concerns raised by rights based NGOs and Council of Europe treaty bodies that the existing 'good relations' duty is being interpreted and applied in a manner which actually undermines equality.

Strand 1 of the Belfast/Good Friday Agreement envisaged:

An **Equality Commission to monitor** a statutory obligation to promote equality of opportunity in specified areas **and parity of esteem between the two main communities**, and to investigate individual complaints against public bodies...

The UK Government did use the Agreement's implementation legislation, the Northern Ireland Act 1998, to legislate for Equality Commission oversight of a two part statutory duty. The first part of the duty under Section 75 of the Act deals with the equality of opportunity limb. The second limb under the Act however does not refer to 'parity of esteem' but instead introduced a duty to promote 'good relations'.

In relation to 'parity of esteem' the Northern Ireland Human Rights Commission recommended the enshrinement within a Bill of Rights of a qualified duty on public authorities to "fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland" (along with protections for the rights of other minorities). The UK Government is yet to discharge its commitment to legislate for the Bill of Rights.

In response to concerns from Equality Coalition members and others that, regardless of benign intentions, the 'good relations' duty would be harnessed by the opponents of rights and equality to obstruct equality initiatives, the Westminster Parliament did subordinate the good relations duty to its equality counterpart on the face of the legislation. The legislation ultimately set out that the 'good relations duty' is to be discharged 'without prejudice' to the equality duty, and that public authorities "should have regard to the *desirability* of promoting good relations", rather than the stronger language of "*due regard* to the *need* to promote equality of opportunity" for the former limb of the duty. This, it was hoped, would be sufficient to prevent equality initiatives, for example new build housing provision rightly likely to benefit one section of the community more than another due to greater objective need, being derailed on the grounds that they could lead to 'community tensions'. There was also the risk that special measures for minorities would be objected to by a more powerful

political constituency and be hence deemed bad for 'good relations' and discontinued.

The Agreement and Northern Ireland Act 1998 also enumerated a number of compulsory procedural obligations on the equality duty, which did not apply to its 'good relations' counterpart. These included duties to impact assess policies in relation to equality of opportunity, monitor any 'adverse impact' they have and, where that arises, consider alternative policies or mitigating measures accordingly. A further safeguard was the oversight of the duties by an independent body with a strong equality mandate - the Equality Commission for Northern Ireland (ECNI). The ECNI produced a detailed methodology involving screening and a seven-stage 'Equality Impact Assessment' (EQIA) test. The EQIA methodology, set out in 2005 Practical Guidance from the ECNI which is still in force, draws strongly on equality and non-discrimination law concepts. The ECNI accordingly defines 'adverse impact' in a similar manner to concepts such as discriminatory detriment, and uses key indicators of adverse impact drawn from standard objective empirical measures common in equality assessments (e.g. lower participation or success rates). The EQIA methodology set out in the guidance does not apply to 'good relations' and the ECNI, rightly reflecting the hierarchy in the legislation, initially advised that good relations policies themselves be subjected to EQIAs. The term 'good relations' was not defined under the 'section 75' legislation.

The Belfast/Good Friday Agreement, in the words of Mary Robinson, the then UN High Commissioner for Human Rights, moved equality and rights from the 'margins to the mainstream' in official policy terms. Prior to this, notwithstanding the success of fair employment legislation, community relations imperatives were dominant in the official strategic policy. The Agreement by contrast, as well as stressing a framework of 'equality of treatment' for the identity of the two main communities, provided measures for linguistic diversity and the tackling of deprivation and inequality through targeting objective social need. Such a framework is also contained in human rights treaties the UK has entered into, including the European Charter for Regional or Minority Languages and European Convention on Human Rights (ECHR) both of which were referenced in the Belfast/Good Friday Agreement.

The Courts have held that Parliament would not intend legislation to be interpreted incompatibly with treaty based commitments. It is therefore reasonable to expect both the provisions of the Agreement and human rights treaties to provide the parameters for how 'good relations' is to be interpreted. Given the duties were part of the Agreement's implementation legislation it would also not be unreasonable to expect some of their provisions – e.g. equality of treatment, objective need and linguistic diversity – to become core concepts in defining and interpreting what constitutes good relations. The ECNI guidance on good relations however makes only passing reference to the Agreement and appears to draw more on community relations approaches in its definition and interpretation of the concept.

The origins of the 'good relations' type duties are in race relations legislation in Great Britain but in 1998 the concept was neither prominent nor well defined. The duty in Great Britain has since evolved into one where primacy is given to it being utilised to 'tackle prejudice and promote understanding'. In Northern Ireland however interpretation of the concept has evolved differently. Although the ECNI guidance

does similarly see challenging sectarianism and racism as part of good relations, the guidance also places emphasis on good relations being about reducing segregation.

Despite the hierarchy between the two duties there have been subsequent attempts to elevate the status of the 'good relations' duty. The direct rule Government's high level '*A Shared Future*' strategy, consulted on in 2003 and issued in 2005, envisaged 'good relations impacts assessments' (to assess impacts on the promotion of sharing) alongside EQIAs. The strategy also envisaged legislating for an exemption from protections preventing sectarian discrimination to allow for 'mixed housing' schemes. CAJ noted at the time that given existing community differentials in housing need the allocation of resources away from those in objective need in this manner would perpetuate inequalities and surely undermine good relations. In the end the proposal was not legislated for.

Nevertheless in 2007 the ECNI announced a major shift in policy in recommending that its seven-stage EQIA process should also now be applied to good relations *using the same methodology*. Effectively, and whilst the legal basis for this is at best unclear, the ECNI had transformed EQIAs into Equality and Good Relations Impact Assessments. From the outset there are clear methodological problems with such an approach. The seven-stage EQIA process had been carefully tailored and designed using well grounded equality concepts. Such methodology was now being applied to an entirely different concept. The risk in applying the EQIA process to good relations is that simple negative perceptions, 'impacts' or 'tensions' which do not actually objectively reach the threshold of adverse impact, could in a lay sense be considered as such. Consequently it could then be read that the public authority is 'required' to take measures against such an 'adverse impact' on good relations grounds. The ECNI has confirmed it did not pilot the likely impact of this new approach before its implementation.

In recent years there have been concerns raised that equality and rights initiatives have been stifled due to mistaken 'good relations' considerations. These concerns have been most prominent in the fields of socioeconomic rights (particularly housing) and in the realisation of international treaty commitments relating to the Irish language. A Council of Europe human rights treaty body expressed concerns about the direction the concept of good relations had taken in the context of Government policy and also cited reports that "the need for keeping good relations has been used as justification for not implementing provisions in favour of persons belonging to minorities."

The *Together: Building A United Community Strategy* now envisages legislation which will formally change the remit of the Equality Commission to add good relations functions. The Strategy also plans to change the formulation of EQIAs to add in good relations considerations. Given this it is now an opportune moment to take stock as to how the s75(2) 'good relations' duty has been interpreted and advised upon by the Equality Commission in recent years and assess the extent this has complemented or undermined equality.

This present report first provides a background narrative to the origins of the duties within the Agreement and its implementation legislation. It also explores the likely interpretation of 'good relations' in the context of the prevalent legal, conceptual and

human rights frameworks. The report then examines how the Equality Commission has interpreted and given strategic advice on the s75(2) good relations duty through its published guidance to public authorities, including the changes the ECNI has recommended for EQIAs. The case studies chapter then examines tailored ECNI advice to public authorities in response to EQIAs in three thematic areas. These are first the topical issue of flag flying by public authorities, which provides an opportunity to assess the fate of the Agreement's intentions of equality of treatment for identity. The second case study focuses on good relations and the Irish language, the area where there has been most controversy with international treaty bodies raising concerns about how the 'good relations' duty has been interpreted. The final case study covers good relations and socioeconomic rights, including housing provision, given as this was the area CAJ and other organisations were most concerned about during the passage of the legislation. The report finishes with further analysis and conclusions.

Findings and Recommendations

Overall Finding:

A combination of factors, including decisions and advice by the ECNI, have led to a situation whereby equality initiatives, and the purpose of the Section 75 equality duty and Equality Impact Assessments (EQIAs), are being undermined by the present interpretation and application of the 'good relations' duty. The main issues in relation to the ECNI are:

- The 2007 decision to recommend incorporating 'good relations' into EQIAs using the methodology designed to assess equality impacts;
- Divergence in interpreting the dimensions and boundaries of 'good relations' from the framework provided in UK human rights commitments and the Belfast/Good Friday Agreement;
- Problems and inconsistencies within the advice given by the ECNI to public authority EQIAs including on how 'adverse impacts' are determined;
- Significant omissions in the ECNI 'Statement of Key Inequalities' in relation to inequality between the two main communities. This includes the area of housing where the Statement focuses on 'good relations' issues rather than inequality;

There are arguments that ongoing discussion about the relationship between the two section 75 duties and the hierarchy between them are a distraction. However, this research has demonstrated that the current interpretation of the section 75(2) 'good relations' duty is having a demonstrable practical impact in thwarting the implementation of particular equality and rights based initiatives.

Specific Findings

- **The UK Government has not legislated in accordance with its international commitments under the Belfast/Good Friday and subsequent Agreements for a Bill of Rights, inclusive of a duty to respect, on the basis of equality of treatment, the identity of ethos of the**

two main communities and other measures relating to minority and socio economic rights. This and other high level policy developments have impacted on the framework for interpreting the ‘good relations’ duty;

- **The 2007 ECNI decision to recommend incorporation of the good relations duty into EQIAs using the equalities methodology is not provided for in the Agreement or legislation and has had a retrogressive impact;**
- **There are significant problems and inconsistencies in relation to when the ECNI determines or endorses that the threshold of ‘adverse impact’ has been met in EQIAs. The application of the equality concept of adverse impact to the more subjective concept of ‘good relations’ has had a consequent detrimental impact on positive action policies;**
- **The ECNI definition and interpretation of ‘good relations’ has not drawn sufficiently on the applicable legal framework. At times the ECNI interpretation has been incompatible with international obligations in relation to minority language rights and positive action to redress socio economic inequality;**
- **The ECNI advice is consistent in reflecting the legislative hierarchy between the duties but inconsistent on other matters including the relative weight given to good relations considerations in EQIAs and in its treatment of minority rights;**
- **There are significant omissions in the ECNI ‘Statement of Key Inequalities’ in relation to inequality between the two main communities. In relation to housing the document focuses more on good relations imperatives. This is impacting significantly on the application of the section 75 duties.**

Recommendations

Recommendation One: The process to develop draft legislation to implement commitments in the Together Building a United Community Strategy should:

- **Consider whether the proposed changes to EQIAs and the ECNI can be accomplished in a manner which is not retrogressive to the equality duties and broader international obligations, including those under the Belfast/Good Friday Agreement;**
- **Ensure any resultant addition of good relations impact assessments should be underpinned by a legislative framework which ensures good relations have an appropriate methodology which is duly subordinate to and compatible with equality assessments and international obligations;**
- **Develop a definition of ‘good relations’ which draws on and is compatible with international standards, including human rights treaties and the framework provided by the Belfast/Good Friday Agreement, and place an obligation on the ECNI to interpret the duty in such a manner;**

- Consider taking forward commitments to single equality legislation, in a manner which ensures upward harmonisation along with the extension of the present three 'good relations' categories to the other equality groups;
- Ensure that any changes to the remit of the Equality Commission are compatible with international obligations, best practice and are not regressive in relation to the institution's equality function. This would include incorporating safeguards in the legislation to ensure the maintenance of the primacy of the equality function.

Recommendation two: the UK Government, in addition to its remit in relation to the above, given the relevance to providing a framework for good relations, should:

- Implement its commitments within the Belfast/Good Friday Agreement and the Joint Declaration to legislate for a Bill of Rights for Northern Ireland, inclusive of the Human Rights Commission's formulation of a duty for equality of treatment for the identity and ethos of the two main communities and its provisions in relation to minority rights, equality and non-discrimination;
- Implement its commitment under the St Andrews Agreement 2006 to an Irish Language Act.

Recommendation three: the Equality Commission should review:

- Its decision to recommend the addition of good relations to EQIAs and screening using the same methodology which had been designed to assess equality impacts;
- Its EQIA advice to public authorities in order to eliminate the inconsistencies, problems and ambiguities identified in this research and ensure that such advice is compatible with its own guidance and international standards and obligations, in particular those relating to positive action to tackle socioeconomic disadvantage and the rights of linguistic minorities under binding Council of Europe treaties;
- Its application of the concept of 'adverse impact' in EQIAs to ensure the Commission only advises its threshold has been met when there is objective evidence based on equality indicators and challenges the incorrect application of the concept in public authority EQIAs;
- Its interpretation and definition of the concept of good relations in its strategic guidance on Section 75 to one which draws on international standards, including the rights and equality provisions of the Belfast/Good Friday Agreement;
- Its statement of key inequalities and related research to remedy the omissions in relation to inequalities between the two main communities.

1. Introduction

Background and methodology

On 23 May 2013 the Office of the First and deputy First Minister published the '*Together: Building a United Community Strategy*.' This document confirmed a proposal, reported by the BBC back in January 2013,¹ to rename the Equality Commission the 'Equality and Good Relations Commission' and grant the body additional community relations powers. The Strategy also envisages an augmented 'good relations' impact assessment. This move has brought additional focus on long standing concerns raised by rights based NGOs and Council of Europe treaty bodies, that the existing 'good relations' duty is being interpreted and applied in a manner which actually undermines equality.

The Equality Commission has existing competence in the area of 'good relations' as, in addition to duties under anti-discrimination legislation it advises public authorities on the Section 75 statutory duty which, as well as containing an equality duty, obliges them to "have regard to the desirability of promoting good relations between persons of different religious belief, political opinion, and racial group."

CAJ, along with the trade union UNISON, co-convenes the 'Equality Coalition' a network of NGOs which have campaigned for the effective implementation of the section 75 duties. The origins of this research are based in concerns that the Equality Commission was not implementing its mandate as effectively as it could in advising on the implementation of the duties. A scoping exercise revealed that an area with a significant body of commentary, evidence and concerns was the application of the 'good relations' duty. It therefore appears an opportune moment, particularly in the context of the '*Together: Building a United Community Strategy*', to take stock of how the 'good relations' duty has been developed, interpreted and advised upon to date.

The origins of the 'good relations' duty and of the oversight of this by the Equality Commission are in the implementation legislation for the Belfast/Good Friday Agreement (although the Agreement itself made no reference to 'good relations'). At the time of the passage of the 'good relations' duty, under what was to become section 75(2) Northern Ireland Act 1998, CAJ and other NGO and trade union members of the Equality Coalition expressed concerns that the duty could be interpreted in a manner which would actually conflict with equality obligations. These concerns led to the UK Government explicitly subordinating the 'good relations' duty to its equality counterpart within the legislation.²

Since that time there have been ongoing challenges, raised both by rights-based NGOs and two Council of Europe treaty bodies, in relation to interpretation of the 'good relations' duty in a manner detrimental to equality and human rights imperatives. This has particularly been the case on policy relating to socioeconomic

¹ Devenport, Mark "Northern Ireland peace walls should 'come down by 2022'" BBC News Online, 24 January 2013.

² The legislation ultimately set out that the 'good relations duty' is to be discharged 'without prejudice' to the equality duty, and that public authorities "should have *regard* to the *desirability* of promoting good relations", rather than the stronger language of "*due regard* to the *need* to promote equality of opportunity" for the former limb of the duty.

rights, especially housing, and also in policy on the Irish language. The issue is often manifest at the point of policy appraisal.

The role of this research is therefore to set the context to the evolution of the duties since the Agreement and then to assess the interpretation, guidance and advice of the Equality Commission on the good relations duty against equality and human rights standards.

The methodology employed by this research is largely desk based involving an examination of ECNI statutory guidance on the duty and of the individual written advice the ECNI gives to public authority EQIAs. ECNI EQIA responses in three thematic areas were obtained under freedom of information legislation.

The first two chapters will deal with the origins of the good relations duty, its legislative passage, the concerns raised about its potential to conflict with equality imperatives, and how the concept could be harnessed in a positive and human rights compliant manner.

The following two chapters will deal in turn with critically assessing the written statutory guidance published by the Equality Commission in relation to the good relations duty, and subsequently the Commission's advice to public authorities on a number of thematic areas.

The final chapter contains further analysis and recommendations.

Acknowledgements

The research was conducted by Daniel Holder, Deputy Director of CAJ. Thanks go to the various persons who provided material or otherwise commented or contributed to this report within CAJ, the Equality Coalition and elsewhere including: Robbie McVeigh, Patricia McKeown, Mathew McDermott, Janet Muller, Dessie Donnelly, Rory O'Connell, Brian Gormally, Emma Patterson, Liz McAleer and Debbie Kohner. Particular thanks to Barbara Cohen and Brenda Parkes for the detailed paper they provided on the application of good relations duties in Great Britain which is heavily drawn upon in chapter two. Thanks also to the Equality Commission for the high level engagement with CAJ over the course of the development of this research. Needless to say the report remains the view of CAJ.

2. From ‘parity of esteem’ to ‘good relations’: the Belfast/Good Friday Agreement and the duties

This chapter outlines the background to the introduction of the ‘good relations’ duty under the implementation legislation for the Belfast/Good Friday Agreement. It recalls that the original formulation of the Agreement for the second leg of a duty the Equality Commission was to oversee was a provision on of ‘parity of esteem’ for the identity of nationalist and unionist communities. It then sets out the background to this and how a ‘parity of esteem’ duty could have been given legislative effect in a human rights compliant manner. This chapter also reflects on the remit of the Equality Commission and its relationship with the duties. It then sets out the background context of Government’s decision to legislate for ‘good relations’.

What did the Belfast/Good Friday Agreement provide for and did Government disregard it?

The Belfast/Good Friday Agreement was an agreement reached in multiparty talks and includes an international treaty between the UK and Ireland; the Agreement was also endorsed by referendum in Ireland, north and south.³ The primary implementation legislation for the Agreement was the Northern Ireland Act 1998, section 75 of which contained statutory equality and good relations duties. The Agreement explicitly provided for a dual-track statutory duty overseen by a new Equality Commission but formulated it as follows:

An **Equality Commission to monitor** a statutory obligation to promote equality of opportunity in specified areas **and parity of esteem between the two main communities**, and to investigate individual complaints against public bodies...⁴

This provision was listed as a safeguard to ensure that “all sections of the community” were protected and could participate and work together in the “Democratic Institutions in Northern Ireland” set out in the Agreement. The Equality Commission itself was also a product of the Agreement’s implementation legislation.⁵

The Agreement later enumerates a number of obligations to be attached to the statutory obligation on public authorities to *promote equality of opportunity* across nine grounds. This includes requirements to draw up statutory schemes covering arrangements for “policy appraisal, impact assessment, public consultation, public access to information and services, monitoring and timetables.”⁶ These stipulations

³ The Agreement consisted of the Multi-Party Agreement negotiated by participant political parties and a bilateral UK-Ireland treaty. Article 2 of the treaty commits the two states to implement the provisions of the Multi-Party Agreement which correspond to them. See: UK Treaty Series No. 50 (2000); Ireland Treaty Series 2000 (no 18). Further treaties were formulated to implement particular provisions of the Agreement.

⁴ Multi-party Agreement, strand 1, paragraph 5(e), emphasis added.

⁵ The Agreement does qualify the creation of a unified Equality Commission from its predecessor bodies as subject to ongoing consultation (in reference to the *Partnerships for Equality* White Paper) but does set out that the remit of such a body once established, as it ultimately was, would be to “advise on, validate and monitor the statutory obligation and ... investigate complaints of default” (Rights, safeguards and equality of opportunity, paragraph 6).

⁶ Multi-Party Agreement, Rights, safeguards and equality of opportunity, paragraph 3.

in the Agreement do not cover the corresponding 'parity of esteem' duty.⁷ The Agreement states that the British Government will legislate to bring in the statutory equality of opportunity duty "as a particular priority".⁸

The Agreement does not make reference to 'good relations' (or 'community relations') save insofar as the Ministerial Code of Conduct binds Ministers to "operate in a way conducive to promoting good community relations and equality of treatment."⁹ There is also reference to integrated education and mixed housing in the section on reconciliation. References to rights and the 'parity of esteem' concept do recur elsewhere in the Agreement. These include the commitment of the sovereign government to exercise power with 'rigorous impartiality' founded on principles which include 'parity of esteem'.¹⁰ The Agreement also commits the UK to incorporating the European Convention on Human Rights into Northern Ireland law.

Parity of esteem is later referenced in relation to the Agreement's provision for a Bill of Rights.¹¹ The Agreement mandates the new Human Rights Commission to advise Government on the Bill of Rights which it states is to incorporate "additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem" and specifically asks the Commission to consider:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.¹²

As alluded to above the Agreement's implementation legislation, the Northern Ireland Act 1998, did implement a two part statutory duty with Equality Commission oversight. On the face of it this would appear to implement the commitment in the Agreement for the Commission to oversee a two part statutory duty. Given, however, that the formulation of the second limb in the legislation was through the concept of 'good relations' rather than 'parity of esteem', it could be argued that conversely this stipulation in the Agreement was disregarded. It could also be argued that formulating and legislating for 'parity of esteem' was envisaged separately in the Agreement within a Bill of Rights (as also was a clear formulation of rights to equality of opportunity), although it is of course possible to first legislate then further 'enshrine' such matters within a Bill of Rights.

⁷ Paragraph 3 as above full text is "3. Subject to the outcome of public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables."

⁸ Multi-Party Agreement, Rights, safeguards and equality of opportunity, paragraph 3.

⁹ Strand 1, Annex A.

¹⁰ Constitutional Issues: paragraph 1(v).

¹¹ The Agreement provides that the Bill is to be legislated for at Westminster and include both the rights in the European Convention on Human Rights (ECHR) and other rights deemed to reflect the particular circumstances of Northern Ireland.

¹² Multi-Party Agreement, Rights, safeguards and equality of opportunity,, paragraph 4.

There is therefore some ambiguity in the Agreement and its implementation legislation as to what was intended, not least as the commitment for legislating for a Bill of Rights remains outstanding. Given the nature of the political negotiations which led to the Multi-Party Agreement it is not possible to defer to the usual *travaux préparatoires*¹³ documents that usually aid treaty interpretation.

A further safeguard contained in the Agreement, and its implementation legislation, was deferral to an independent body with a firm equality mandate, the Equality Commission for Northern Ireland (ECNI), to provide advice and guidance to public authorities on how to interpret and implement the duty.¹⁴

In addition to the section 75 statutory duties broader ECNI functions are set out in equality and anti-discrimination legislation. For example fair employment legislation mandates the ECNI to promote equality of opportunity, promote affirmative action and to work for the end of unlawful discrimination and unlawful harassment.¹⁵

In relation to situating the functions of a body like the Equality Commission in the international context EU equal treatment directives are of particular relevance.¹⁶ These require member states to set up independent equality bodies with a mandate to provide independent assistance to victims of discrimination, conduct independent surveys concerning discrimination and publish independent reports and make recommendations on any issue relating to discrimination.¹⁷

The ECNI is a member of EQUINET the European Network of Equality Bodies, composed of 38 national equality bodies across 31 European countries. EQUINET states that Equality Bodies “function as ‘independent organisations giving assistance to victims of discrimination, monitoring and reporting on discrimination issues, and promoting equality.’”¹⁸

Whilst EQUINET notes there are no specific EU guidelines to Member States on how such bodies should operate at Council of Europe level the former Commissioner for Human Rights, Thomas Hammarberg, did issue an Opinion on ‘national structures for promoting equality’ which sets out the expected parameters of such institutions. The opinion underlines two core indicators against which to assess such institutions, the first independence (both *de jure* and *de facto*), and the second their effectiveness (in deploying “all of their functions and powers to a scale and a standard that ensures impact on discrimination and inequality”).¹⁹

¹³ “preparatory works” the official records of negotiations leading to treaties which are often used as a supplementary means of interpretation to confirm or clarify meaning when application is ambiguous, obscure or manifestly absurd or unreasonable (see Article 32 Vienna Convention on the Law of Treaties).

¹⁴ The ECNI was established from a merger of its predecessor bodies under the same Northern Ireland Act 1998.

¹⁵ The Fair Employment and Treatment (Northern Ireland) Order 1998, article 7. A range of anti discrimination law invokes similar functions on the Commission (e.g. see para 27 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006). The Northern Ireland Act 1998 s74 on the Commissions functions defers to the functions of predecessor bodies, and hence the anti-discrimination legislation which established them, for its functions. The Race Relations (Northern Ireland) Order 1997 is the only other provision referencing good relations promotion among ECNI functions.

¹⁶ Listed by EQUINET as Directive 2000/43/EC (the so-called Race Directive), Directive 2004/113/EC (the so-called Gender Goods and Services Directive) and Directive 2006/54/EC (the so called Gender Recast Directive).

¹⁷ <http://www.equineteurope.org/-Equality-bodies> and <http://www.equineteurope.org/About-Equinet> (accessed March 2013)

¹⁸ As above.

¹⁹ Opinion of the Commissioner for human rights on national structures for promoting equality, CommDH(2011)2, 21 March 2011.

Equality law, human rights compliance and the 'parity of esteem' duty

The background to the inclusion of the 'parity of esteem' provisions within the Agreement can be traced to recommendations in an official review of equality law and the inter-governmental declaration which preceded the Agreement.

In 1990 the then Standing Advisory Commission on Human Rights (SACHR) presented to Parliament its second report reviewing the equality law framework for tackling religious and political discrimination. In this report SACHR concluded action was needed to guarantee the "equal treatment and esteem of both traditions within Northern Ireland." The backdrop to such recommendations was the context of unionist dominance of public space characteristic of the previous Stormont Parliament. This relates to flags, symbols and emblems, but also the exclusion of the Irish language. Noting that human rights law had now recognised the legitimacy of specific rights for minorities within existing state boundaries SACHR recommended a duty be placed on public authorities "to ensure that their functions are carried out in such a way to ensure that members of both main sections of the community are granted equality of treatment and esteem." SACHR then singled out the treatment of the Irish language as a 'touchstone' measure of whether the existence of two traditions was being treated seriously, recommending consideration of Irish language legislation to set out entitlements to use the language in dealings with public authorities.²⁰ SACHR also concluded that it would be desirable "to introduce a statutory duty on all public bodies to monitor the impact of their activities as between the two main sections of the community."²¹ This cited duties under race relations law in Great Britain as a model.²²

Subsequent to the SACHR report the 1995 Joint Declaration between the British and Irish Governments reflected such an equality of treatment approach when they agreed:

...that future arrangements relating to Northern Ireland...should respect the full and equal legitimacy and worth of the identity, sense of allegiance, aspiration and ethos of both the unionist and nationalist communities there.²³

Both governments also committed to the principle that institutions in Northern Ireland should afford both communities satisfactory political and symbolic expression. In a phrase later repeated in the Belfast/Good Friday Agreement the Declaration set out that UK jurisdiction would be founded on full respect for "parity of esteem, and on just and equal treatment for the identity, ethos and aspirations of both communities." As noted by SACHR the move also coincided with the development of human rights instruments which codified into concrete positive obligations long standing concepts

²⁰ Standing Advisory Commission on Human Rights Command Paper CM 1107 *Religious and Political Discrimination and Equality of Opportunity in Northern Ireland: Second Report* (HSMO, 1990) see conclusions on Communal Rights and Recognition paragraphs 12.61-7.

²¹ As above, paragraph 12.31.

²² Under s71 Race Relations Order 1976. This statutory duty, which makes reference to promoting good relations as well as equality of opportunity and eliminating discrimination, is further discussed in chapter 2.

²³ 'A New Framework for Agreement' (UK-Ireland), 22 February 1995, paragraphs 19-20.

relating to minority rights and pluralism, some of which were then referenced or reflected in the Belfast/Good Friday Agreement.²⁴

The concept of 'parity of esteem', which can be characterised as referring to the acceptance of more than one national tradition within the identity of a state (or region of a state), is not explicitly used in human rights instruments. Depending on interpretation the concept could conflict with other rights claims. This includes other equality claims, particularly the question of how the rights of other minorities can be safeguarded in a framework based around the two main communities. A local example of this is found in the long standing 'teacher exemption' from fair employment anti-discrimination law.²⁵

There are also risks that the concept of 'parity' could be interpreted, not as equality of outcome, but as 'equitable' treatment i.e. giving the two main communities 'the same' regardless of their actual situation and objective need. The purpose of substantive equality obligations in human rights instruments has been to ensure specific measures for disadvantaged groups to advance the *outcome* of equality of treatment.²⁶ This contrasts with an interpretation of the concept of 'parity' whereby there might be an expectation that specific measures are matched with an equivalent measure for the historically dominant group.²⁷ For example an 'equitable' allocation housing provision for communities will only serve to perpetuate inequality if there are significant differences in objective housing need between them. In some cases dominant groups can even argue they are in fact those at disadvantage and are 'discriminated' against due to measures to remedy the conditions of disadvantaged groups.²⁸ Human rights obligations however make clear that duties to tackle discrimination mean adopting special measures to alleviate the conditions which perpetuate the inequalities faced by groups of individuals who suffer historical disadvantage. Such measures are legitimate under human rights law provided they are reasonable, objective and proportionate to achieving the outcome of equality of

²⁴ Namely the Council of Europe's: European Charter for Regional and Minority Languages and Framework Convention for National Minorities.

²⁵ The present 'teacher exemption' from anti-discrimination law, which goes beyond occupationally specific requirements and can therefore be used as an instrument for maintaining the ethos of separate 'Catholic' and 'Protestant' schooling sectors, could exclude other minorities and does not afford protection against discrimination for anyone who wishes to work in the schools of 'another' community.

²⁶ See for example ICESCR General Comment 16 on gender equality which states "Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience" (UN doc E/C.12/2005/4 11 August 2005, paragraph 7).

²⁷ At times such an approach has been advocated in Northern Ireland. For example, in the context of the outworking of the peace agreements there have been attempts by unionist parties to, advocate incorporation of provisions under the Framework Convention for National Minorities for all 'communities' rather than the originally intended 'minorities'. See discussion in the Final Report of the Bill of Rights Forum established under the St Andrews Agreement (31 March 2008) page 70-73.

²⁸ See for example discourse on the "Rights of Man" website claiming men have been politically disenfranchised (despite continuing to make up a substantive majority of elected representatives): http://therightsofman.typepad.co.uk/the_rights_of_man/2011/12/the-political-disenfranchisement-of-men-in-britain-a-chronology.html This approach is also common in the language of the far right for example see information on BNP "Rights for Whites" campaign in East London, (see 'Submission to part 2 Stephen Lawrence Inquiry' London, 1998: *Searchlight*), paragraph 27).

treatment and are discontinued if and when substantive equality has been achieved.²⁹

Any attempt to give legislative effect for a 'parity of esteem' duty in a human rights compliant manner should therefore address the above issues and provide safeguards against its abuse. The Northern Ireland Human Rights Commission (NIHRC), established to supersede SACHR under the Agreement, was in effect tasked to provide such formulation of the 'parity of esteem' in the context of its 2008 advice on a Bill of Rights. The NIHRC advice on the matter recommended the incorporation of the following right:

Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.³⁰

This draws on the language of the Agreement, including the restriction of the duty to 'identity and ethos' but also adds the limitation clause to ensure the provision is read compatibly with other rights, including those of numerically smaller new and long standing minority ethnic communities. The NIHRC advice also contained further recommendations making provisions for all national, ethnic, religious, linguistic or cultural minorities along with a duty to encourage tolerance and dialogue. The Commission also recommended rights recognising the plurality of British and Irish citizenship and national identity.³¹

The UK Government is yet to legislate to implement the Bill of Rights mandated by the Agreement.³² Subsequent commitments to single equality and Irish language legislation are also outstanding. UN and Council of Europe treaty bodies have frequently pronounced on such matters urging their implementation.³³ In addition to

²⁹ ICESCR General Comment 20 'Non-discrimination in economic, social and cultural rights', Un Doc E/C.12/GC/20 2 July 2009, paragraphs 8-9. Note despite special measures usually being temporary until substantive equality is achieved ICESCR provides that where this is not possible positive measures may exceptionally need to be of a permanent nature, for example interpreting services for linguistic minorities. Paragraph 13 of the General Comment as well as emphasising a 'clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects' also sets out a three part test as to ascertaining as "an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society." From this it could be determined any 'good relations' limitation on equality would have to reach these thresholds in order to be compatible with the duties under the ICESCR.

³⁰ Northern Ireland Human Rights Commission 'A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland' (Belfast, 2008), page 41.

³¹ As above.

³² In 2009 the Northern Ireland Office (NIO) issued a controversial consultation paper, which proposed a very limited number of rights be included in the Bill of Rights. The incorporation of an 'equality of treatment for identity and ethos' provision was one of the few rights Government appeared to be willing to consider, although the NIO curiously went on to argue the 'equality of treatment' protections "might be said to be already provided by" the statutory equality duty on promotion of equality of opportunity. NIO 'A Bill of Rights for Northern Ireland: Next Steps' November 2009, paragraph 6.11.

³³ For recent United Nations recommendations see Committee on Economic, Social and Cultural Rights (Concluding observations on the UK) 12 June 2009, UN Doc E/C.12/GBR/CO/5, paragraph 10 (Bill of Rights); paragraph 16 (single equality legislation) paragraph 37 (Irish Language Act); see also Committee for the Elimination of Racial Discrimination (CERD) (Concluding observations on the UK) 14 September 2011, UN Doc CERD/C/GBR/CO/18.20, at para 19. For Council of Europe Recommendations see: Council of Europe, Recommendations of the Committee of Ministers, RecChL (2007)2 adopted 14 March 2007; Advisory Committee (Framework Convention for National Minorities), Second Opinion on the United Kingdom, ACFC/OP/II (2007) 003, Adopted on 6 June 2007; Council of Europe, Committee of Experts (European Charter for regional or Minority Languages) ECRML (2010)4, 21 April 2010; Third Opinion on the UK, Advisory Committee (Framework Convention for National Minorities), Third Opinion on the United Kingdom, ACFC/OP/III(2011)006, Adopted on

the 'section 75' duties enhanced fair employment and treatment legislation committed to in the Agreement was legislated for.³⁴ The priority given to equality in the Agreement did mark a break with previous official approaches which had placed focus on improving community relations, and for which there were alternative proposals in relation to the statutory duties.

The 'Good Relations' duty: the alternative proposal

In the run up to the Agreement a head of steam had been growing, including through work by UNISON, CAJ and the SACHR towards the introduction of a statutory equality duty to replace the predecessor 'Policy Appraisal and Fair Treatment' (PAFT) guidelines. At this point Government did have some reservations to the proposals (in a precursor to later official discourse on the inclusion of socioeconomic rights in the Bill of Rights) questioning whether the duties would unduly bind elected authorities to particular policies and the perceived administrative burden.³⁵ The priority being given to equality was also questioned by others including former SACHR member Professor Tom Hadden who queried whether equality provisions in PAFT or in relation to employment equality between the two main communities was such an 'overriding political objective'. He argued that many people:

...would give equal priority to fostering better community relations and reducing, or at least not increasing, the degree of separation between members of the two communities.³⁶

Around this time a further employment equality review was conducted by SACHR at the request of Government.³⁷ SACHR's final report following the review, in 1997, took forward the proposal for a statutory equality duty as one of its central recommendations.³⁸ This was followed by Government's 1998 White Paper, *Partnerships for Equality*, which responded to the recommendation. The White Paper set out that Government proposed to take forward a statutory obligation on public authorities to ensure that "their various functions are carried out with due regard to the need to promote equality of opportunity". The White Paper also noted, without further elaboration, that it had been suggested that the new statutory equality duty might also extend to the promotion of 'good relations' between the two communities and between people from other ethnic groups.³⁹ The Ministerial Foreword set this out as a concrete proposal:

22 December 2011; See also commitments in the (UK-Ireland) St Andrews Agreement 2006 relating to an Irish Language Act and single equality legislation.

³⁴ Fair Employment and Treatment (Northern Ireland) Order 1998.

³⁵ For a detailed narrative see: McCrudden, Christopher 'Mainstreaming Equality in the Governance of Northern Ireland' *Fordham International Law Journal* Vol. 22(4) 1998 Article 25, p1696.

³⁶ Tom Hadden et al., 'Equal But Not Separate: Communal Policy Appraisal' (June 1998) distributed as a supplement to Fortnight 371. Cited in McCrudden, Christopher 'Mainstreaming Equality in the Governance of Northern Ireland' *Fordham International Law Journal* Vol. 22(4) 1998 Article 25, p1721.

³⁷ Command Paper CM3890 1997/98 '*Partnership for Equality: The Government's proposals for future legislation and policies on Employment Equality in Northern Ireland*' March 1998, Paragraph 1.7 (Partnership for Equality, White Paper).

³⁸ Standing Advisory Commission on Human Rights (SACHR). (1997) *Employment Equality: Building for the Future*. London: HMSO (CM 3684).

³⁹ *Partnership for Equality White Paper*, paragraph 4.9.

...we propose to put in place a new statutory framework requiring the public sector to promote equality of opportunity.... We also propose that this statutory obligation should extend to promoting good relations between people of different religious groups and political opinion, and people of different racial groups.⁴⁰

The Minister set out that “This new statutory obligation would be enforced by a powerful new Equality Commission” which would have an enforcement role over statutory schemes which would set out how public bodies would promote equality of opportunity and good relations. The Minister also states “The Commission could also have a role in promoting measures to recognise parity of esteem.”

CAJ and others emphasised at the time that, the *White Paper* had been ‘directly superseded’ by the Belfast/Good Friday Agreement which followed a month after its publication.⁴¹ The Agreement did mark a significant departure from past approaches towards those based on human rights. The text of the Agreement referenced ‘right/s’ over fifty times, provided for stronger equality duties, a Bill of Rights and anti-poverty approaches based on objective social need.⁴² As noted by the then UN High Commissioner for Human Rights, the Agreement moved human rights (including equality) from the ‘margins to the mainstream.’⁴³ There was no specific provision in the Agreement for a ‘good relations’ duty, yet Government nevertheless legislated for its establishment as it had proposed in the *White Paper*.

Prior to the Agreement, despite the existence and success of fair employment legislation, equality and human rights had been marginal in official policy discourse. As Professor Chris McCrudden reflected, equality had “been perceived by too many in positions of power as divisive, ignoring ‘the real problems,’ even sometimes as subversive.”⁴⁴ Instead other commentators point to the dominance of a community relations model, which at its crudest was preoccupied with the problem being the *existence* of two communities (with differing identities and national aspirations) rather than *inequality* and differences between them:

The “two-traditions,” or perhaps more pejoratively “two tribes,” paradigm was, arguably until the current peace process, the dominant construct for not only framing an analysis of the nature of the conflict for much of its history, but also of what was required to achieve its resolution through reconciliation between those warring traditions.⁴⁵

⁴⁰ *Partnership for Equality White Paper*, Introduction by the Secretary of State (Mo Mowlam MP)

⁴¹ CAJ S70 Response to Partnership for Equality, *White Paper on Employment Equality*, June 1998, page 2. See also research commissioned by the Equality Commission and Equality Authority advising on the same: O’Cinneide, Colm ‘Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland’ (Equality Commission/Equality Authority, 2005) chapter 5.

⁴² For further examination see CAJ article: Mageean, Paul and O’Brien, Martin ‘From the Margins to the Mainstream, Human Rights and the Good Friday Agreement’ *Fordham International Law Journal* Vol. 22:1499.

⁴³ Mary Robinson, UN High Commissioner for Human Rights ‘Equality and Human Rights-Their Role in Peace Building’, Speech at the Stormont Hotel, Belfast, Dec. 2, 1998.

⁴⁴ McCrudden, Christopher ‘Mainstreaming Equality in the Governance of Northern Ireland’ *Fordham International Law Journal* Vol. 22(4) 1998 Article 25, p1697

⁴⁵ McEvoy, Lesley. McEvoy, Kieran and McConnachie, Kirsten ‘Reconciliation as a dirty word: conflict, community relations and education in Northern Ireland’ *Journal of International Affairs*, Fall/Winter 2006, vol. 60, no. 1.p81 citing also Joanne Hughes, *Partnership Governance in Northern Ireland: the Path to Peace* (Dublin: Oak Tree Press, 1998); Democratic

There is some common ground between approaches based on human rights and a model discouraging segregation.⁴⁶ There are also a range of areas of difference and potential areas of conflict. Firstly, approaches emphasising internal communal division between Catholics and Protestants tend to focus on interpersonal relationships and on more inter-communal contact rather than the obligations and responsibilities of the State. A focus on 'relations' to the detriment of equality can by omission result in the de facto maintenance of situations of inequality and subordination, particularly if even mere discussion of 'divisive' subjects is discouraged. Secondly approaches which advocate resolution through the emergence of one 'shared' identity can conflict with duties to respect pluralism, both in the context of rights to self-identification and also if types of minority expression (e.g. minority languages) are excluded on the grounds that they are not shared. Finally, policy approaches aimed at ending 'separation' can conflict with equality imperatives based on objective social need. Take the example of a policy of 'shared housing' in a new build social housing estate whereby quotas are set for both communities and others. Should objective need for housing be equivalent among all groups in the local area, such a policy is unlikely to conflict with equality duties. In the more common situation where there is much greater objective need within one group than another such an approach, however benign its intentions may be, would perpetuate and reinforce existing (and potentially long standing) housing inequality.

Approaches founded on community relations models can be complementary to equality imperatives and do not have to be inherently inimical to human rights. Relatively recently the Community Relations Council in response to a consultation on strategic good relations policy did emphasise that "good relations must always be compatible with the full implementation of human rights including the rights of minorities."⁴⁷ Nevertheless there can be the above potential areas of conflict between the competing imperatives, a subject which will be periodically returned to throughout this report.

The next chapter will detail how the second part of the statutory duty was given legislative effect. It will explore the origins of good relations as a duty and strategic policy concept in Great Britain and Northern Ireland respectively. It will also cover the legal and human rights framework for interpreting the 'good relations' concept.

Dialogue, Reconstituting Politics (Belfast Democratic Dialogue, 1996). See also McVeigh and Rolston 'From Good Friday to Good Relations: sectarianism, racism and the Northern Ireland state' *Race and Class* Vol. 48(4): 1-13, p13.

⁴⁶ For example in duties to end segregation see Article 3 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on racial segregation and its elaboration in ICERD General Recommendation 19. The ICERD Committee has made clear sectarian discrimination in Northern Ireland is to be treated as a form of racial discrimination to which the provisions of ICERD apply (see UN Doc CERD/C/GBR/18-20 (List of Themes on UK) 2 August 2011, paragraph 1(e)).

⁴⁷ Community Relations Council 'Response to the consultation on the Programme for Cohesion, Sharing and Integration Consultation', October 2010, paragraph 2d.

3. Legislating for and interpreting “Good Relations”

Following an outline of the scope of the legislation which introduced the good relations duty, this chapter will examine the origins and development of statutory good relations duties in general which were first found in race relations legislation in Great Britain in 1976 and belatedly in Northern Ireland over 20 years later. It will then further examine the legislative process of the Northern Ireland Act 1998, the concerns which were raised at the time in relation to the likely impact and interpretation of the good relations duty. The discussion will then turn to the subsequent strategic community relations and anti-sectarianism policy in Northern Ireland and the concurrent treatment of good relations and equality. Finally this chapter will examine how a concept of ‘good relations’ should be interpreted in the context of the prevailing legal and human rights frameworks.

Section 75 of the Northern Ireland Act 1998

‘Section 75’ of the main implementation legislation for the Belfast/Good Friday Agreement – the Northern Ireland Act 1998 – introduced the two part statutory duty and Equality Commission oversight of the same.⁴⁸ The first part – Section 75(1) - dealt with the statutory equality of opportunity duty envisaged in the Agreement across the nine equality grounds. The second part -Section 75(2) legislated for the duty to promote good relations rather than covering ‘parity of esteem’ which had been envisaged in Strand 1 of the Agreement. The Good Relations duty covered three grounds namely ‘persons of different religious belief, political opinion and racial group’⁴⁹ as had been earlier mooted in the *Partnerships for Equality* White Paper.

Schedule 9 of the Act then sets out further section 75 provisions. This includes requirements for statutory schemes – termed Equality Schemes– which must, in particular, state the public authority’s arrangements for assessing compliance with the duties. Although the original formulation in the Agreement had related such schemes to the equality of opportunity limb only, the legislation stipulates that the schemes are to cover both parts of the duty. The legislation also provides that arrangements for impact assessment and consulting on policies, and the monitoring of any ‘adverse impacts’ of policies must also be set out in schemes but does make this obligatory for the equality of opportunity duty only, and not the good relations duty. No definition of ‘promoting good relations’ was provided in the 1998 Act.

Where public sector ‘good relations’ duties came from

A duty, limited to local government, to promote good relations between different racial groups had been included in Northern Ireland’s belated first racial discrimination legislation in 1997.⁵⁰ Duties to promote good relations have their origins in much earlier racial discrimination legislation in Great Britain, with the first statutory reference to a duty to promote good relations found in the Race Relations Act 1976. Section 71, subordinate to the broader duties of the Act, placed a duty on local government to carry out its functions “with due regard to the need to” promote good relations as well as equality of opportunity and to eliminate unlawful

⁴⁸ Through paragraph 1 Schedule 9 of the Act provided for under Section 75(4).

⁴⁹ The former two, as well as having broader application, had long been used as the indicators for ‘community background’ within the two main communities within fair employment legislation (i.e. Protestant/Catholic and unionist/nationalist etc).

⁵⁰ Race Relations (Northern Ireland) Order 1997, Article 67.

discrimination between racial groups. Section 43 provided that promoting good relations was also one of the duties of the Commission for Racial Equality (CRE), established by the same Act.

The earlier Community Relations (Northern Ireland) Act 1969, which established the Northern Ireland Community Relations Commission, also had among the Commission's duties encouraging the establishment of 'harmonious community relations'.⁵¹ This duty did not extend to other public bodies, except insofar as the Commission was to assist others to take steps to secure the same. The Commission was short lived and abolished in one of the few acts of the brief power-sharing executive in 1974.⁵²

It appears that in Great Britain the duties in the 1976 Act was neither prominent nor well defined. Attention was drawn to it in 1980 when the CRE formally investigated the impact of its own sponsoring department's application of immigration control procedures. The Home Office unsuccessfully tried to block the investigation in the courts but the CRE argument that its investigation powers included its statutory duty to promote good racial relations prevailed.⁵³ In terms of the essence of the investigation and the way it considered the concept of 'good race relations' the Home Office, despite the evidence to the contrary, had argued that "strict immigration control" were an "essential basis for good community relations". The CRE by contrast contended that the unfairness of negative decisions on those who should have entitlements was damaging race relations.⁵⁴

The duty on local authorities in the 1976 Act was vague and non-specific having no provision for schemes or policy appraisal. There is little apparent evidence of focus on it by the CRE or it actually being implemented by local authorities beyond some Council's holding occasional multi-cultural social events. Fifteen years on from the 1976 Act it is a notable indicator of the lack of prominence of the original s71 'good relations' duties that there is no reference to them in either the Ouseley or Cattle Reports into the unrest in Bradford, Oldham in 2001, despite the connections with the subject matter of the reports.⁵⁵

By this time, and two years after the statutory duty in the Northern Ireland Act 1998, the 1976 Act in Great Britain had been amended to include an expanded racial equality duty across the public sector, again inclusive of 'good relations'.⁵⁶ This also led to a duty to produce Racial Equality Schemes with arrangements for conducting impact assessments on the impacts of policy on racial equality.⁵⁷ The CRE produced guidance on the duties which attempted, without defining good relations, to develop the meaning of the concept, stating that it was shorthand for communities who "respect differences and, secure in the knowledge they have equal rights and

⁵¹ Community Relations (Northern Ireland) Act, Section 1(3)(a).

⁵² For a narrative on the Commission see 'Tracing the meaning of 'community relations' in Northern Ireland since 1969: Reflections of Duncan Morrow (Community Relations Council, 2013) pp3-10.

⁵³ Judgement of Woolf J, E&W High Court, 14 October 1980.

⁵⁴ Commission for Racial Equality 'Immigration Control Procedures: Report of a Formal Investigation', 1985, p12.

⁵⁵ Community Pride not Prejudice, making diversity work in Bradford, Bradford Race Review, July 2001; Community Cohesion: A Report of the Independent Review Team Chaired by Ted Cattle, Home Office, 2001.

⁵⁶ The Race Relations (Amendment) Act 2000.

⁵⁷ Race Relations Act 1976 (Statutory Duties) Order 2001.

opportunities, pool their talents and energies.”⁵⁸ It suggested public bodies could help meet this goal through the other parts of the statutory duty (tackling racial discrimination and promoting equality of opportunity), creating opportunities for people from different communities to meet and openly and honestly discuss issues and concerns and addressing all the needs of the community by targeting projects at particular groups.⁵⁹ CRE monitoring in general found that ‘good relations’ was taken less into account by public authorities than the other elements of the duty.

In a formal investigation in 2007 into regeneration and racial equality the CRE found that despite regeneration projects being linked to community tensions, 9 out of 10 related racial equality impact assessments did not even look at the ‘good relations’ element of the duty.⁶⁰ It reported that community tensions could arise due to misinformation that projects were unduly benefiting particular groups. However it records that, although countering such misinformation would be exactly the type of action you would expect from discharging the ‘good relations’ duty, in general public authorities were not doing so.

In an inquiry into equality and good relations in relation to Gypsy and Traveller sites the CRE suggested that the duty should be interpreted in this context as how public authorities could best contribute to integration, avoiding segregation, defusing racial tensions and hostility, promoting benefits of equal rights and opportunity, and challenging public misconceptions and prejudice. The inquiry found site provision policies were generally not being impact assessed nor monitored and hence were not informing Councils of policies which were perpetuating inequalities and aggravating community tensions. The inquiry found instead most ‘good relations’ initiatives were one off cultural events which did nothing to tackle underlying causes of what had become a vicious circle of failing to adequately provide sites and resultant poor race relations.⁶¹

Statutory duties were also placed on Public Authorities under disability legislation and gender legislation. In 2006 a statutory duty was introduced on gender grounds, but covered eliminating unlawful discrimination and harassment and promoting equality of opportunity, rather than good relations.⁶² Around the same time the Disability Discrimination Act 1995, which does extend to Northern Ireland, was amended to include a statutory duty. There is no specific reference to ‘good relations’ within this but it does include a duty to pay due regard to the need to promote positive attitudes towards disabled persons.⁶³

By 2011 a new statutory equality duty had come into force in Great Britain following single equality legislation.⁶⁴ This duty maintained a good relations limb but for the first time providing a level of definition that the duty to ‘foster good relations’ means

⁵⁸ Commission for Racial Equality ‘The duty to promote race equality: A Guide for Public Authorities (Non-statutory)’ May 2002, page 11.

⁵⁹ As above, page 12.

⁶⁰ Regeneration and the Racial Equality Duty: A formal Investigation, Commission for Racial Equality, September 2007.

⁶¹ Common Ground: Equality, good race relations and sites for Gypsies and Irish Travellers, Commission for Racial Equality, May 2006.

⁶² S76A Sex Discrimination Act 1975 (inserted s84 by Equality Act 2006).

⁶³ S49A Disability Discrimination Act 1995 (inserted in Northern Ireland by the Disability Discrimination (Northern Ireland) Order 2006).

⁶⁴ Equality Act 2010.

paying particular regard to “*the need to tackle prejudice and promote understanding*”.⁶⁵ Such a formulation is similar to the provisions of human rights instruments like ICERD.⁶⁶ There has therefore been some shift towards a concept which involves a duty to tackle racial (and by extension sectarian, homophobic etc) prejudice. The new duty covered age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.⁶⁷

In summary, at the time of the Belfast/Good Friday Agreement the good relations concept in Great Britain had been largely neglected and was poorly, if at all, defined. In this sense the Equality Commission for Northern Ireland had little to go on from the duties in Great Britain in relation to informing its own advice on how to interpret the new section 75(2) good relations duty. Since then the concept has evolved with CRE suggesting a ‘good relations’ duty could be used to counter misinformation, misconceptions and to tackle racial prejudice and promote understanding. The chapter will now cover and contrast how the concept of ‘good relations’ has evolved and developed in Northern Ireland.

The 1998 Act: concerns the ‘good relations’ duty could undermine equality

Concerns about the lack of reference to ‘parity of esteem’ and that the lack of definition of ‘good relations’ could lead to minimal interpretations of the provision were raised in the parliamentary debates on the Northern Ireland Bill.⁶⁸ The main concern from NGOs was the extent to which the formulation of the duty as undefined ‘good relations’ would be open to interpretations in a manner which would actually undermine equality initiatives on the grounds they might lead to ‘community tensions’. One example, from the CRE Formal Investigation into regeneration policy, illustrates this point well:

...in one area, officers recommended that regeneration funding should be allocated to a predominantly ethnic minority area, based on strong evidence of need. The council refused to approve this and redirected the funding to predominantly white British areas. A number of interviewees in this area felt this was motivated by fear of a ‘white backlash’.⁶⁹

The fear was that an undefined ‘good relations’ duty could be used to institutionalise a practice whereby equality and rights initiatives were blocked on the grounds that there were objections to them. In effect the duty could become a mechanism for the opponents of rights and equality to stifle positive action. Member groups of the Equality Coalition, including CAJ and UNISON who convene the network, lobbied hard for the equality duty to have primacy over its good relations counterpart to

⁶⁵ Equality Act 2010 S.149(5).

⁶⁶ See for example Article 7 ICERD: ‘States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.’

⁶⁷ Equality Act 2010 S.149(7).

⁶⁸ See HC Deb 27 July 1998 vol 317 cc98-115, Eddie McGrady MP column 105, and Maria Fyfe MP column 108.

⁶⁹ Regeneration and the Racial Equality Duty: A formal Investigation, Commission for Racial Equality, September 2007, page 24.

mitigate against this risk and allow initiatives to continue on the basis of objective social need. As suggested by CRE in its 2007 investigation into regeneration the appropriate role of good relations in such scenarios would be to tackle prejudice and misinformation surrounding equality initiatives.

The s75(2) good relations duty also covered only the aforementioned three grounds, whereas the s75(1) equality of opportunity duty covers nine grounds.⁷⁰ This could even lead to the scenario whereby, for example, initiatives to promote equality of opportunity on grounds of sexual orientation are challenged on the grounds that they could affect good relations on grounds of religious belief, when there is no counterpart 'good relations' duty on grounds of sexual orientation.

Equality Coalition members intervened during the passage of the bill in an ultimately successful campaign to ensure that 'good relations' did not trump the equality provisions in the Act. This secured the explicit subordination on the face of the legislation of the 'good relations' duty to its 'equality of opportunity' counterpart.⁷¹ The legislation ultimately set out that the 'good relations duty' is to be discharged 'without prejudice' to the equality duty, and that public authorities "should have regard to the *desirability* of promoting good relations", rather than the stronger language of "*due regard* to the *need* to promote equality of opportunity" for the former limb of the duty.⁷²

The relationship was also made explicit on the Parliamentary record by the then Secretary of State Mo Mowlam who stated that "Good relations cannot be based on inequality between different religions or ethnic groups" and affirmed that there should be no conflict between the two duties.⁷³ This subordination of the good relations duty was and is a first – with similar duties in legislation in Great Britain not containing this hierarchy.

There has been opposition to the hierarchy.⁷⁴ In a paper in the first official review of section 75 equality duty expert Professor Chris McCrudden noted that the critique related to the intersection between equality and tackling sectarianism in relations between the two main communities. Specifically some commentators had argued there should be more of a focus on the latter, or even that the focus on equality and groups underpinned rather than undermined such sectarianism. McCrudden provided the following counter argument:

Community relations activity that is not based on a notion of tackling inequality is community relations built on sand. For those who argue thus, the idea that community relations is in some way in constant tension with equality is a dangerous notion. It is either an attempt to retain the status quo with respect

⁷⁰ Religion; political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation.

⁷¹ Section 75(2) reads "Without prejudice to its obligations under subsection (1) [the equality duty], a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group."

⁷² Section 75 Northern Ireland Act 1998. For jurisprudence and a definition of due regard see 'Submission from the Equality Coalition to the Ad Hoc Committee on Conformity with Equality Requirements in relation to Proposals for Welfare Reform Bill, December 2012,' section 2.2

⁷³ *Hansard*, House of Commons, 27 July 1998, Vol. 316, 109.

⁷⁴ See for example Alliance party concerns about a 'hierarchy between equality and good relations', *Hansard*, Northern Ireland Assembly (Equality and Good Relations Motion), 28 September 2010.

to existing levels of inequality or it is an attempt to retain policy making and administrative turf, neither of which is a suitable way of dealing with problems. Community relations strategies to date have clearly not been a notable success story. Much work needs to be done to develop good relations in Northern Ireland, but it is not acceptable that equality should be subordinated to this goal. The stronger we make the equality goal the more we will lay good foundations for improved relations across all communities (a prime aim of community relations policy) in Northern Ireland. Indeed...research appears to show that one of the few areas in which separation between the two communities has diminished has been in employment, exactly the area of activity that has seen the more sustained application of equality legislation over the past two decades.⁷⁵

Whilst the primacy of the equality *duty* was put into the legislation CAJ developed broader concerns that 'good relations' in strategic policy would undermine equality imperatives.

The subsequent policy environment: towards a 'Shared but Unequal Future'?

A review of community relations policy had been provided for in the Northern Ireland Executive's first term draft Programme for Government.⁷⁶ The later April 2003 UK-Ireland Joint Declaration made reference to a deeply divided society and the importance "improving community relations, tackling sectarianism and addressing segregation, including initiatives to facilitate and encourage integrated education and mixed housing." The Joint Declaration committed the British Government to "encouraging the devolved administration, when restored, to prioritise and take forward a review of policy on good community relations."⁷⁷ The review was to take account of the 'A Shared Future' consultation document, issued earlier in 2003 under 'direct rule' given the suspension of the Assembly.⁷⁸

The Equality Commission responded to this consultation suggesting, among other matters that: the good relations duty be extended under a single equality act beyond the three categories to cover all other equality groups; a good relations strategy take account of the impact of disadvantage and poverty and residential and educational segregation; and that lessons be learned from the ECNI experience of harmonious workplaces under anti-discrimination and equality legislation which could provide models for community based approaches to good relations. The ECNI recommended that an additional policy aim of promoting understanding of "equality and human rights standards in society so as to promote good relations and diversity" be added to the shared future policy. The response makes a clear statement that:

The Commission believes that equality is a pre-requisite for good relations. A policy which aims to bring about a more shared and pluralist society must facilitate the recognition of inequalities, an understanding of others' needs and

⁷⁵ McCrudden, Christopher 'Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998' p21, Annex b Vol. 2 in McLaughlin and Faris 'The Section 75 Equality Duty – An Operational Review' (Northern Ireland Office, November 2004).

⁷⁶ Northern Ireland Executive, draft Programme for Government, 2001-2002, page 25-6.

⁷⁷ Joint Declaration by the British and Irish Governments, April 2003, paragraph 27.

⁷⁸ Shared Future: A Consultation Paper on Improving Relations in Northern Ireland, January 2003 Community Relations Unit, Office of the First Minister and Deputy First Minister.

concerns by all sectors of society, and a willingness to come together to respond appropriately.⁷⁹

Ultimately in the context of continued suspension of the Assembly it was the direct-rule Government who issued a high-level strategy for good relations in 2005, retaining the title *A Shared Future*. Whilst the initial review had stressed that human rights (including equality) should be central to promoting better relations, there was little reference to this in the subsequent *A Shared Future* documents. CAJ questioned whether the blueprint would effectively provide for a 'Shared but Unequal Future' as it effectively dismissed inequality as a source of the root of community division preferring an explanation based on a 'culture of intolerance.' CAJ noted that this in effect regressed to an explanation of segregation resonant of debates in the 1970s and 1980s when explanations focused on personal intolerance or bigotry rather than government or structural failures. For CAJ other problematic issues with a *Shared Future* were that:

- it assumed (wrongly given evidence from official statistics) that community differentials had disappeared;
- it disregarded the lessons fair employment campaigning had had for desegregating workplaces;
- it effectively determined that issues of equality and rights were divisive rather than a route to reconciliation;
- its indicators focused on 'attitudinal' issues and 'segregation' rather than inequality;
- it effectively set aside equality for good relations in a number of areas including proposed exemptions from anti-discrimination law setting to facilitate mixed housing above tackling housing inequality;

CAJ expressed concerns that the policy would roll back the primacy given to equality and rights in the Agreement. Despite the legislation and Parliament's intentions on the hierarchy between the duty *A Shared Future* indicated 'good relations impact assessments' (to assess impacts on the 'promotion of sharing') should sit alongside equality impact assessments.⁸⁰

One assessment by prominent anti-racism commentators is highly critical of the evolution of the concept of good relations culminating in *A Shared Future*. Arguing in effect that this attempted to reverse the primacy given to equality under the Agreement (GFA):

...'good relations' adopts much of the fairly shallow analysis of the community relations industry. The watchwords – diversity, equity, interdependence – did not change at all. While the concepts of interdependence and diversity are fairly innocuous, the reference to equity is far more problematic. 'Equality' is regarded as too radical; it was bad for 'community relations' and it is now bad for 'good relations'. Tellingly, a word which was central to the GFA is excised

⁷⁹ Equality Commission for Northern Ireland response to 'A Shared Future' A Consultation on Improving Relations in Northern Ireland, September 2003, paragraph 2.4.

⁸⁰ CAJ 'Equality in Northern Ireland: Rhetoric and Reality', 2006 p124; see also CAJ submission s143: response to shared future consultation paper (June 2003); See CAJ submission s180: to DSD regeneration plan for North West Belfast City Centre (February 2007).

from the lexicon of 'good relations' in the post-GFA state. Moreover, this term is now imposed upon anti-racism; people of colour, like Catholics, can now only ask for equity because to demand equality might somehow generate 'bad relations'.⁸¹

In implementing *A Shared Future* Government set out that it intended to engage with the ECNI with a view to amending legislation to remove protection against religious/political discrimination in housing to facilitate 'shared housing' schemes.⁸² CAJ at the time noted that if there were an equal playing field the worthwhile goal of shared/integrated housing could be pursued without conflict with equality imperatives, however in the context of clear differentials, the allocation of 'shared' housing on the basis of (religious) quotas would perpetuate inequalities, allocating resources away from those in greatest objective need, which in itself would surely undermine 'good relations'.⁸³ In the end the proposal was soundly rejected by equality advocates and no legislative amendment was proceeded with.

The restored devolved government did consult (in 2010) on a revised strategy, now entitled the Cohesion, Sharing and Integration Strategy (CSI), in which 'good relations' remained the predominant concept. The Human Rights Commission, in its response to the strategy noted that the draft CSI strategy:

...makes reference to 'good relations' some seventy times and it is one of the underpinning concepts of the programme.... However definition or interpretation of the term is not elaborated on in any part of the document... This could lead to a range of interpretations including some not compatible with human rights and equality duties...the Commission has had cause to raise concerns regarding the misinterpretation of the good relations duty in a manner that has actually ran contrary to human rights duties.⁸⁴

The Human Rights Commission also raises concerns that one of what it calls the 'striking features' of the draft CSI policy was the "virtual absence of any reference to discrimination." It notes the term 'discrimination' is only used once in the body of the document and that neither the legacy of sectarian discrimination nor its ongoing manifestations are dealt with by the CSI strategy. This, the Commission argues, misses opportunities to advance reconciliation by naming and addressing present-day inequalities."⁸⁵

The response of the Community Relations Council (CRC) to the draft CSI strategy also dealt directly with the relationship between equality and good relations both in the context of policy and the section 75 duties:

CRC since its inception has believed that the principle and practice of equality is at the core of building good relations. This implies both the full application of

⁸¹ McVeigh, Robbie and Rolston, Bill 'From Good Friday to Good Relations: sectarianism, racism and the Northern Ireland state' *Race and Class* Vol. 48(4) 2007, pp1-23, page 15.

⁸² OFMDFM Shared Future Triennial Action Plan, 2006, p18

⁸³ *Rhetoric and Reality*, 2006, page 95.

⁸⁴ Northern Ireland Human Rights Commission 'Response to the OFMDFM Consultation on the Programme for Cohesion, Sharing and Integration', October 2010, Paragraphs 31-32.

⁸⁵ As above, paragraph 19.

the equality provision of section 75 and a generosity which acknowledges past unfairness and disadvantage and seeks to redress any unacceptable exclusions resulting from it. CRC further believes this commitment to inclusiveness and equality relates not only to the past but to policy priorities for the present and the future.⁸⁶

CRC attributes the likely cause of 'deep confusion' which characterises public debate on good relations to the poor definition of the concept in law. It states that for CRC good relations does not nor preclude proper readjustments to remedy proven inequalities and stresses that good relations "must always be compatible with the full implementation of human rights including the rights of minorities."⁸⁷

The ECNI response to CSI does mention the successes of fair employment legislation, its emphasis overall however is very much on interpersonal attitudes and behaviour rather than on structural inequalities. The ECNI concludes that it "considers that the main purpose of a strategy on cohesion, sharing and integration must be to find ways of dealing with the inheritance of history, in terms of the separateness and lack of interconnection between the two main traditions." In the field of housing the ECNI response focuses on segregation and not inequality. A different tone is struck to the ECNI's aforementioned previous *A Shared Future* response in relation to the relationship between the two duties:

Equality of opportunity and good relations are inseparably linked. The one cannot be effectively pursued without the other and neither will find its full expression in the absence of the other. They are sometimes spoken of as if they were in competition, as if there were a contest between them. But there is no need for such an apprehension. They require each other and they complement each other.⁸⁸

CAJ was concerned that CSI did not place sufficient emphasis on the need for equality in establishing good relations. In particular we highlighted that suggested approaches of prioritising funding to promotion of shared housing could be detrimental to the most disadvantaged areas and hence worsen inequality and be detrimental to good relations. CAJ recommended that Government should instead refer to well established human rights standards when interpreting any definition of good relations.⁸⁹ A Council of Europe treaty body has expressed similar concerns that:

...the CSI Strategy has developed the concept of "good relations" apparently to substitute the concept of intercultural dialogue and integration of society. The Advisory Committee has been informed that, in some instances, the need for

⁸⁶ Community Relations Council, Response to the consultation on the Programme for Cohesion, Sharing and Integration Consultation, October 2010, paragraph 2b.

⁸⁷ Community Relations Council, Response to the consultation on the Programme for Cohesion, Sharing and Integration Consultation, October 2010, paragraph 2d.

⁸⁸ ECNI 'Response to the draft Programme for Cohesion, Sharing and Integration' paragraph 14.

⁸⁹ CAJ Submission s269: response to OFMdfM CSI Strategy (November 2010), page 8.

keeping good relations has been used as justification for not implementing provisions in favour of persons belonging to minorities...⁹⁰

May 2013 saw the publication by OFMdFM of a revised good relations strategy, now entitled *Together: Building a United Community*.⁹¹ The vision of the strategy draws on the language of the legislative formulation of the duties in advocating for a united community based on equality of opportunity and the 'desirability' of good relations. There are also references to reconciliation, diversity, embracing cultural expression and a society free of prejudice, hate and intolerance.⁹² There is no reference to 'parity of esteem' or similar equality of treatment, nor to the Irish language or the framework of the Belfast/Good Friday Agreement. The Strategy defers issues of cultural expression in general, including flags and emblems, to an all party working group.⁹³ The term 'good relations' is used 179 times in the document but there is no definition provided.

A section of the document entitled 'Good Relations and Equality' sets out the text to the Section 75 duties and states that they must be applied in their entirety. It states that 'by improving equality of opportunity for all, we make positive strides to address better community relations', that tackling sectarianism, prejudice and hate will assist in reducing the motivation for discrimination and concludes that in policy making "we regard the promotion of equality of opportunity as an essential element in the building of good community relations and consider that good relations cannot and should not be built on a foundation of inequality."⁹⁴ The strategy then states that complementary to the policy are a number of existing or pending separate equality and reconciliation strategies on children and young people, childcare, victims and survivors, older people, Lesbian, Gay, Bisexual and Transgendered (LGBT) people, gender and racial equality. In relation to sectarianism a definition is provided for the strategy, which focuses on interpersonal behaviour ('threatening, abusive or insulting behaviour or attitudes'). The strategy then commits, if there is consensus, to defining sectarianism in the legislation which will establish the "Equality and Good Relations Commission".⁹⁵

In relation to legislating to transform the ECNI the 'shared community' priority of the strategy sets out an intention of enhancing 'good relations scrutiny' by placing it on a statutory basis by setting up the 'Equality and Good Relations Commission' which will 'build on and incorporate' the existing Equality Commission but also add the present advisory work of the Community Relations Council to its remit.⁹⁶ The strategy then commits to amend the remit of the ECNI to incorporate statutory functions granting it a broad advisory scrutiny and challenge role in relation to good relations. This includes scrutiny and challenge of Government in fulfilling the aims of

⁹⁰ Advisory Committee on the Framework Convention for National Minorities (Third Opinion on the UK adopted 30 June 2011) ACFC/OP/III(2011)006, paragraph 126.

⁹¹ See also earlier statement from the First Minister and deputy First Minister, Thursday, 9 May 2013 [<http://www.northernireland.gov.uk/index/media-centre/executive-statements/statement-090513-together-building.htm> accessed 20 May 2013]

⁹² 'Together: Building a United Community' OFMdFM, May 2013, page 3, emphasis added.

⁹³ Together: Building a United Community, page 6.

⁹⁴ Together: Building a United Community, paragraph 1.17.

⁹⁵ Together: Building a United Community, paragraph 1.36.

⁹⁶ Together: Building a United Community, Executive Summary, page 5-6, and table at paragraph 1.58.

the *Together: Building a United Community* strategy itself.⁹⁷ The role is to include promoting good relations across all sections of the community, although it does not set out an intention to extend categories to which good relations duties apply.

Significantly the Strategy also recommends significant changes to Equality Impact Assessments (EQIAs) to 'introduce an enhanced good relations section' within them.⁹⁸ It commits to an 'augmented impact assessment' and the development of an enhanced EQIA template to screen policy and spending commitments for alignment 'with the strategy'.⁹⁹ In essence, as well as being explicit that policy includes spending, this appears to directly align good relations impacts with the contents of the strategy itself. The proposal, to have a legislative basis, would require amendment of the Northern Ireland Act. The power to amend Section 75 and its respective schedules is presently vested in the Westminster Parliament.¹⁰⁰

In summary, the development of high-level community relations policies are clearly relevant to the statutory duties, and recent developments are clearly going to have an impact on them. However, it is worth recalling for the purpose of the analysis that follows in relation to the application of the good relations duty to date, that the section 75(2) good relations duty was established at the time of the Belfast/Good Friday Agreement as a separate legislative vehicle to overall community relations policy. The duty remains subordinated to its equality counterpart in the legislation and a further safeguard established further to the Agreement was precisely the oversight remit of the ECNI – an independent body with a strong equality remit. Before the next chapter examines how the ECNI has interpreted the good relations duty to date, the following section will discuss how we should expect it to be interpreted in light of the applicable human rights and legal frameworks.

How should the duty be interpreted? Human rights and legal framework

The term 'good relations' is one not found in international human rights or equality instruments and hence, unlike key equality concepts, an international body of knowledge cannot be readily deferred to for definition.¹⁰¹ However, the obvious starting point for interpreting the section 75(2) good relations duty are the parameters set by the treaty based commitments the UK has entered into, including key international human rights instruments, but also the provisions of the Belfast/Good Friday Agreement.

Unincorporated treaties do not form direct part of domestic law, but it has been established as a principle of legal policy that, where possible, legislation should be

⁹⁷ *Together: Building a United Community*, paragraph 6.28-9.

⁹⁸ *Together: Building a United Community*, Executive Summary, page 6 and table at paragraph 1.58.

⁹⁹ *Together: Building a United Community*, paragraph 6.30 and table at paragraph 1.58.

¹⁰⁰ Northern Ireland Act 1998, schedule 3 (Reserved Matters), paragraph 42(b) of.

¹⁰¹ An exception to this is the Appendix of General Policy Recommendation no 2 on 'Basic principles concerning specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level' of the Council of Europe's European Commission against Racism and Intolerance (ECRI), principles 3a of which lists promoting good relations as one of the duties of such bodies. No definition is given. The recommendation was adopted by ECRI on 13 June 1997 and hence predates the Agreement.

interpreted compatibly with international obligations.¹⁰² This principle is particularly useful when seeking to eliminate ambiguities in interpretation. In effect treaties become ancillary aids in interpreting legislation. This would seem particularly relevant when the legislation exists to give effect to a treaty commitment, as is the case with the Northern Ireland Act 1998. The Equality Commission and its Dublin counterpart received advice that the courts would take this approach in a report they commissioned in relation to the equality implications of the Belfast/Good Friday Agreement:

... the courts apply a standard presumption in interpreting legislation that the legislature will be deemed to intend to adhere to its international legal obligations. Therefore, according to well-established precedent ...where an ambiguity exists in the interpretation of legislation, the courts will prefer to adopt the interpretation that does not create inconsistency with the treaty commitment in question. The Agreement, as a set of commitments binding ... in international law, could therefore in both jurisdictions be used to interpret legislation, where ambivalence or uncertainty existed as to its meaning.

However, the UK courts have been willing to go further and to treat the entire text of the Agreement as a quasi-constitutional document which could be used to interpret legislation and executive acts designed to give effect to its provisions, even in the absence of textual ambiguity. Thus, the Law Lords in *Robinson v. Secretary of State for Northern Ireland* and the Northern Irish Court of Appeal in *De Brun* viewed the Northern Ireland Act 1998 as designed to give effect to the spirit and letter of the Agreement, and therefore interpreted both the provisions of the 1998 Act and the permissible scope of Ministerial powers conferred by that Act by reference to the Agreement's contents.¹⁰³

This therefore provides a framework for interpreting the potential parameters of 'good relations' insofar as the outcome of the implementation of the duty should be compatible with, and not conflict with, the state's treaty-based commitments. It follows that the section 75(2) 'good relations' duty should at least be interpreted compatibly with the human rights instruments the UK has signed up to and the provisions of the Belfast/Good Friday Agreement.¹⁰⁴

It would therefore appear that provisions in the Agreement, including those on rights, equality and equality of treatment of the identity and ethos of the two main communities, would be a relevant consideration when interpreting the good relations duty. Many such matters are binding on executive ministers as the Agreement set out that the Ministerial Pledge of Office would include a provision "to serve all the people of Northern Ireland equally, and to act in accordance with the general

¹⁰² *R v Lyons* [2002] UKHL 44 §27 (Lord Hoffman) See also: *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71, [2006] 2 AC 221 at §27 (Lord Bingham); *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 747.

¹⁰³ O'Connell, Colm 'Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland (Dublin, Equality Authority and Equality Commission for Northern Ireland 2005, page 11.

¹⁰⁴ There is also the general rule of international law treaties are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties 1969 (Done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331) Article 31(1).

obligations on government to promote equality and prevent discrimination” and that the Ministerial Code would provide that Ministers at all times must, among other matters, “operate in a way conducive to promoting good community relations and equality of treatment.” The St Andrews Agreement provided for the ministerial code to be set up on a statutory basis.¹⁰⁵

In another obvious area the Belfast/Good Friday Agreement also places emphasis on linguistic diversity and contains eight specific commitments to the Irish language.¹⁰⁶ These commitments were followed by the UK’s ratification of the Council of Europe *European Charter for Regional and Minority Languages*, including a range of specific duties under Part III for the Irish language.¹⁰⁷ The ‘good relations’ duty should be therefore interpreted compatibly with the commitments on the Irish language contained in the Agreement and Charter. This should protect against an interpretation that, for example, it would be automatically bad for ‘good relations’ to desist from promoting the Irish language, given this would conflict with the duty under the Charter to do so. Positively the ‘good relations’ duty could be interpreted in accordance with Charter and harnessed to discharge the duties under it to promote respect, understanding, and tolerance of the language.

In relation to another key treaty, the European Convention on Human Rights (ECHR), such a practice has been explicitly incorporated into domestic law with s3 of the Human Rights Act 1998 stipulating that legislation must be read and given effect in a manner compatible with ECHR rights. Domestic Courts must take into account Strasbourg¹⁰⁸ jurisprudence when interpreting ECHR rights. In addition Strasbourg itself will interpret ECHR rights in light of other relevant international standards and their authoritative interpretation by the treaty bodies.¹⁰⁹ For example, if interpreting Article 10 (freedom of expression) duties the UK has signed up to under the aforementioned *European Charter for Regional or Minority Languages* and the assessments made by the Committee of Experts (COMEX) who supervise UK compliance with the Charter would be relevant.

There are a number of general human rights principles relevant to interpreting ‘good relations’ that can be drawn upon from ECHR jurisprudence. For example, in referring to the ‘hallmarks of a democratic society’ the Court has consistently “attached particular importance to pluralism, tolerance and broadmindedness”. In relation to minority rights the Court has asserted that “democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position” and set out in a similar vein to the above that where conflict exists public authorities should not move to “remove the cause of tension by eliminating pluralism, but to ensure the competing groups tolerate each other...”¹¹⁰ Such principles are relevant to interpreting the ‘good relations’ duty, which in any case –

¹⁰⁵ Pledge of Office was legislated for under the Northern Ireland Act 1998 and includes the equality provision. The Northern Ireland (St Andrews Agreement) Act 2006 set up the ministerial Code on a Statutory Basis, the current code includes the provision for equality of treatment.

¹⁰⁶ Rights, Safeguards and Equality of Opportunity, Paragraph 4.

¹⁰⁷ Council of Europe Treaty no. 148. Declaration contained in a Note Verbale from the Foreign and Commonwealth Office of the United Kingdom, handed at the time of deposit of the instrument of ratification on 27 March 2001..

¹⁰⁸ The seat of the European Court of Human Rights.

¹⁰⁹ *Demir and Baykara v Turkey* §85 [2008] ECHR 1345.

¹¹⁰ *Agga v Greece*, 2002 [§60]; *Barankevich v Russia* 2007 [§§30-31].

as provided for in s3 of the Human Rights Act 1998 must be interpreted compatibly with ECHR rights.

It would appear therefore that there is a framework rooted in the Agreement and the UK's human rights commitments to both set parameters on and also guide the interpretation of the 'good relations' duty by the Equality Commission. The lack of a firm definition of good relations in Great Britain at the time of the Agreement also would also appear to make the concept sufficiently malleable allow this to happen.

From examining both the evolution of the duty in Great Britain, the origins of the duty in the Agreement, the hierarchy in the legislation and the broader human rights framework, it would appear reasonable to expect the parameters of good relations to be shaped by imperatives, such as:

- tackling racism, sectarianism, other prejudice (including countering misinformation over initiatives based on objective social need);
- promoting equality of treatment for the identity and ethos of the two main communities, whilst respecting the rights of others;¹¹¹
- ensuring pluralism, tolerance, understanding minority rights and linguistic diversity etc, and
- promoting integration, including through tackling segregation.

Such imperatives, and the duty as a whole, should also operate within the parameters of the framework of policies compatible with human rights obligations and principles as well as, given the hierarchy of the duties, policies compatible with the statutory equality duty.

The next chapter will examine the general interpretation of the Equality Commission of the good relations duty in practice and its guidance to public authorities.

¹¹¹ See discussion in chapter two on a legislative and human rights compliant formulation of the framework of 'parity of esteem' contained within the Belfast/Good Friday Agreement.

4. Equality Commission Guidance on the ‘good relations’ duty

Further to its statutory duty to advise public authorities in connection with the section 75 equality and good relations duties the Equality Commission first issued statutory guidance on the duties in 2000. This guidance was revised and reissued first in 2005 and again in 2010 further to periodic reviews of the effectiveness of the duties. The Commission also produced guidance specific to the good relations duty in 2007, much of which is carried through into the 2010 guide.¹¹²

This chapter examines how the ECNI guidance has interpreted and advised on the application of the ‘good relations’ duty. First it will look at how the ‘good relations’ concept has been interpreted and defined by the ECNI. It will then examine the provisions for Equality Impact Assessment (EQIA) within the legislation and the methodology the ECNI had developed for it and finally it will provide commentary on the ECNI’s subsequent decision to incorporate good relations within the EQIA process.

What did the ECNI draw on to define the parameters of ‘Good Relations’?

In seeking to define the ‘good relations’ duty it is notable that the Commission’s guidance makes no more than a passing reference to the Belfast/Good Friday Agreement. There is no reference to ‘parity of esteem’, equality of treatment or other matters covered in the treaty. At face value therefore the framework provided by the Agreement does not appear to have been utilised to interpret the scope of the good relations duty. There is similarly no indication of interpretation of the good relations concept in accordance with the human rights standards to which the UK is party, including the ECHR. Earlier versions of the guidance do include a list of titles of international human rights standards in the appendix. This was dropped in the 2010 guidance.

The 2007 good relations guidance is lengthy and detailed and does contain elements which you would expect to find from a human rights framework in interpreting good relations. The ECNI outlines that the concept involves challenging sectarianism and racism: “challenging misconceptions, preconceptions, stereotypical assumptions and prejudices against people perceived as outsiders or different (such as migrant workers or Irish Travellers).”¹¹³ The Commission also directly addresses the issue of positive action measures to address inequalities, noting that public authorities should “consider what steps need to be taken to gain the confidence, trust and acceptance of all parts of the community” as part of the Good Relations duty, emphasising “Communication of the reasons for the positive action is essential in this situation.”¹¹⁴

It states, largely citing anti-prejudice measures that a *requirement* of the duty is that public authorities are “to take a **pro-active** initiating approach to contributing to a shared society, rather than responding to the effects of a divided one”.¹¹⁵ This

¹¹² ‘Promoting Good Relations, A Guide for Public Authorities’, Equality Commission, October 2007.

¹¹³ Promoting Good Relations, paragraphs 1.3 and 2.8.

¹¹⁴ Promoting Good Relations, paragraph 2.23.

¹¹⁵ Promoting Good Relations, paragraph 1.3 emphasis in original.

provision is highlighted in some Commission EQIA advice.¹¹⁶ In echoes of *A Shared Future* imperatives the guidance also emphasises an interpretation of the duty as one which reduces segregation. The Commission states “separation emphasises difference and encourages mistrust. Economically, as well as morally, the provision of parallel services is inefficient and unsustainable” and states it has consistently emphasised that ‘separate but equal’ is not an option.¹¹⁷

In relation to a definition of ‘good relations’ the Commission did introduce its own ‘working definition’ in the 2005 guide to the Statutory Duties. This is not as simple as the framework of giving primacy to ‘tackling prejudice and promoting understanding’ ultimately found in the Equality Act 2010. Rather the ECNI working definition states:

The growth of relationships 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.¹¹⁸

In the subsequent 2007 guidance on the good relations duty the Commission repeats this ‘working definition’ and also that provided by Government in a *Shared Future*. The guidance also notes that ‘good relations’ is not defined in legislation and that there is not a single agreed definition. The Commission does not advocate a definition but instead suggests public authorities develop their own definition or adopt one developed by another organisation.¹¹⁹ The outcomes of the duty in practice will of course be dependent on its practical application, in particular in how it is used, if at all, to appraise policy.

Good relations, the law and the Equality Impact Assessment Process (EQIA)

Both the Agreement and legislation make provision for a policy impact assessment process on the equality duty, but not for the good relations duty. The Agreement stipulates public bodies would be obliged to draw up statutory schemes demonstrating their implementation of the equality of opportunity duty which would cover “arrangements for policy appraisal, including an assessment of impact” as well as matters such as consultation and monitoring.¹²⁰ Schedule 9 of the Northern Ireland Act 1998 duly sets out obligations to produce an ‘equality scheme.’ Whilst this is to cover how the public authority will generally fulfil the duties imposed by both limbs of the duty, the legislation sets out a number of mandatory elements of such schemes which it only applies to the ‘equality of opportunity’ and not to the good relations limb. These are the arrangements for policy appraisal, monitoring of

¹¹⁶ See for example, ECNI response to Derry City Council, Consultation on the “Resolution to make application to the Privy Council to have the name of the City changed from Londonderry to Derry”. September 2009, paragraph 2.3.

¹¹⁷ Promoting Good Relations, paragraph 2.24.

¹¹⁸ ECNI, Guide to the Statutory Duties, 2005, p81.

¹¹⁹ Promoting Good Relations, Guide for Public Authorities, ECNI 2007, paragraph 3.26. The Community Relations Council definition, which is closer to the approach in the Equality Act 2010, is among those then referenced in the guide. It states: “Good Relations challenges sectarianism and racism, promotes equality, develops respect for diversity and raises awareness of the interdependence of the people and institutions within NI”

¹²⁰ Rights, safeguards and equality of opportunity, paragraph 3.

‘adverse impacts’ and the publication of the same, with the legislation stating equality schemes must, among other matters, set out the public authority’s arrangements:

for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity;

for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity;¹²¹

Schedule 9 also sets out ‘duties arising from equality schemes’ in relation to publishing impact assessments, which include detailing any consideration by the public authority as to mitigate any adverse impacts on equality of opportunity, or alternative policies which might better achieve equality of opportunity. These obligations are set out for the equality of opportunity limb of the duty only.¹²² Equality schemes are to conform to any guidelines issued by the ECNI in relation to their form and content. The ECNI guidance sets out and recommends a methodology for policy appraisal known as the Equality Impact Assessment (EQIA). The EQIA, the guidance sets out, involves a seven step EQIA procedure with detailed methodology to assess equality impacts.

Mandatory steps of the EQIA include assessing and monitoring any ‘adverse impact’ of policies on equality of opportunity. The concept of ‘adverse impact’ is also taken from the Agreement and legislation. Accordingly the Commission defined ‘adverse impact’ in accordance with well developed equality law concepts, such as that of discriminatory detriment. It is made clear that treatment not only must be differential but also ‘less favourable’ to constitute adverse impact, a threshold it sets as being lower than the legal test for unlawful discrimination. The definition provided in ECNI guidance is:

Adverse Impact: Where a Section 75 category has been affected differently by a policy and the effect is less favourable, it is known as adverse impact. If a policy has an adverse impact on a Section 75 category, a public authority must consider whether or not the adverse impact is unlawfully discriminatory. In either case a public authority must take measures to redress the adverse impact, by considering mitigating measures and/or alternative ways of delivering the policy.¹²³

Furthermore the ECNI published Practical Guidance on EQIAs which provides detailed guidance on how to assess adverse impacts. Beyond reproducing the actual text of section 75 there understandably is no reference of ‘good relations’ at all in this guidance which clearly draws on the ECNI experience of equality and non-discrimination law to detail methodology. The practical guidance includes examples of key indicators of adverse impact drawn from standard objective empirical based indicators common in equality assessments e.g. lower participation or success rates; eligibility criteria which disadvantages a particular group, differential charges to different groups. The guidance suggests the use of quantitative and qualitative data

¹²¹ Schedule 9, paragraph 4(2)(b-d).

¹²² Schedule 9 paragraph 9.

¹²³ Guides to Statutory Duties 2005, Appendix A, and Guide to Section 75, 2010 p82.

to guide equality impact assessment, and sets out and defines the key equality concepts of direct discrimination and indirect discrimination referring to the relevant anti-discrimination law in relation to the formula used. The guidance also teases out the difference between a differential impact and adverse impact drawing on the equality law concept of less favourable treatment. The Commission sets out that the determination of whether an impact is adverse involves a “systematic appraisal of the accumulated information”. The Commission points out that there is no standardised statistical test for this but the public authority must make a reasonable judgement, which can involve ‘commonsense’. In an affirmative action clause the Guidance also makes clear that when adverse impacts are identified they may be justifiable, indeed necessary, to promote equality of opportunity if the policy intends to address the needs of the specific group.¹²⁴

The EQIA process itself was therefore meticulously designed around equality law concepts. The ‘good relations’ duty was to be implemented in a manner different to policy appraisal, for example through the adoption of good relations strategies or policies by public authorities. In relation to the relationship of the EQIA with good relations the Commission’s early advice recommends that good relations type policies should themselves be subjected to EQIA to ensure they did not detrimentally impact on equality.¹²⁵ There was no recommendation for good relations impact assessments.

The ECNI decision to recommend Equality and Good Relations Impact Assessments

Independent research commissioned by the ECNI in 2006 as part of an effectiveness review of the section 75 statutory duties notes pressure on the Commission at the time to further advance the good relations duty. The research recorded that within the Commission they however “detected no sense of complacency on the matter (in fact one senior member of staff suggested that the Commission effectively ignored the legislative distinction between 75(1) and (2))”. The researchers further noted the concerns of NGOs that such a policy direction conflating the two duties may lead to the undermining of the equality duty.¹²⁶

The Commission’s Final Report of the Effectiveness Review was published in late 2008 and did include a specific section on the good relations duty. In this the Commission stated that it believed “enhancing implementation of the legislation has a greater capacity to ensure the interdependence of the duties than a change to the legislation to bring parity between the duties.”¹²⁷ The Commission did note that its five year review of equality schemes provided an insight into the distinct approaches

¹²⁴ ECNI ‘Section 75 of the Northern Ireland Act 1998 Practical Guidance on Equality Impact Assessment’, February 2005, p22-28.

¹²⁵ Guide to Statutory Duties 2005, page 64. This states “the Commission recommends that policies specific to the promotion of good relations, or which have an impact on good relations, are ‘screened in’ for further assessment. The relation between the two duties is relevant here, as is the need to assess the equality impacts of good relations policies.” The guidance also states that although the main purpose of screening is to identify adverse impact it could also be used to scope opportunities to promote equality of opportunity and good relations.

¹²⁶ Dickson, Brice and Harvey, Colin ‘Assessing the Role of the Equality Commission in the Effectiveness of Section 75 of the Northern Ireland Act 1998’, Human Rights Centre, School of Law, Queen’s University Belfast, November 2006, p90.

¹²⁷ Equality Commission, Section 75, Keeping It Effective, Final Report –November 2008, page 62, this view was advocated in the context of the relative youth of the legislation and the strategic focus from Shared Future.

of public authorities on the good relations duty but “did not identify a need for a change to the legislation formally to require public authorities to engage in impact assessment regarding good relations, as they currently do on equality of opportunity.”¹²⁸

Nevertheless, the Commission’s guide for public authorities on the good relations duty, published in October 2007, did mark such a radical shift in policy with the Equality Commission now recommending:

...the use of the seven-step equality impact assessment (EQIA) procedure to consider whether, and how, policies have an impact on good relations, whether that impact is positive or negative, and to consider mitigating measures and alternative policies which might better promote good relations.¹²⁹

The Commission was therefore advising that when conducting EQIAs public authorities should also concurrently assess impacts on good relations *using the same methodology*.

In response to questions from CAJ during the course of this research the ECNI indicated that these policy changes had been tested through the research for the effectiveness review and consultation on the review report.¹³⁰ The final report of the effectiveness review does commit to monitoring over time the impact of the 2007 guidance on the good relations duty.¹³¹ It appears however the new approach was never actually piloted in practice to what its impact would be on policy appraisal. The risks with taking such an approach lie in the seven-stage EQIA process which is clearly tailored and designed for a one concept (assessing impacts on equality of opportunity) being applied to a wholly different concept.

The risk in applying the EQIA process to good relations is that simple negative perceptions, ‘impacts’ or ‘tensions’ which do not actually objectively have a detrimental impact on equality of opportunity (and would not reach the threshold of discriminatory detriment or adverse impact) could be elevated to such a status and considered ‘adverse impacts’. Consequently it could then be read the public authority is ‘required’ to take measures against such an ‘adverse impact’ on good relations grounds. This would include the scenario referenced in chapter two whereby a positive action measure for a disadvantaged minority is objected to by a majority group with greater political clout, and the measure is therefore considered an ‘adverse impact’ on good relations and not proceeded with.

Human rights standards are clear that such lawful temporary special measures to alleviate disadvantage are not to be considered an ‘adverse impact’ (i.e. discriminatory).¹³² The ECNI itself echoes this in stating positive action measures are not to be considered as discrimination in its guidance on the equality limb of the

¹²⁸ Equality Commission, ‘Section 75, Keeping It Effective, Final Report’ November 2008, page 63.

¹²⁹ Promoting Good Relations, paragraph 3.16.

¹³⁰ ECNI e-correspondence with CAJ 27 November 2012,

¹³¹ Equality Commission, ‘Section 75, Keeping It Effective, Final Report’ November 2008, page 62.

¹³² See for example General Comment 20 (Non-discrimination in Economic, Social and Cultural Rights) of the UN Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, 2 July 2009

duty.¹³³ However, the invitation to assess ‘adverse impacts’ on good relations grounds through the application of equality methodology to good relations risk this precise scenario.

The revised Commission 2010 Guidance on section 75 maintains and hence embeds the 2007 position of recommending EQIA as the most effective tool for assessing the likely impact of a policy on good relations. In a move which may cause understandable confusion for public authorities the 2010 revised guidance also refers back to the 2005 Practical Guidance on EQIAs which make no reference to good relations and recommends an impact assessment process thoroughly grounded in equality considerations.

There have also been changes to the recommended policy ‘screening’ process. In order to make a decision on whether a policy warrants an EQIA a public authority is first to screen its new or amended policy. There has also been a change in the screening questions recommended in ECNI guidance, with ‘good relations’ considerations achieving enhanced prominence in the most recent edition. The 2005 and 2010 ECNI guidance both set out four screening questions. In the 2005 guidance the focus is on an evidence base relating to participation, needs, experiences of different groups, including evidence that has emerged from previous consultations. Only the last question makes explicit reference to ‘good relations’ and this in the context of whether the policy affords an opportunity to better promote them.¹³⁴ In the 2010 guidance there is a different approach, with two questions now focusing exclusively on good relations and two on equality of opportunity. The good relations questions now encompass assessing whether there are any minor or major impacts on good relations, as well as whether there is an opportunity to better promote them.¹³⁵ The ECNI states an Advisory Group on the 2010 Guidance specifically considered these amendments to the screening process, again though there is no indication any practical piloting of their likely impact took place.

The ECNI statutory guidance defines the relationship between the equality of opportunity and good relations duties and has always been consistent in highlighting the hierarchy between the two duties. The guidance incorporates Mo Mowlam’s Parliamentary statement that good relations cannot be based on inequality, and that the good relations duty cannot be invoked to justify failures to comply with the equality duty. In relation to the specific question of how tensions between the two duties should be resolved there is some evidence of a shift in the

¹³³ For example, ECNI ‘Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities’, April 2010, pages 8-9.

¹³⁴ The Screening Questions in the 2005 ECNI Guidance are: Is there any indication or evidence of higher or lower participation or uptake by different groups? Is there any indication or evidence that different groups have different needs, experiences, issues and priorities in relation to the particular policy? Have previous consultations with relevant groups, organisations or individuals indicated that particular policies create problems that are specific to them? Is there an opportunity to better promote equality of opportunity or good relations by altering the policy or working with others in government or in the larger community? ECNI Guide to the Statutory Duties 2005, page 62

¹³⁵ ECNI ‘Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities’, April 2010 pages 66-68; questions 3 and 4 are – ‘to what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group?’ and ‘Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?’ There are similar questions – across the nine categories – for equality of opportunity.

ECNI view or emphasis overtime. Note the following difference from the guidance up to 2005 and the revised guidance in 2010:¹³⁶

Original Guidance: To the extent that public authorities perceive, in particular circumstances, a tension between the two duties, *the primary duty of a public authority is its equality duty*. The good relations duty cannot be invoked to justify a failure or refusal to comply with the equality duty.¹³⁷

Current Guidance: To the extent that a public authority may perceive, in certain circumstances, a tension between the two duties, the following must be taken into account. *Both duties have to be discharged in all circumstances*. What the Section 75 statutory duties provide is that the discharge of the good relations duty cannot be an alternative to or cannot set aside the equality of opportunity duty.¹³⁸

Overall the written guidance has however maintained emphasis on the hierarchy between the two duties.

Was there a legal basis for Equality and Good Relations Impact Assessments?

The ECNI 2010 guidance itself notes there is no legislative requirement to use an EQIA for good relations assessments but the Commission states this does not mean it is inappropriate to do so.¹³⁹ It is notable however that, as referenced in the previous chapter an integrated impact assessment placing ‘good relations’ alongside equality had been foreseen under the discontinued direct-rule *A Shared Future* strategy, but was never taken forward in legislation.¹⁴⁰ The provision for policy appraisal, monitoring adverse impact and resultant consideration of mitigating measures and alternative policies in the Agreement and legislation are required for the equality of opportunity duty only. Public authorities are however to conform to any guidelines as to the form or content of their equality schemes issued by the Commission with the approval of the Secretary of State.¹⁴¹

The 2007 ‘promoting good relations guide’ does not fall into this category. Three chapters of the revised 2010 guidance do constitute approved guidance by the Secretary of State. The first two chapters set out the scope of the legislation and guidance on form and content of the Equality Scheme, and do not digress from the legislation in relation to obligations which are for the equality limb of the duty only. The final approved chapter, on elements of an equality scheme is more ambiguous, stating, as per the legislation “A scheme must include an outline of a public authority’s arrangements for assessing and consulting on the impact of policies adopted or proposed to be adopted *on the promotion of equality of opportunity*” but

¹³⁶ There is also a notable difference in emphasis between the two guides in relation to the terms ‘due regard’ and ‘regard.’ The 2005 guide (paragraph 2.14) emphasises the former (which relates to equality) was intended to be stronger than the latter (which relates to good relations), an approach not taken in the 2010 guide (p27).

¹³⁷ Guide to the Statutory Duties, 2000, paragraph 2.12; 2005 paragraph 2.17. (emphasis added)

¹³⁸ ‘Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities’, April 2010, page 27 (emphasis added).

¹³⁹ As above, pages 42 and 55.

¹⁴⁰ ‘*A Shared Future: Policy and Strategic Framework for Good Relations in Northern Ireland*’, OFMDFM, 2005 Page 63

¹⁴¹ Schedule 9 paragraph 4(3).

recommends screening (Annex 1) and equality impact assessment tools set out in an annex to assess the likely impact of a policy on both equality *and* good relations. Screening is set out in the chapter as relevant to both limbs but for EQIA methodology the Commission again defers to its 2005 guidance. In essence the practical impact of enforcement of the changes will be dependent on whether the public authority incorporates ‘good relations’ into its own EQIA methodology within its approved equality scheme.

The Commission has indicated that the decision to recommend the insertion of good relations into EQIAs grew out of the 2006-2008 effectiveness review of section 75. The commitment in relation to reviewing section 75 was contained in a further international agreement between the UK and Ireland in relation to implementing the Belfast/Good Friday Agreement. The 2003 Joint Declaration stated that the British Government would “with the Equality Commission and other interested parties, review the operation of the section 75 equality duty including effective monitoring and enforcement mechanisms (without diminishing its current effectiveness in legislation or in the Equality Commission’s guidelines).”¹⁴² This commitment therefore contains explicit commitments that the outworking of the review should not be retrogressive in their impact.

The next chapter will examine the practical outworking of the new approach of inserting good relations into EQIAs on three thematic case studies. These cover recent ECNI advice to individual public authorities on specific policies in the areas of the Irish language, flag flying and socioeconomic rights.

¹⁴² Joint Declaration of the British and Irish Governments, 2003, Annex 3 paragraph 10.

5. Equality Commission advice to public authorities: case studies

In order to assess the practical impact of Commission advice to public authorities, and particularly the interface with advice on the equality duty, CAJ examined the ECNI advice to individual public authority Equality Impact Assessments under three policy areas. These responses are not routinely published on the Commission's website but were made available to CAJ under freedom of information legislation. There are a relatively small number of written responses and the information contained in the case studies is representative of the positions taken. The case studies cover the following areas:

- 1) Good Relations and flag flying
- 2) Good Relations and the Irish language
- 3) Good Relations and socio-economic inequality

These areas have been singled out for the following reasons. The first covers the issue of the display of flags, like the union flag or Irish tricolour, by public authorities. This area provides a barometer to measure how the duty has fared in relation to the framework provided by the Belfast/Good Friday Agreement relating to equality of treatment for the identity of the two main communities.

The second case study covers good relations and the Irish language, the subject whereby there has been most international controversy regarding the impact of interpretations of the 'good relations' duty. Human rights treaty bodies have raised concerns that the duty has been applied in a manner incompatible with UK human rights commitments on the language, and paradoxically become an obstacle to the realisation of such commitments.

The third case study relates to how the duty has come into play in relation to socio-economic rights, including housing provision. This policy area has been selected as it was the policy area CAJ and other organisations were most concerned about during the passage of the legislation, namely that initiatives based on objective social need could themselves be blocked or limited by 'good relations' considerations. This case study drills down in to the particular area of housing provision.

Case Study 1: The good relations duty and flag flying

Background

As evidenced in late 2012 by the protests and disorder following the vote in Belfast City Council to limit the flying of the Union Flag, the display of national flags has been and remains a heavily contentious issue. Under the Stormont Parliament legislation heavily regulated the display of flags.¹⁴³ Such legislation referred to the private use of flags rather than the display of flags on government, police and local authority buildings, where Government practice had been to display the Union Flag and the flag of the Stormont Parliament.¹⁴⁴

The Belfast/Good Friday Agreement did not explicitly deal with flags. However, nationalists interpreted the 'parity of esteem' duty for equality of treatment for the identity and ethos of both main communities and other provisions of the Agreement as providing for a 'two flags' or 'no flags' policy framework. By contrast Unionists tended to emphasise that the Agreement kept Northern Ireland within the UK and therefore argued only one flag should be flown to indicate constitutional status.¹⁴⁵

Some countries do to an extent fly two flags to represent two national identities, for example in Scotland¹⁴⁶ or Catalonia.¹⁴⁷ In practice a two flags interpretation has not been implemented in Northern Ireland, although some local councils have 'no flags' policies.¹⁴⁸ In 2002 Police reform also led to in effect a 'no flags' policy in relation to national flags for police stations.¹⁴⁹ Government departments are obliged (but also limited to) flying the Union Flag on designated days. The background to this is that the Union Flag was routinely flown by custom and practice at government buildings, however as there was no legislation requiring this Sinn Féin ministers were able not to do so. In response to this the UK Government introduced the Flags (Northern

¹⁴³ The Civil Authorities (Special Powers) Act (Northern Ireland) banned (in reference to the Irish Tricolour) any 'green, white and yellow' (sic) flag. Further to a legal challenge by a Nationalist MP who had had a flag seized by the RUC on a protest march which was successful on a technicality, Stormont introduced fresh public order legislation and the Flags and Emblems (Display) Act (Northern Ireland) 1954. This made it an offence to 'interfere' with a union jack anywhere other than on your own property and, targeting the tricolour, granted a power to the RUC to seize or require a person to remove any other flag (or other 'provocative' emblem) considered likely to cause a breach of the peace. A person declining to remove a tricolour (or other provocative flag or emblem, but not the union flag which was specifically exempt) committed an offence. The Act was finally repealed by the Public Order (Northern Ireland) Order 1987.

¹⁴⁴ The Union Flag is often colloquially referred to as the Union Jack and the flag of the Stormont Parliament, officially titled the Ulster Banner, as the 'Northern Ireland flag' although the latter now has no legal status further to the end of the institution under the Northern Ireland Constitution Act 1973.

¹⁴⁵ See for example submissions by political parties to the NI Assembly Ad Hoc Committee on Flag Regulations, the Report on Draft Regulations proposed under Article 3 of The Flags (Northern Ireland) Order 2000, Annex B.

¹⁴⁶ The Scottish Government's 'Rules for Hoisting Flags on Buildings of the Scottish Government' Issue No. 17 (Valid from January 2013) provides for the Scotland flag (Saltire) to be flown from government buildings with the Union Flag on designated days.

¹⁴⁷ Article 8.2 of the Statute of Autonomy of Catalonia provides for the presence of the Catalan flag in public buildings and Article 3 of Law 39/1981 (28 October 1981) provides that the Spanish flag be flown inside and outside government buildings, (there are restrictions for the Spanish flag only to be flown on armed forces and certain central government buildings).

¹⁴⁸ In mid 2012 of the 26 local Councils 16 flew the Union Flag, 11 of which do so every day and 5 on specific days, 7 of the 16 flew the flag from their headquarters only, 9 also do so from other buildings. No council flies the tricolour. 8 Councils fly no flag at all and 2 fly civic flags (EQIA Policy on the Flying of the Union Flag, draft report for consultation, Belfast City Council, June 2012, Appendix B).

¹⁴⁹ Under the Police Emblems and Flags Regulations (Northern Ireland) 2002 which largely prevents the PSNI from flying the Union Flag or any other national flag, at any time. The PSNI can fly its own service flag.

Ireland) Order 2000 and subsequent regulations. This obliged Government departments to fly the Union Flag on 15 designated days, but not to fly it or any other flag at other times. This legislation did not apply to local government, and hence most policy discussions on flags remain within local councils.

The Secretary of State was to have regard to the Belfast/Good Friday Agreement when making the flags regulations. A Sinn Féin MLA, Conor Murphy, took a Judicial Review alleging, among other matters, the Regulations were incompatible with the Agreement (although the ‘parity of esteem’ duty was not raised). Despite holding that Section 75 did not apply to the Secretary of State Mr Justice Kerr nevertheless held that he did not consider the Section 75 duties would have been breached by the flags regulations. Rather he sided with the Government’s argument that their considerations were about limiting the use of the flag and that “the flying of the Union flag is not designed to favour one tradition over another; it merely reflects Northern Ireland’s constitutional position as part of the United Kingdom.” Mr Justice Kerr held this was reflected by the Secretary of State confining the flying of the Union Flag to the same days it was flown on government buildings in Great Britain, to strike the correct balance between competing views. Mr Justice Kerr also regarded the regulations as not treating anyone less favourably or being of discriminatory intent, and held that flying the union flag on designated days was not incompatible with the Belfast Agreement provisions for rigorous impartiality or partnership, equality and mutual respect.¹⁵⁰

Equality Commission Policy

The above judgment references the ECNI expressing ‘grave reservations’ about the Flags Regulations. In related evidence to the Assembly the ECNI, citing the (then) new section 75(2) duty, indicated that the display of flags had “clear implications for good relations”, that there would be “particular problems for good relations if organisations were to decide to fly the Union Flag at all local facilities” (rather than just their headquarters). Citing its experience of fair employment legislation relating to ensuring harmonious workplaces the ECNI set out its then preferred position was for no flags to fly.¹⁵¹ The ECNI does also state that ceremonial use of flags on main administrative headquarters, as envisaged by the aforementioned Flags Regulations, ‘may be capable of justification’ under FETO, but emphasised that was a matter to be determined by the fair employment tribunal.

The ECNI issued a subsequent briefing paper in 2005 on flying the Union Flag. This advice largely sets out fair employment policy/jurisprudence, the equality duty, and makes a passing reference to the relevance of the good relations duty. This advice has now been incorporated into the current ECNI overarching advice on emblems which states:

The Commission is often asked for its opinion with regard to the flying of the Union Flag at workplaces. We remain of the view that the flying of the Union Flag must be viewed within the context in which it is flown or displayed. Factors affecting the context include the manner, location and frequency with

¹⁵⁰ Kerr, J in *Conor Murphy’s Application for Judicial review* [2001] NIQB 34

¹⁵¹ Northern Ireland Assembly Ad Hoc Committee on Flag Regulations, the Report on Draft Regulations proposed under Article 3 of The Flags (Northern Ireland) Order 2000.

which flags are flown. The Union Flag is the national flag of the United Kingdom and, arising there from, has a particular status symbolising the constitutional position of Northern Ireland. On the other hand, the Union Flag is often used to mark sectional community allegiance. There is a world of difference between these two approaches. Thus, for example, while it is acceptable and appropriate, in the Commission's view, for a local Council to fly the Union Flag at its Civic Headquarters, the rationale for its display at every Council location, facility and leisure centre would be questionable.¹⁵²

The particular context of the *Murphy* judgement led the Court to accept that flying the Union Flag on the same days as it is flown in Great Britain could reflect the 'constitutional position of Northern Ireland' and did not constitute less favourable treatment. The above ECNI advice now incorporates similar acceptance of the Union Flag being flown to symbolise constitutional position, but explicitly qualifies this to location. The ECNI position is that it is 'acceptable and appropriate' for the Union Flag to fly from council headquarters, as it regards this as symbolising constitutional status – but would be sceptical that this is the case if flown from other Council premises. The ECNI advice is not explicit on whether flying the Union Flag on 'designated days' rather than all year round would also be considered an indicator of motivation and intent but does in general defer to the overall context in which the flag is displayed. Under this framework a key consideration for an EQIA would therefore appear to be determining the purpose and motivation for which a flag is displayed.

Commission advice to Councils on flags has been examined in relation to advice on number of EQIAs from 2006 on.¹⁵³ The first trend which is apparent in this advice is that there is a focus on fair employment and equality of opportunity duties with a tendency only to include passing references to good relations. The ECNI advice largely reiterates the policy and case law. The advice does reflect the above position that flying the Union Flag from council headquarters symbolises the constitutional position in the UK and, in effect, is not to be considered an adverse impact. Some advice has included the position that it is acceptable to fly the Union flag all year round rather than on designated days (providing it is done from civic headquarters). This position was contained in 2009 ECNI advice to Banbridge Council which states the ECNI has advised that the policy of flying the Union Flag all year round at the civic building "seems to be an option that would be within the general context of a policy which symbolises the constitutional position of Northern Ireland."¹⁵⁴ A different position was taken in an earlier ECNI investigation report into a decision by Lisburn Council to fly the Union Flag from locations other than its headquarters. This investigation, taken under the ECNI's enforcement powers relating to the Section 75 duties, established a breach of the Council's equality scheme on procedural grounds, insofar as the extension of flying six Union Flags at other locations was inconsistent with the policy adopted by the Council as a result of an EQIA in 2003.

¹⁵² 'Promoting a Good and Harmonious Working Environment, A Guide for Employers and Employees', Equality Commission, October 2009, page 7.

¹⁵³ Equality Commission responses to EQIAs: Antrim Borough Council 'Flying the Union Flag at the Civic Centre and Antrim Forum' March 2008; Ballymena Borough Council 'Flags and Emblems Policy' July 2006; Omagh District Councils Cultural Policy, Sept 2006 (paragraphs 2.3-4 on flags); Banbridge Council Flags and Emblems Policy, April 2009 and Equality Commission correspondence to Belfast City Council, ref 2761, 29 September 2011. The ECNI has indicated subsequent advice has remained consistent with these submissions.

¹⁵⁴ Banbridge Council Flags and Emblems Policy, April 2009.

The Commission recommends display of the flag be confined to council headquarters consistent with the 2003 EQIA. In this instance the Commission also recommends that the display of the Union Flag is limited to designated days given this was recommended by a further Council EQIA concluded in 2006. Although this is context specific and relates to the process adopted the Commission does go on to state in its advice that: “More generally the preferred position of the Equality Commission is that the Council should abide by the Department of the Environment recommendation in respect of the 17 designated days for the Union Flag as previously advised to the Council and should not add additional days to the calendar.”¹⁵⁵ In general, whilst all are context specific, the submissions do appear to take at face value the assertion that the purpose the Union Flag is being flown for is to remind persons of the constitutional position of Northern Ireland, rather than conducting analysis of the motivation behind policy proposals. The ECNI has indicated to CAJ during the course of this research it does not regard this as its role.¹⁵⁶

Commission EQIA advice on flags includes reference to the stipulations and case law of Fair Employment legislation (FETO). Not only may flags policies be challenged under FETO but given the close nature of the equality law concepts used in both FETO and EQIAs, the use of jurisprudence and evidence from the former within the EQIA would seem an appropriate way of evidencing whether there is an ‘adverse impact’ on equality.¹⁵⁷ The threshold for ‘adverse impact’ in an EQIA is lower than that of unlawful discrimination. However, it is notable in this regard that the Commission is careful in its advice on flags to stick to what is likely to be unlawfully discriminatory when assessing likely adverse impacts. Whilst at times the Commission sets out preferred positions its advice does not advocate that any of the policies (which involve flying the union flag or no flags) constitute an adverse impact, beyond setting out the procedures when a public authority itself identifies one. The Commission is also clear on which policies will be ‘acceptable and appropriate’ and, in essence, are not to constitute an adverse impact. Consistent with the legislative framework the advice also urges public authorities to demonstrate evidence that lead to determinations of adverse or differential impacts.¹⁵⁸ This provides Councils with a relatively broad scope to decide to fly or not fly the Union Flag.¹⁵⁹

As alluded to earlier ‘good relations’ are generally marginal in ECNI advice on flags EQIAs. More recent correspondence from Belfast City Council however directly asks the Commission for its position in relation to good relations considerations of flag flying. The Commission’s response therefore draws out its position. In relation to the general question of whether flying the Union Flag on designated days might breach

¹⁵⁵ Final Report of Commission Investigation under Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998, Paul Butler & Lisburn City Council, 28 June 2006.

¹⁵⁶ ECNI Comments on CAJ draft report, March 2013, p2.

¹⁵⁷ Fair Employment legislation (which also now covers service provision) has used the concept of discriminatory detriment, similar to ‘adverse impact’ in determinations on workplace emblems. The present legislation, the Fair Employment and Treatment (Northern Ireland) Order 1998, adds provision against sectarian harassment which is more likely to be used in such claims, however this is likely to be based on broadly similar considerations.

¹⁵⁸ e.g. see paragraph 3.3 of Omagh 2006 EQIA response; paragraph 3.2 of 2006 Ballymena response.

¹⁵⁹ Should the Commission decide to change its advice and argue flying the Union Flag alone is an ‘adverse impact’ there would be the potential for its advice to be used as the basis of complaints under FETO to tribunals, establishing further legal precedents (either way). However, to do this the Commission would presumably have to objectively evidence that such a position does constitute an ‘adverse impact’.

the good relations duty the Commission indicates subjective negative perceptions of a policy arrived at through due process should not prompt consideration of alternative policies:

The Commission is of the view that the flying by a local Council of the Union Flag, on appropriate occasions, with decorum and with sensitivity, should not be regarded as itself being a breach of any legal obligation. There can be no guarantee that any policy decision will not be perceived as a source of offence by some people. The fact of such perceived or actual offence does not, of itself, disallow a policy decision properly taken.¹⁶⁰

In relation to a question of whether a 'no flags' policy might breach the good relations duty the Commission responds that whilst this policy may be considered in some respects to be a 'neutral' policy, that in the event of a switch from a policy of permanent display of the Union Flag to no flag "it would for instance be appropriate to consider the impact on good relations for the Protestant/Unionist community." In response to a question of whether flying the Union Flag on designated days plus a few extra days is an acceptable policy the Commission is again careful to stick to advising on what is likely to be deemed unlawful. It advises that such a policy is unlikely to be found unlawful so long as a policy is being adopted with due process for an acceptable reason, is not done with the intention of discriminating or harassing anyone on religious/political grounds, nor with the intent of damaging good relations and due account is given to 'context, proportionality and sensitivity'.¹⁶¹ This correspondence also asks for the ECNI position in relation to a 'two flags' policy. The response indicates the outworking of emphasising constitutional position as a determining factor with, the Commission cautioning against a 'two flags' approach asking if the Council:

... have a basis for considering that the same 'constitutional recognition' aim that applies to the Union flag could be applied to the national flag of Ireland? And what [the policy's] potential impact would be on good relations... The council should consider whether, if this policy were challenged under FETO, it could satisfy a Tribunal that the decision, in its intention and its impact, was not discriminatory on grounds of religious belief or political opinion. The Commission would recommend the Council consider this position very carefully before advancing it..."¹⁶²

If the interpretation of 'good relations' was in part relating to a framework relating to 'parity of esteem' or '*equality of treatment*' for the identity of both main communities, ECNI advice would likely be different and lead to recommending policy options on flag flying moving towards discussions on two flags, no flags models or indeed the development of alternatives such as civic flags. There is no indication however that the ECNI has interpreted 'good relations' in this manner and it is worth reemphasising that 'good relations' are a marginal consideration in ECNI EQIA advice on flag flying, and rather the Commission generally sticks to the more objective equality law framework about what is likely to be unlawful in the particular context flags are displayed.

¹⁶⁰ Equality Commission correspondence to Belfast City Council, ref 2716, 29 September 2011.

¹⁶¹ As above.

¹⁶² As above.

Case Study 2: The Good Relations duty and the Irish language

Background

There has been considerable international controversy over the way the good relations and broader section 75 duties have been applied to initiatives to promote the Irish language. The Committee of Experts (COMEX) monitors compliance with the European Charter for Regional and Minority Languages for the Council of Europe. COMEX has expressed concerns over reports¹⁶³ of the way the duties have been used and has emphasised that positive measures for Irish are not to be considered an adverse impact:

The Committee of Experts has been informed about several instances, especially within local councils, where it was decided not to promote or use the Irish language as it may contravene **section 75** of the Northern Ireland Act... The Committee of Experts emphasises that the **adoption of special measures in favour of regional or minority languages aimed at promoting equality** between the users of these languages and the rest of the population or which take due account of their specific conditions **is not to be considered an act of discrimination** against the users of more widely used languages.¹⁶⁴

The treaty body to the Council of Europe's Framework Convention for National Minorities (FCNM) has also made similar observations:

The Advisory Committee was disconcerted to hear that some **representatives of the authorities consider that promoting the use of the Irish language is discriminating against persons belonging to the majority population.** Such statements are not in line with the principles of the Framework Convention.... It also reiterates that [..] implementation of minority rights protected under the Framework Convention are not be considered as discriminating against other persons.¹⁶⁵

The Committee further held that "It is regrettable that measures to promote the visibility and use of [the Irish] language have often been opposed with the justification that they constitute discrimination against other groups of the population."¹⁶⁶ The treaty-body directly addressed use of the 'good relations' duty in preventing positive action on the Irish language, singling out bilingual signage, given the specific cultural patrimony duties under the FCNM to promote place names in their original languages:

¹⁶³ See for example POBAL's three monitoring reports, An Chairt Eorpach do Theangacha Réigiúnacha nó Mionlaigh Feidhmiú na Cairte i leith na Gaeilge / The European Charter for Regional or Minority Languages: The implementation of the Charter in Respect of Irish - 2001-2; 2002-5; 2005-08.

¹⁶⁴ Council of Europe (2010) Report of the Committee of Experts on the Charter (UK 3rd Monitoring Cycle) ECRML (21 April 2010)4, para 123, emphasis added.

¹⁶⁵ Council of Europe (2011) Advisory Committee on the Framework Convention for National Minorities (Third Opinion on the UK) ACFC/OP/III(2011)006 (adopted 30 June 2011), paragraph 28, emphasis added.

¹⁶⁶ As above, paragraph 21.

The Advisory Committee has been informed that, in some instances, the need for keeping **good relations has been used as justification for not implementing provisions in favour of persons belonging to minorities, such as the erection of bilingual signs...** Additionally, it finds it problematic that the official policy is to limit the erection of such signs to certain areas where the issue would not raise controversies. The Advisory Committee is concerned that this approach is not in line with the spirit of the Framework Convention ... the aim of which is to value the use of minority languages... with a view to promoting more tolerance and intercultural dialogue in society.¹⁶⁷

CAJ has in the past urged Government to acknowledge that the destruction of the Irish language as the majority language was due to active discrimination rather than an incidental outcome of industrialisation.¹⁶⁸ CAJ argued this is the backdrop to modern day incidents of discrimination in relation to Irish speakers and in this sense positive action for the language is effectively countering historic disadvantage. Despite the international bodies making clear statements to the contrary there continue to be charges that use of Irish itself has a discriminatory impact.¹⁶⁹

The long-term political model which has underpinned such approaches is one which sees 'linguistic unity' in the official language as a prerequisite to success of the state formation.¹⁷⁰ However, advocating the 'unilingual state' within the UK context became unsustainable by the 1990s both given the rise in provision for Welsh and Scots Gaelic but also in the UK embracing the aforementioned Council of Europe instruments expressly providing for linguistic pluralism, and subsequently the Belfast/Good Friday Agreement (which borrowed heavily from the language of the European Charter).¹⁷¹ A further development at this time was the emergence of a prominent political lobby to promote Ulster Scots.¹⁷² This at times, borrowing from the language of 'parity of esteem', argued it is 'discrimination' not to provide, for example equal funding and provision for both Irish and Ulster Scots.¹⁷³ This is effectively an interpretation of 'parity' or 'equality of treatment' of as one requiring resources to be distributed 'equitably' rather than on the basis of objective need or equality of outcome. This approach was heavily criticised as incompatible with the legal framework provided under the treaties. COMEX stated languages need to be treated in accordance with their objective situation and that inappropriate measures

¹⁶⁷ As above paragraphs 126 and 158, emphasis added.

¹⁶⁸ See for example CAJ s188a 'Response to Consultation Paper on Irish Language legislation for Northern Ireland' March 2007. For a relatively recent example in legislation see the Public Health and Local Government (Miscellaneous Provisions) Act (Northern Ireland) 1949 prohibiting the erection of street signs in Irish. It was repealed in 1995.

¹⁶⁹ One example, directly criticised by the Council of Europe, is a 2007 Northern Ireland Assembly motion asking MLAs, given the 'sensitivities' around Irish, to keep it out of the Assembly, specifically arguing that its use was an 'adverse impact' against unionists. Official Report Northern Ireland Assembly 9 October 2007, motion proposed by David McNarry MLA, see criticism of same in Council of Europe (2010) Report of the Committee of Experts on the Charter (UK 3rd Monitoring Cycle) ECRML (21 April 2010)4, para 127.

¹⁷⁰ For further information on the historical context see 'Staid agus Stádas Gaeilgee í dTuaisceart na hÉireann, The UK governments approach to the Irish language in light of the European Charter for Regional or Minority Languages', CAJ, September 1992.

¹⁷¹ Multi-Party Agreement, economic, social and cultural issues, paragraphs 3-4.

¹⁷² Linguistically 'Ulster Scots' refers to the Ulster variant of Scots which is one of a number of Scots variants on a linguistic continuum with English. It is a largely spoken rich linguistic tradition with no standardised written form.

¹⁷³ See for example the oral evidence of the Minister of Culture, Nelson McCausland MLA to the Assembly Culture Committee, Official Report, 4 December 2008.

based on demands for ‘parity’ will “not serve the needs of either Irish-speakers or Ulster Scots-speakers and will hold back the development of both”.¹⁷⁴ Specific concerns were raised that “inappropriate claims for parity of treatment between Irish and Ulster Scots” had led to incidents of funding or other initiatives for Irish being refused on the basis that it was not possible to reciprocate for Ulster-Scots.¹⁷⁵ COMEX, who reported even receiving the opinion that support for Irish should be frozen until Ulster Scots had reached the same level of development, emphasised the situation of Irish and Ulster Scots was ‘quite different’ and urged measures be taken forward on the basis of respective objective need.¹⁷⁶

Equality Commission Policy

In its early days the ECNI came under criticism from POBAL, an Irish language NGO, and an international language rights expert who argued that, in conflict with ECHR jurisprudence, the ECNI had taken an approach that was both legally incorrect and a misapplication of non-discrimination by “suggesting that linguistic pluralism should be eliminated because of what is in fact intolerance.” This related to advice reportedly given by the ECNI in 2002 “that in the spirit of ‘inclusivity and mutual respect’ employers should probably prevent individuals from using Irish in case hearing the language could ‘offend’ others”.¹⁷⁷ Dr Fernand de Varennes further outlines positions in relation to the legal framework in subsequent correspondence to the Irish-language NGO POBAL on the matter stating:

There is no right “not to hear Irish”. It is absurd to submit that there is in Northern Ireland a legal provision which creates a right not to be exposed to individuals having a private conversation in Irish. There are provisions which recognize a duty in relation to equality, and to a non-threatening environment, etc. Bluntly, none of these have anything to do with Irish, or to prohibit the private usage of languages other than English. It is of course possible for someone to threaten another individual in Irish – as it could happen in English and other languages. But unless such a situation occurs, there is no rational basis for the assertion that having individuals speak Irish or another language is a threat.¹⁷⁸

Dr de Varennes also draws attention to, as referenced in an earlier chapter of this research, the basic rule of interpretation in common law that legislation should be interpreted compatibly with treaty based commitments. Accordingly the provisions of FETO should be interpreted compatibly with treaty based commitments including the Charter and Framework Convention. CAJ also corresponded with the Equality Commission at the time in relation to the above matter stating we were ‘somewhat surprised’ at the position the ECNI had adopted in correspondence to us. CAJ cited the provisions of the Framework Convention permitting persons to use their minority

¹⁷⁴ Council of Europe (21 April 2010) Report of the Committee of Experts on the Charter (UK 3rd Monitoring Cycle) ECRML (2010)4, paras 20, 57 and Finding D.

¹⁷⁵ Council of Europe (21 April 2010) Report of the Committee of Experts on the Charter (UK 3rd Monitoring Cycle) ECRML (2010)4, paras 16-17; Council of Europe (2011) Advisory Committee on the Framework Convention for National Minorities (Third Opinion on the UK) ACFC/OP/III(2011)006 (adopted 30 June 2011), paragraph 77

¹⁷⁶ As above paragraphs 16-17.

¹⁷⁷ de Varennes, Fernand ‘Language Rights and Human Rights: The International Experience’, in Ó Riagáin, Dónall (ed.) *Language and Law in Northern Ireland* (Belfast, Queen’s University Belfast, 2003) p15

¹⁷⁸ Fernand de Varennes, correspondence to Pobal 10 August 2003.

language in private and public and expressed concern at the ECNI assertion that: “for employees to converse in Irish in the company of others who do not speak the language is likely to be seen by those others as excluding them from the conversation.” CAJ responded that:

While in certain situations the speaking of a particular language *may* have an exclusionary effect [CAJ] think[s] it is unwise to particularise this to the use of Irish and to suggest it *is likely* to lead to feelings of exclusion. To the extent to which this could be a problem we think it could apply to the use of any language and is not particular to Irish....[This may give]... the impression that the Commission is in some way singling out the Irish language for negative treatment. We would be concerned that on the basis of information provided in your letter employers may feel the safest option is to simply ban the use of Irish in the workplace.¹⁷⁹

The ECNI subsequently supported an Irish speaker, who had been allegedly banned by his employer from greeting Irish speaking customers in the language, in lodging proceedings with the Fair Employment Tribunal.¹⁸⁰ ECNI guidance on harmonious workplaces has also more shifted towards compliance with the human rights standards on minority languages. The Commission’s 2009 latest guidance on emblems on the workplace, references the provisions of the Charter, and sets out that, providing policies are proportionate and reasonable, “The use of languages other than English, for example in corporate logos and communications, will not, in general, constitute an infringement of a good and harmonious working environment.”¹⁸¹

The ECNI in response to questions by CAJ in relation to this research on compatibility of ECNI advice with the Framework Convention has stated that there are no specific exemptions in anti-discrimination legislation in relation to the use of minority languages.¹⁸² It is the case that the legislation does not provide explicit exemptions. However it is not clear that the Commission is giving regard to the legal principles of interpreting anti-discrimination legislation, in a manner compatible with the treaty based commitments to Irish in the Charter, Framework Convention and Belfast/Good Friday Agreement. The same legal principle also applies to Section 75(2).

The main umbrella NGO for Irish speakers, POBAL, in a submission to the Council of Europe has raised concerns about the ECNI’s continued interpretation of ‘good relations’ in advice on Irish language policy. In a submission to COMEX POBAL

¹⁷⁹ CAJ correspondence to ECNI 29 July 2003; and ECNI correspondence to CAJ 16 June 2003,

¹⁸⁰ *Aodhán Connolly v Botanic Inns*. The case was settled with payment of £3720 without admission of liability. ECNI ‘Decisions and Settlements Review 2005-6’, page 45.

¹⁸¹ ‘Promoting a Good and Harmonious Working Environment, A Guide for Employers and Employees’, Equality Commission, October 2009, page 9. Fair Employment legislation itself has moved from the concept of ‘discriminatory detriment’ to that of ‘sectarian harassment’ for circumstances when there is dominance of emblems associated with one side of the community. This provision being read compatibly with the human rights framework would mean there would be very few, if any, circumstances, whereby promoting Irish, alongside English, could reach such a threshold. Not only does bilingualism prevent ‘dominance’ but languages are materially different from ‘emblems’ in a number of ways, including that languages are required in the workplace, but also in relation to Irish there are explicit human rights obligations relating to its promotion.

¹⁸² ECNI Comments on CAJ draft report, March 2013 p5.

urged the ECNI undertake a 'comprehensive review' of the section 75 advice it offers to public authorities on Irish:

Generally, Irish speakers believe that the Irish language should be available to all. However, since demographically, Irish speakers tend to belong to the Catholic community, and since Irish is not taught in Protestant schools in the north, Section 75 is being widely interpreted to mean that provision for Irish speakers constitutes discrimination against Protestants. (Irish speakers reject this interpretation, and also note that paradoxically, the failure to provide services for Irish speakers does not appear to be interpreted as discrimination against Catholics.) This confusion at a policy level impact upon practice and compounds the tendency to refer issues pertaining to the Irish language through 'Good Relations' departments and units, thus defining the language in a context which may tend to encourage either the vetoing of provision for Irish on the grounds that it might be 'divisive' or to set it in the context of a quid-pro-quo approach.¹⁸³

To examine the current ECNI position EQIA advice to public authorities on Irish language policy was obtained under freedom of information and examined.¹⁸⁴ The ECNI indicates in its submissions that it has no direct jurisdiction over language issues, but provides EQIA advice in accordance with its duties under section 75 and other anti-discrimination statutes such as fair employment legislation. The first trend which is apparent is that good relations considerations are prominent in EQIA advice on the Irish language.

In a response to Limavady Council the ECNI states that 'good relations' have always been an 'integral consideration' in race relations and argues that an important aspect of language policy is the inter-relationship between different language communities, thus indicating it regards good relations as an important factor in relation to Irish language policies. By contrast, save for a line misquoting the title of the European Charter, the ECNI advice does not make reference minority language rights despite the role of such treaty based commitments in interpreting both FETO and Section 75 provisions. The Limavady consultation related to a proposal by the Council, in promoting the duties under the European Charter, to extend the use of its English-Irish bilingual logo.

In relation to the aims of the Limavady policy the Commission's advice questions both the 'reasonableness' of the policy and recommends the Council to justify how the extended bilingual policy can fit with the aims of the Council's good relations policy of being "open and welcoming... where all people feel equally valued, and diversity is celebrated." This could give the impression that the ECNI is questioning if the bilingualism policy can fit such aims, and risks being read as implying that monolingualism is the best way to celebrate diversity.

¹⁸³ An Chaitir Eorpach do Theangacha Réigiúnacha nó Mionlaigh Feidhmiú na Cairte i leith na Gaeilge 2005-08, The European Charter for Regional or Minority Languages: The implementation of the Charter in Respect of Irish 2005-08, POBAL 2009, Paragraphs 4.4 and 5.05.

¹⁸⁴ Namely responses to the following EQIAs: Limavady Councils Bilingual logo (April 2009); the Department for Regional Development (DRD) proposals for bilingual traffic signs (March 2011) and Derry City Council Irish and Ulster Scots Policies (2008).

The ECNI cites that the EQIA concludes that there 'may' be adverse impacts on persons from a Protestant/Unionist background citing personal beliefs regarding the Irish language. In effect the ECNI then goes on, not to challenge, but to assume or endorse the view that the policy proposal would constitute an 'adverse impact.' No further evidence, beyond reiterating data in the EQIA that more Irish speakers in the Catholic, nationalist and young categories, is presented as to how the threshold of 'adverse impact' has been determined, nor is there clarity as to whether the ECNI regards the alleged adverse impact as being on equality of opportunity or good relations grounds.¹⁸⁵ Having accepted that there is an 'adverse impact' the submission then focuses on mitigating measures, considering alternative policies and stating that a system 'must' be established to monitor the impact of the policies. Under the legislation such measures are only to be considered if a policy actually constitutes an adverse impact on the grounds of equality of opportunity.

In relation to measures for both Irish and Ulster Scots the ECNI endorses a parity approach between Irish and Ulster-Scots in EQIA advice to Derry City Council. In its advice the ECNI expresses concern and questions differential treatment for Ulster-Scots in relation to Irish, recommending the Council provide a detailed rationale for this and "consider the relevance of the good relations duty to the differential provision for Ulster-Scots".¹⁸⁶ In relation to the Limavady response the ECNI suggests consideration of 'trilingual logo' as alternative policy to mitigate against the alleged 'adverse impact' of an English-Irish bilingual logo.

A response to the Department of Regional Development (DRD) in 2011, on proposals for bilingual (English plus Irish or Ulster Scots) road signage, does identify and give reference to relevant international duties on minority language rights, including the Charter. However, the framework provided by such instruments is still not reflected in the practical advice given. There is little consideration given in the advice to the rights of the minority language speakers. The only practical reference to minority rights in the advice is where the ECNI states that it is not clear if DRD has 'fully considered' that there might be 'chill factors' for 'religious and political minorities' in district council areas as a result of bilingual signage. From context it is reasonable to presume this is largely referring to unionist minorities in nationalist council areas who may erect signs in Irish, given as this is the only group specifically referenced earlier in the advice. The ECNI goes as far as urging screening of each and every decision to put up an individual bilingual sign.¹⁸⁷ This is a significant policy call from the ECNI that in effect every single sign constitutes a separate policy, and contrasts with other decisions about what constitutes a policy for the purposes of Section 75.¹⁸⁸

¹⁸⁵ Equality Commission, 3 April 2009. 'Equality Impact Assessment: Extension of the Council's Bilingual Logo'.

¹⁸⁶ Equality Commission, 2008, 'Response to EQIA by Derry City Council on Proposed Ulster Scots Policy', paras.5.3-4,6,7.

¹⁸⁷ ECNI advice to DRD, 2011, paragraphs 10, 13, 14 and 24.

¹⁸⁸ A contrasting example is found in a section 75 investigation into the Department of Social Development's (DSD) amendment of funding criteria for receiving neighbourhood regeneration monies from EU peace funds. The investigation considered the contention that in adding a further criterion of neighbourhood size the funding criteria moved away from objective need and hence diverted funding away from Catholic areas to ensure a more even distribution of funding between Catholic and Protestant areas. In this instance, the Commission considered on the basis of evidence obtained in the investigation that "the procedure to define neighbourhoods was not a policy but simply a definitional tool." (ECNI, Final Report of Commission Investigation under Paragraph 11 of Schedule 9 of the Northern Ireland Act, conclusions paragraph 1).

In its EQIA advice the ECNI does not tend to set out the threshold that has to be met to constitute discriminatory detriment (unlawful or otherwise) or challenge assertions that provision for Irish (alongside English) on signs or logos constitutes an adverse impact. Rather the ECNI appears to generally accept at face value assessments that bilingual English-Irish provision constitutes an adverse impact. It is often not clear from its advice if the Commission regards this threshold of 'adverse impact' as having been met on equality or good relations grounds, or both. The consequence of this is that the ECNI effectively acts on EQIA conclusions by the public body of likely 'adverse impacts' on Protestants and unionists often on the simple grounds that Catholics and nationalists are more likely to be Irish speakers. This is despite the ECNI itself in the DRD submission pointing out that no research evidence to this end had been presented.¹⁸⁹ Such an approach then leads to the prompting of requirements for the public authority to consider alternative policies and mitigating measures. In response to questions during the course of this research the ECNI has argued it is not its role to assess adverse impacts but rather to advise the public authority how it must respond when it itself has identified one. This would appear to be a problematic position, and not one that is consistently applied by the ECNI itself and one which is further explored in the conclusions.

The approach to minority language speakers in the above DRD consultation contrasts with another well publicised ECNI submission, namely the EQIA response to Derry City Council's proposal for the city's name to be officially changed from Londonderry to Derry, which the Commission strongly opposed. The ECNI in its advice, which focuses on good relations in its response, did itself make an assessment that the proposal would constitute a "serious adverse impact", a conclusion not reached by the public authority.¹⁹⁰ The Commission concludes:

It is the Commission's view that good relations in this instance have been insufficiently addressed by the Council. In the light of the serious adverse impacts on people of different religion/political belief within the Council area, and possibly for the region as a whole, the Equality Commission strongly advise Derry City Council not to proceed with the policy (emphasis in original).¹⁹¹

The response is strong on minority rights stating "policy-making should not simply be about reflecting the wishes of the majority", reminding the Council that "An EQIA is not a tool which was designed to ensure that the wishes of the majority prevail" and that it must make provision to take into account the views of the minority.¹⁹² Such articulation of minority rights principles is welcome. However, the ECNI does leave itself open to charges of inconsistency given such principles appear not to have been applied to other minorities in other contexts, including submissions on the Irish language where the minority rights of Irish speakers are explicitly set out in Council of Europe instruments. In these two submissions at least the focus of minority rights concerns on unionist minorities could also lead to charges of inconsistency.

¹⁸⁹ ECNI advice to DRD, 2011, paragraphs 9,10.

¹⁹⁰ Equality Commission Response to EQIA Derry City Council Consultation on the "Resolution to make application to the Privy Council to have the name of the City changed from Londonderry to Derry" September 2009.

¹⁹¹ As above, paragraph 5.2 emphasis in original.

¹⁹² As above, paragraphs 3.14, 3.16, 3.34.

What the response to Derry City Council does have in common with the Irish language submissions is the apparent looseness of the methodology by which the ECNI makes its assessment that there has been a 'serious adverse impact.' Rather than exploring whether there is relative disadvantage within the unionist community which would be exacerbated by the policy, the ECNI argues more attention should be paid to qualitative data and its impact on good relations. The ECNI cites as evidence a view in a community conference report that there was a "perception among Protestants Derry City Council is working towards a nationalist agenda and was biased against the Protestant population".¹⁹³ The validity or reliability of this position is however not further assessed and tested. Rather it is taken at face value and appears to be the basis on which the Commission reaches its conclusions. Whilst such thresholds are similar in Irish language advice they are inconsistent to the approach taken on flags.

¹⁹³ As above, paragraph 3.3.2 and 3.2.3.

Case Study 3 The good relations duty and socio-economic inequality

Background

As alluded to earlier there had been a concern that 'good relations' imperatives could unduly interfere in human rights based approaches (including the subset of human rights that is equality) to tackling poverty and disadvantage through objective social need. A safeguard to counter this had been the subordination of the good relations duty to its equality counterpart.

The approach of tackling objective need is also part and parcel of duties to promote equality, and at a strategic policy level was committed to under the 2006 St Andrews Agreement which committed to a high-level 'Anti-Poverty and Social Exclusion' strategy to "tackle deprivation in both rural and urban communities based on objective need and to remedy patterns of deprivation."¹⁹⁴ Legislation protecting against individual acts of discrimination is often 'symmetrical' (i.e. would protect both, for example, men and women, despite the general pattern of the former group being at a comparative advantage). Measures to *promote equality* for disadvantaged groups are not to be regarded as 'discrimination' or, in section 75 language 'an adverse impact' for relatively better off groups. As in the examples from Great Britain in chapter 2, a complementary good relations duty may prompt a public authority into initiatives to tackle prejudice and promote understanding that measures are based on objective social need to the benefit of all persons at disadvantage. In the local context this was highlighted as an equality imperative at the time of the Agreement:

If the reality of continuing Catholic disadvantage was to be tackled effectively, then public authorities should, in particular, be required to ensure that economic inequalities between the Catholic and Protestant sections of the community in Northern Ireland should be progressively reduced. Public authorities should not consider these measures to be an act of unfair discrimination. Policies in which social need were targeted would disproportionately tackle Catholic disadvantage but would effectively also address Protestant disadvantage.¹⁹⁵

In 2013 the most recent Community Relations Council Peace Monitoring Report continues to cite that community differentials still persist between Protestants and Catholics, with Catholics experiencing much greater socio-economic disadvantage on a range of indicators. Citing the DSD Family Resources Survey issued in February 2013, the report notes that on every single measure on the deprivation indices Catholic families experience more deprivation than Protestants.¹⁹⁶ In legislating for Section 75 Government made clear that the duty did not prevent public authorities from taking positive action to address disadvantage (noting this was an 'important method of combating inequality') and also that the equality duty bound public authorities to consider doing so.¹⁹⁷

¹⁹⁴ Agreement at St Andrews (UK-Ireland), 2006, Annex b.

¹⁹⁵ McCrudden, Christopher 'Mainstreaming Equality in the Governance of Northern Ireland' *Fordham International Law Journal* Vol. 22(4) 1998 Article 25, p1728.

¹⁹⁶ Nolan, Paul Community Relations Council Northern Ireland Peace Monitoring Report Number 2, pages 85 and 91

¹⁹⁷ Official Report (Hansard), HC 18 November 1998, columns 1069-1070, Paul Murphy MP.

Housing has long been a key equalities issue in Northern Ireland with an end to housing discrimination being one of the central demands of the civil rights movement. The first issues cited in the conclusions of the official inquiry (Cameron Commission) into the outbreak of the 'Troubles' are discrimination and inequality in housing provision.¹⁹⁸ Significant changes subsequently occurred including the removal of housing allocation powers from local authorities into an independent body mandated to allocate housing on objective social need, the Northern Ireland Housing Executive (NIHE). CAJ research in 2006 noted that whilst there was a view that housing inequality between the two main communities was a thing of the past this was not borne out by analysis of the evidence of differentials.¹⁹⁹ Nowhere has housing disadvantage and inequality been more prominent than in north Belfast, where the NGO Participation and the Practice of Rights (PPR) have been campaigning for improved housing conditions. The situation in north Belfast has been commented on by human rights bodies at both UN and Council of Europe level.

In 2009 a UN Committee raised concerns that the Section 75 Equality Impact Assessment process was not being effectively implemented particularly in the context of urban regeneration programmes. The Committee called for targeted measures to promote substantive equality including "adequate housing programmes for the poor and, in particular, Catholic families" and raising concerns about the chronic shortage of housing for disadvantaged and marginalised, singling out Catholic families in north Belfast.²⁰⁰ The Council of Europe Human Rights Commissioner, Thomas Hammarberg, visited north Belfast in 2011 and raised similar concerns, including that little action had been taken to respond to the UN Committees' recommendations.²⁰¹

Figures quoted by PPR indicate Catholic families make up 75% of those in housing stress on the north Belfast waiting list, despite only being 45% of the population, but also point to NIHE projections that by 2012 95% of the need for new build social housing in north Belfast would be required to address need within the Catholic community.²⁰² PPR cite official responses which have not addressed either the patterns of need for predominantly Catholic or Protestant communities. PPR reports that the objective need of the Protestant communities have focused on maintenance and refurbishment rather than new housing, yet official responses have included initiatives to effectively artificially 'engineer housing need', including leafleting among the Protestant community to attract persons to live in the predominantly Protestant area beside Girdwood. In 2011 the housing Minister controversially overturned an

¹⁹⁸ Disturbances in Northern Ireland: Report of the Commission appointed by the Governor of Northern Ireland (Cameron Report) HMSO CM532 1969, chapter 12, paragraph 229(a).

¹⁹⁹ See CAJ Rhetoric and Reality, 2006, chapter 4 and CAJ S172 Briefing on Religious and Political Differentials in Northern Ireland.

²⁰⁰ UN Committee on Economic, Social and Cultural Rights (Concluding Observations on the UK) E/C.12/GBR/CO/5 12 June 2009 paragraphs 29 and 31.

²⁰¹ Mr Hammarberg stated *"The conditions I witnessed in the Seven Towers are only one illustration of a problem affecting, in particular members of the Catholic community, across north Belfast... The UN Committee for Economic, Social and Cultural Rights directed the government to put in place a strategy to meaningfully address this in 2009 and I am disappointed that no action appears to have been taken in response to this."*

<http://www.pprproject.org/content/equality-can%E2%80%99t-wait-implement-law> [accessed October 2012]

²⁰² PPR Background Briefing on North Belfast Housing Inequality
<http://www.pprproject.org/sites/default/files/Background%20on%20Housing%20Inequality%20in%20North%20Belfast.pdf> [accessed October 2012]

earlier decision to build around 200 new homes on the site, most of which would have been allocated to Catholics on the basis of objective need. PPR report that in effect the Minister cited ‘good relations’ as in justification for his decision citing a prerequisite of cross community agreement for revised proposals.²⁰³

Tension has arisen between ‘good relations’ approaches centred on the prerogative of ‘shared’ or mixed housing and the equality prerogative of housing provision on the basis of objective need. Despite the defeat of ‘shared future’ proposals to legislate for an exemption to anti-discrimination law to allow shared housing schemes that would otherwise have a discriminatory impact, there are concerns such approaches continue to be pursued through alternative means. Such concerns are raised in a PPR submission to a NIHE consultation on establishing a Belfast ‘city centre waiting list’, a primary stated aim of which is to establish “a wide and diverse waiting list catchment and promote shared housing”. It appears from this response PPR is concerned the NIHE proposes to artificially redraw administrative boundaries to exclude areas of high, predominantly Catholic, objective housing need in order to resource shared city centre housing, and hence prioritise ‘good relations’ imperatives over equality. An option which would have incorporated single *identity* areas into the waiting list (but given differentials would have led to 63% of houses going to Catholics, 4% to Protestants and 25% ‘undisclosed’) is not supported. Instead NIHE advocates establishing a new Belfast City Centre waiting list which *excludes* single identity areas. Although NIHE concedes there would be an (equality) ‘adverse impact’ on Catholics, PPR note this appears to be the preferred option as it would engineer “what is deemed to be an acceptable profile of a shared community.” PPR regards the plan as incompatible with section 75 equality obligations, urging that long standing inequalities are first addressed before the shared housing imperatives under the auspices of the ‘good relations’ duty, which lie at the heart of the proposal are advanced.²⁰⁴

Equality Commission Policy:

In relation to the general issue of taking positive action to address inequalities the guidance given by the Equality Commission on the statutory duties strongly echoes the human rights framework:

The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to secure equality of opportunity between the groups identified in Section 75 (1). The equality duty should not inhibit action to counter disadvantage among particular sections of society – indeed such action may be an appropriate response to redressing inequalities of opportunity. There should therefore be no conflict with affirmative action or positive action to counteract disadvantage or accommodate difference.²⁰⁵

ECNI Guidance on the duties also explicitly confirms that likewise there should be no conflict between the equality duties and the specific policy initiatives to tackle poverty

²⁰³ PPR Background Briefing on North Belfast Housing Inequality, 2012.

²⁰⁴ PPR Response to NIHE Consultation on the establishment of a Belfast City Centre Waiting List, 7 November 2011.

²⁰⁵ Equality Commission ‘Section 75 of the Northern Ireland Act 1998: Guide to the Statutory Duties’ February 2005, paragraph 2.1.

on objective need.²⁰⁶ This is echoed in the 2005 EQIA Practical Guidance which advises if adverse impacts are identified across different policy options the policy option which does not disadvantage those at greatest objective need should be selected.²⁰⁷ Strategic guidance from ECNI has therefore guarded against 'good relations' (or indeed interpretations of equality as formal equality) taking precedence over 'objective need' equality imperatives. There are however some signs of departure from this framework in individual advice it has given to public authorities.²⁰⁸

In 2009 in response to an EQIA on Government's rural anti-poverty framework notes the EQIA statistical analysis had identified that farmers in "Severely Disadvantaged Areas" were "predominantly Catholic." The ECNI response to this is not entirely clear. It states that access and eligibility criteria for resultant anti-poverty initiatives "should be formulated to ensure equality of opportunity *and good relations* to redress any negative differential impact in respect of religion."²⁰⁹ It is not clear whether this is indicating programmes should ensure they are accessible to those with most objective need and hence redress the inequality. Alternatively, and problematically, this could be read that as the framework will predominantly benefit Catholic farmers, there will be a differential impact which requires redress on both 'good relations' and equality of opportunity grounds.

Such a perspective is articulated in the ECNI response in 2009 to Department of Education proposals on recommending entry criteria to post-primary schools (Transfer 2010). The ECNI had previously welcomed the use of Free School Meals Entitlement (FSME).²¹⁰ The focus of the ECNI EQIA advice however and its 'main criticism' of the proposals is the lack of mitigating measures or alternative policies to address the 'identified negative impact' of the primacy given to FSME as a school entry criterion. The ECNI does recognise the Department was seeking "to address the socio-economic inequalities inherent in the current system" given as FSME is a proxy indicator for disadvantage, but also notes it identified a 'potential adverse impact' on Protestant children, who constitute 39% of the intake but 27% FSME. This is an indicator of greater levels of disadvantage among Catholic children, and clearly the policy would redress through such prioritisation of those (including Protestant children) in objective need. The ECNI states it does appreciate that the department was seeking to address socio-economic disadvantage but, confusingly states 'if the method chosen to do so is shown to create another inequality between equality categories (in this case between Protestants and Catholics), albeit within a target group which in itself suffers inequality, (those children who come from a disadvantaged background), this is an issue that has to be addressed'. An assessment of whether the policy constitutes indirect discrimination would be likely to determine it does not given there is objective and reasonable justification for it, in light of objective need. The ECNI nevertheless does not conduct any assessment as

²⁰⁶ As above, specifically referencing the New Targeting Social Need (New TSN) and Promoting Social Inclusion (PSI) policies.

²⁰⁷ Equality Commission, 'Section 75 of the Northern Ireland Act 1998 Practical Guidance on Equality Impact Assessment', February 2005, paragraph 4.2.

²⁰⁸ To inform this section CAJ requested and received copies of Commission responses on this theme from 2008-2011.

²⁰⁹ Equality Commission 'EQIA response to DARD Rural antipoverty and social inclusion framework' June 2009, paragraph 3.5 emphasis added.

²¹⁰ ECNI Comments on CAJ draft report, March 2013 p7 referencing April 2009 response to 'Transfer 2010'.

to whether the policy 'is shown to' meet the threshold of adverse impact, which it cites the Department had only identified as a 'potential', but rather assumes that it has and accordingly proceeds directly to advise that the Department must develop and consider mitigating measures or alternative policies. The Commission goes on to stress good relations:

In this context we would also like to emphasise that equality of opportunity and good relations are inextricably linked and interdependent, and both must be addressed by designated public authorities. The adverse impact affecting Protestant children in the EQIA is not only an issue for equality of opportunity but also has potential implications for good relations between the two main communities in Northern Ireland. When developing mitigating measures/ alternative policies the Department should also take into account the implications of its proposals for good relations.²¹¹

There is no indication that this ECNI good relations advice is aimed at advising the Department to mitigate any community tensions by clearly articulating that the policy is based on objective need. Rather it appears to be arguing that such issues be a relevant consideration in requiring the Department to consider alternative policies or mitigating measures. The overall position is compounded in that there is in fact limited competition for school places between Protestants and Catholics, given the segregation within the school system. Dropping FSME as a criterion is only likely to benefit the 'better off' in both sectors to the detriment of disadvantaged Protestant and Catholic children, precisely the scenario both the 'equality of opportunity' duty and anti-poverty framework were both designed to redress.

This has not been the consistent position of the ECNI as demonstrated by its position on a similar issue, the proposal to end public subsidies to fee-paying places in 'Preparatory units of Grammar Schools'. The ECNI in its response to a consultation in 2001 stated:

The Commission does not believe that the continuation of a fee paying sector in primary years assists with the objective of delivering equality of opportunity. The Commission does not support the continued funding of the preparatory units of Grammar Schools. The Commission recommends the present funding of approximately 30% of the teaching costs of this pupil group should cease.²¹²

Freedom of information requests show the Commission continued to give this advice late into 2009 elaborating its rationale for adopting the position as consideration "that a key component of a quality education system is equality of access. Preparatory Departments inherently do not provide equality of access as attendance is dependent on a parents'/families' ability to pay additional substantial costs."²¹³ The Commission also drew attention to the statutory basis given to addressing poverty in

²¹¹ Equality Commission 'Response to EQIA Department of Education Consultation on the 'Transfer 2010 Guidance: Post-Primary School Admissions Process' June 2009, Paragraphs 2.2.3-4.

²¹² Equality Commission response to Common Funding Formula 2001, quoted in e-mail correspondence to DE from the ECNI Director - Policy manager, 27 March 2009.

²¹³ E-mail from Public Policy Manager to Department 23 December 2009.

the St Andrews Agreement.²¹⁴ Such an approach concurs with a human rights approach to equality, as well as an approach putting equality above maintaining 'good relations' with particular interest groups.

Ending the subsidy was recommended by the Independent Strategic Review of Education in 2006 and consulted on by the Department in 2010. There was a significant change in emphasis in the formal ECNI response to the EQIA in 2010. The ECNI only makes passing reference to its 2001 position that the subsidy does not assist delivering equality of opportunity, and rather urges that the 'translating into policy' of the principle of ceasing funding should be given 'careful consideration' noting possible 'adverse impacts' on 'Protestant' and 'Other' children (there are no preparatory units in the 'Catholic' schools sector). The ECNI expresses disappointment that greater consideration has not been given to parents who have children in such schools and concern that alternative policies had not been considered, singling out 100% public funding for preparatory units (if changing status and having open enrolment) as one 'worth detailed consideration.' Expressing a 'significant degree of concern' at the timing of the change the ECNI recommends consideration of maintaining the subsidy for existing pupils and delaying implementation to new pupils for a year.²¹⁵ Unusually the ECNI finishes its submission by recognising Preparatory Departments have a "very high standard of education" and "for many people in Northern Ireland have a great significance" and asks the Department for a meeting to discuss responses to the consultation before it makes final decisions". The Minutes of the ECNI meeting coinciding with the submission note that it had been preceded by a "considerable number of parents of children attending preparatory schools" writing to the Commission.²¹⁶

Notwithstanding that the EQIA advice deal more with questions of process in relation to the policy proposal, it is unusual to the extent it is quite explicit in proposing alternative policies. This EQIA obligation kicks in when an *adverse* impact had been determined, and it is not clear whether this is the case. The ECNI does make reference to 'possible' adverse impacts, but is not clear on whether it regards this as on equality or good relations grounds. It would be difficult however to reconcile the Commission determining the policy change constituted an adverse impact on equality of opportunity with its earlier and long held position.

Turning to advice on the issue of housing, the ECNI has responded to a number of EQIA exercises, including Girdwood. In commenting on the hierarchy between the equality and good relations duties ECNI advice consistently cite the paragraph from the 2005 ECNI guidance on how to deal with conflict between the two duties:

To the extent that public authorities perceive, in particular circumstances, a tension between the two duties, the primary duty of a public authority is its

²¹⁴ E-mail from Head of Policy and Development 26 April 2009.

²¹⁵ Correspondence from ECNI Chief Executive to Department of Education School Finance Branch in response to EQIA on the Proposal to Withdraw Funding from the Preparatory Departments of Grammar Schools, 4 March 2010.

²¹⁶ Equality Commission Board Minutes, March 2010, item 9.2.

equality duty. The good relations duty cannot be invoked to justify a failure or refusal to comply with the equality duty.²¹⁷

This is clearly a strong approach in ensuring equality considerations maintain due primacy. The question does arise if the ECNI can continue to articulate this so clearly given that the advice on how to deal with tensions was amended in the revised guidance. The 2010 guidance now advises that when there is tension between the duties “both duties have to be discharged” although it does still state that the discharge of the good relations duty cannot be an alternative nor set aside its equality counterpart.

ECNI advice to public authority housing EQIAs is also strong in highlighting broader equality issues. For example, submissions raise opportunities to recruit persons from within economically disadvantaged communities or disabled persons into jobs in redevelopment programmes, or equality in procurement practices.²¹⁸

More problematic is the lack of ECNI research and data on housing inequality and the emphasis strategic ECNI policy instead places on tackling segregation. The principal ECNI document to this end is its “Statement on Key Inequalities in Northern Ireland”. This summarises ‘key inequalities’ in housing as follows:

Housing is a basic human need and provides the foundation for family and community life. In many areas of Northern Ireland housing continues to be segregated on the basis of community background, particularly in the social housing sector. Such segregation in housing polarises communities and perpetuates segregation in social and other spheres.²¹⁹

The substantive chapter on housing does make general reference to housing inequalities and to specific issues faced by disabled people and ethnic minorities. However, there is no reference or data on inequalities on the grounds of community background. Instead strong emphasis is placed on the issue of segregation, with statistics provided that 70% of social housing tenants live in ‘communities that are at least 90% Roman Catholic or Protestant’ along with statistics indicating the majority of persons state they would prefer to live in mixed-religion neighbourhoods. The publication states:

Segregation in housing and communities reduces choice, represents inefficient housing allocations and a waste of public resources as it reduces the resources available for affordable housing and, ultimately, it adds to polarisation between communities.²²⁰

As alluded to earlier in this report initiatives to end ethnic segregation are a human rights obligation under for example the UN anti-racism convention (ICERD).²²¹ What

²¹⁷ See: ECNI Response to EQIA on NIHE Social Housing Development Programme: Strategic Guidelines, December 2008, p4; ECNI Response to DSD EQIA on Crumlin Rd/Girdwood Barracks Masterplan, Jan 2008, p5; ECNI response to DSD EQIA West Side Regeneration District Draft Regeneration Plan, March 2009, p2;

²¹⁸ ECNI responses to: Crumlin Rd/Girdwood Barracks Masterplan, paras 2.1-3, & 4; West Side Regeneration, pp 2-3;

²¹⁹ ECNI ‘Statement on Key Inequalities in Northern Ireland’, 2007, page 3.

²²⁰ ECNI ‘Statement on Key Inequalities in Northern Ireland’, 2007, page 22.

²²¹ UN International Convention for the Elimination of All forms of Racial Discrimination, Article 3, and accompanying also General Recommendation 19. .

is problematic however is if only this is emphasised to the detriment of the numerous other duties to tackle housing inequality.

There is evidence that this ECNI emphasis on tackling segregation is influential with a number of public authorities in particular confidently quoting the above paragraph in EQIAs as justification for policy approaches placing primacy on facilitating mixed housing over tackling inequality. A DSD EQIA on the regeneration framework for the north Belfast end of Belfast city centre outlines that social and affordable housing will not be 'targeted' at single identity communities but rather will be available "on an equal basis in line with Government's Shared Future agenda." DSD describes a key aim of the policy as keeping "the neutral space in the city centre" and using it to create desegregated housing. DSD sets out that the policy approach:

...is in line with the Equality Commission for Northern Ireland's Statement on Key Inequalities in Northern Ireland, which states that "Segregation in housing and communities reduces choice, represents inefficient housing allocations and a waste of public resource as it reduces the resources available for affordable housing and, ultimately, it adds to polarisation between communities."²²²

In response to an EQIA on a similar policy, the West Side Regeneration Plan, the ECNI advice to DSD actually challenges the public authority for using the above quote from the ECNI's Statement on Key Inequalities to justify its approach.²²³

In relation to submissions on strategic housing policy the ECNI also has emphasised the issue of segregation. In advice to NIHE on strategic housing guidelines the issue of dealing with adverse impacts on religion is also covered. In the case of advice to the Department of Environment on planning reform paying particular attention to the 'high level of segregation in housing' is the only recommendation in relation to community background.²²⁴ This draws again on the 'Statement on Key Inequalities' further indicating the important influence on subsequent advice and policy the statement has. There is therefore evidence that the ECNI emphasis on tackling segregation, coupled with the lack of reference to housing inequality in the Statement of Key Inequalities, is being harnessed by public authorities to justify approaches which do not duly afford primacy to equality imperatives.

²²² DSD EQIA Northside Urban Village Regeneration Framework, May 2009, paragraphs 7.2-3.

²²³ ECNI Response to DSD EQIA on West Side Regeneration District Draft regeneration plan, March 2009.

²²⁴ ECNI response to Planning Service Consultation and EQIA on the "Reform of the Planning System in Northern Ireland: Your chance to influence change, October 2009, Paragraph 4.3.6.

6. Further analysis and recommendations:

To recap the 'good relations' duty was legislated for as an outworking of the Belfast/Good Friday Agreement, yet there remains divergence from the commitments made as part of this treaty and those which followed to further its implementation. Government was to legislate for a Bill of Rights for Northern Ireland. There was also provision for a single equality bill. The Bill of Rights was to contain provision for equality of treatment for the identity and ethos of the two main communities (to be interpreted compatibly with the rights of others). Such a 'parity of esteem' provision was the second limb of the statutory duty the ECNI was to have oversight of, although the UK Government ultimately chose to frame the second limb of the duty around 'good relations'. A single equality bill would also have enabled a generic 'good relations' duty, (i.e. a duty to tackle prejudice and promote understanding), across all equality grounds to be enacted. To date however these two commitments have not been taken forward. At present there are proposals in the 'Together: Building a United Community Strategy' for legislation to change the remit of the Equality Commission to formally add good relations to its title. The strategy also contains proposals to modify EQIAs to formally add requirements for good relations assessments.

The definition and interpretation of the 'good relations' duty did not follow the path of its counterpart in Great Britain, where the duty is now defined as being related primarily to tackling prejudice and promoting understanding. The duty in Great Britain was not well defined in 1998, although there was some indication from research that the appropriate actions stemming from the 'good relations' duty in relation to socio-economic rights, for example in the area of regeneration, were to seek to explain to opposing parties that initiatives were being taken on the basis of objective need.

Despite well established legal principles that indicate there is an onus to do so the ECNI does not appear to shape its interpretation of the good relations duty explicitly from the framework provided by both the Belfast/Good Friday Agreement and the UK's human rights commitments. Doing so would afford a tighter definition less likely to conflict with equality imperatives.

The ECNI has been consistent in advising on the hierarchy in the legislation between the two duties affording primacy to equality over good relations. However, the ECNI has significantly elevated the role of good relations in equality impact assessments (and related screening) in a manner which was not intended or provided for in either the Agreement or its implementation legislation. From 2007 on the ECNI recommended the direct application of the same methodology designed specifically for equality impacts be applied to good relations. An examination of direct ECNI advice to public authorities' EQIAs on the thematic areas covered has demonstrated that this has allowed equality to be undermined by good relations considerations and hence the decision has been retrogressive in its impact.

The examination of EQIA advice to public authorities by the ECNI on the three selected case studies has also highlighted a number of further issues which overall have a retrogressive impact on its core equality mandate. The issues include:

- Inconsistencies in the weight given to ‘good relations’ considerations in advice;
- Inconsistencies in the approach of assessing or endorsing whether a proposal constitutes an ‘adverse impact’;
- Divergence in interpreting the dimensions of ‘good relations’ from the framework provided in the Agreement and UK human rights commitments;
- Inconsistencies in the application and weight given to minority rights in advice;
- Significant gaps in ECNI-cited research data on inequalities between the two main communities, and in relation to housing placing emphasis over tackling segregation to the detriment of equality;

Weight given to good relations in EQIA advice

There were differences across the three policy areas studied in relation to the relative weight given to ‘good relations’ considerations in ECNI EQIA advice. Within the advice on flying the Union Flag the good relations duty is rarely mentioned. By contrast in advice on Irish language policy good relations considerations, which the ECNI regards as an important consideration of language policy, are often prominent and decisive.

Good relations considerations are also quite significant in EQIA advice on socioeconomic policies proposing criterion on the basis of objective social need. In such advice public authorities are in effect asked to consider the ‘good relations’ impacts of policies targeting objective need on groups which do *not* suffer relative disadvantage. Advice to DARD and the Department of Education gives no indication that the ECNI is advising, in order to promote good relations, that public bodies mitigate community tensions by clearly articulating policies are based on targeting objective need. Rather the advice is likely to be read as indicating that alternative policies and mitigating measures are to be considered to the policies they had proposed. This consequently undermines the equality duty and initiatives to address socioeconomic disadvantage.

The ECNI EQIA advice on housing and regeneration is clear that there is a hierarchy between the two duties in which the equality duty has primacy. However the advice does tend, in accordance with strategic ECNI policy, to emphasise tackling segregation rather than inequality, (with the former and not the latter covered in detail in the Statement on Key Inequalities’) effectively prioritising a good relations rather than an equality imperative.

Measuring ‘adverse impact’

Across the case studies there are differences in the way in which the ECNI assesses or endorses whether the threshold of ‘adverse impact’ has been reached. In part this could be related to the relative weight given to ‘good relations’ considerations, but there are other differences. It is not always clear in ECNI EQIA advice where good relations considerations are highlighted whether subsequent endorsements that a policy would reach the threshold of an ‘adverse impact’ have been made on equality or good relations grounds.

In the ECNI advice examined on policies promoting the Irish language there is a pattern of the ECNI endorsing, at face value, that a proposed policy does constitute an ‘adverse impact’. This is in instances when a public authority EQIA itself suggests

there is an adverse impact, or when the public authority's response is limited to stating that there may be a potential it does. This is problematic given, as Council of Europe treaty bodies have indicated, there is no basis for categorising the policies in question, often related to English-Irish bilingual logos or signage, as constituting an 'adverse impact' on grounds of equality of opportunity. In addition, any assessment of 'adverse impact' on good relations grounds would not only conflict with treaty based commitments but would not require consideration of alternative policies etc. under the legislation.

In response to questions during the course of this research on the above policies and as to why the ECNI has adapted this approach, the Commission responded that it is not its role to assess adverse impacts but rather to advise the public authority how it must respond when it itself has identified one. This position would be problematic on a number of levels. Firstly it would appear to make little sense, and be potentially retrogressive, for a public authority to disregard a good policy proposal or pursue mitigating measures or alternative policies on the basis of an 'adverse impact' which is in fact not an adverse impact. Secondly, it is the ECNI's role to advise on the correct application of the duties, including advice on the correct application of its own methodology, as set out in the practical guidance, to determine the threshold of an adverse impact. Thirdly, it would be inconceivable, and discriminatory, that particular views based on prejudice were acted on as 'adverse impacts.' For example, if a section of the health workforce complained about migrant staff and it was accepted that this constituted an 'adverse impact' on good relations grounds that required an alternative policy or mitigation, which in effect led to restricting the employment of migrant staff.

Furthermore, in relation to other policy areas the ECNI has provided its own assessment as to what does and does not constitute an adverse impact. For example in its EQIA advice on Derry City Council's proposal to seek to change the city's name from Londonderry to Derry the ECNI states, citing insufficient attention to good relations, that such a move would constitute a 'serious adverse impact' when the public authority had not made such an assessment. The ECNI in their EQIA advice on flag flying also explicitly advocate the circumstances when it regards the flying of the union Flag to be acceptable and appropriate, and hence not to be constituted as an 'adverse impact'. In advice on flag flying the ECNI are generally cautious about categorising any policy as an adverse impact but deferring to contextual and proportionality considerations.

There are also related inconsistencies in the evidence base accepted by the ECNI in determining whether the threshold of adverse impact has been reached. In its submissions on flags the ECNI is relatively rigorous in how it assesses 'adverse impacts'. The responses focus on established legal concepts and thresholds of equality of opportunity, rather than a lay interpretation of the 'adverse impacts' concept being then applied to good relations. There is a focus on case law and related legislation. The ECNI is careful to stick to what is likely to be unlawfully discriminatory when assessing likely adverse impacts, and does not advocate that any of the policies (which involve flying the union flag or no flags) constitute an adverse impact. The advice also urges public authorities to demonstrate *evidence*

that lead to determinations of adverse or differential impacts.²²⁵ There are significant differences in this approach and that taken in relation to policies promoting the Irish language where adverse impacts are routinely determined. The evidence usually put forward for this is simply that relatively more Catholics speak Irish than Protestants, which in itself is not 'adverse' nor are 'personal beliefs' on the Irish language which is also cited in another ECNI response. The aforementioned advice to Derry City Council which determines the policy constitutes a 'serious adverse impact' is also limited to evidence of citing a perception in a conference report that the Council has a nationalist agenda and is biased, without further testing this assertion.

Also problematic are ECNI assessments or endorsements that socioeconomic policies based on objective need can constitute an 'adverse impact' against 'better off' groups. ECNI strategic guidance is (rightly) clear that the equality duty should not inhibit action to counter disadvantage, that such action is often the appropriate response redressing inequality under the duty, and that there should be no conflict between the equality duties and measures based on objective need (or indeed even if 'adverse impact' is determined then the policy option which does not disadvantage those at greatest objective need should be selected). However, there is individual EQIA advice from the ECNI which endorses 'objective need' based-policies as constituting an 'adverse impact' and advocating alternative policies are pursued. The ECNI is either making such an assessment in conflict with its own guidance or is doing so on 'good relations' grounds. At times the latter is explicitly cited and provides a clear example of how the good relations duty, and subjective interpretations of 'adverse impact', in practice undermining the purpose of the equality duty.

This is apparent in the ECNI advice on the 'Transfer 2010' consultation. Here the ECNI cautions against using the proposed criterion of Free School Meals (a proxy indicator for poverty and disadvantage) for schools admittance. In effect as there are presently more Catholic children in disadvantage than Protestants, it is argued the policy would constitute an adverse impact on the latter. Such a position would clearly work to the benefit of the better off rather than poorer children from both Catholic and Protestant backgrounds in disadvantaged areas such as the Shankill or Strabane. A further educational policy which invests resources in the middle classes, is the subsidy policy directed at fee-paying preparatory units of grammar schools. The ECNI had a long term position that subsidising such units runs contrary to delivering equality of opportunity. The ECNI EQIA advice however ultimately argues that the policy will constitute an adverse impact on non-Catholic children and sought consideration of alternative policies. The ECNI is then quite prescriptive in proposing alternative policies and mitigating measures, including recommending consideration of maintaining the subsidy for existing pupils.

Interpreting 'good relations' in accordance with the Agreement/human rights framework

There is little reference to the framework provided by the Agreement or human rights standards in ECNI guidance on interpreting the good relations duty. There is no reference to the original provision in the Agreement relating to 'equality of treatment for the identity and ethos' or parity of esteem between the two main communities.

²²⁵ e.g. see para 3.3 of Omagh 2006 EQIA response; para 3.2 of 2006 Ballymena response.

This framework, which would most expect to be seen in submissions engaging identity issues, is not referenced in submissions on flags nor in relation to the Irish language. The exception, although not explicitly founded on this framework, appears to be a small number of submissions whereby the ECNI appears to advise a 'parity' approach between Irish and Ulster Scots on 'good relations' grounds. This is problematic as it does not seek a proportionate outcomes-focused approach but effectively one based on artificial parity between the two linguistic traditions despite their entirely different circumstances and developmental needs. This approach has been consistently set out as non-human rights compliant, and damaging to the development of both the Irish language and Ulster Scots, by the competent Council of Europe treaty bodies as well as the local Human Rights Commission.

Despite established legal precedent that legislation should be interpreted compatibly with the treaty based commitments of the state there is divergence from the human rights framework in EQIA advice on the Irish language and socioeconomic rights. In relation to the former the 'good relations' duty is interpreted incompatibly with the framework provided by the European Charter for Regional and Minority Languages and Framework Convention for National Minorities. This is despite explicit statements from the Council of Europe treaty bodies indicating that policies undertaken in accordance with their provisions should not breach equality duties. EQIA advice which endorses or determines that positive action initiatives to remedy socioeconomic disadvantage in effect themselves constitute discrimination (in section 75 terms 'an adverse impact') is also incompatible with the equality and human rights framework.

The ECNI policy position that the "flying of the Union Flag must be viewed within the context in which it is flown or displayed" is concurrent with the human rights framework which indicates restrictions on expression and what constitutes harassment are very much a matter of intent, circumstance and impact rather than the presence of a flag *per se*.

Treatment of minority rights

There are inconsistencies in the ECNI advice in relation to referencing minority rights. In the case studies little consideration appears to be given to the minority rights of Irish speakers despite these being clearly codified into binding human rights instruments to which the UK is a party. The only explicit practical reference to minority rights in the studied ECNI advice on the Irish language issue focused on the alleged impacts on persons who do not use or would disapprove of the Irish language, with a focus on unionist minorities in nationalist controlled councils. The ECNI response studied which is strongest in emphasising minority rights is the EQIA response to Derry City Council's proposal for the city's name to be officially changed. In reaching the conclusion any change would be a 'serious adverse impact' on unionists the ECNI emphasises "An EQIA is not a tool which was designed to ensure that the wishes of the majority prevail" and that the Council must make provision to take into account the views of the minority. Whilst such an articulation of the principles on minority rights is welcome the ECNI does leave itself open to charges it has taken this approach inconsistently.

Among the performance targets in the ECNI 2009-2012 Corporate Plan is a provision to increase levels of favourability amongst political representatives

“representing the Protestant and Unionist communities by 10% by 2012.”²²⁶ CAJ put to the ECNI that setting such a target could risk influencing ECNI policy positions and priorities in order to effectively promote good relations with political representatives. The ECNI gave assurances this had not been the case, and rather that the target had related to increased engagement rather than policy positions. Nevertheless it would seem risky and generally inappropriate for a body established to scrutinise and where necessary challenge the actions of the Executive to set a target relating to increased approval from any political block within it. It is also worth noting that independent surveys commissioned by the ECNI have found that despite the context of a divided society, in relation to the general public, there is no difference in levels of confidence in the Commission on the basis of community background.²²⁷

It is also worth noting that despite the good relations duty covering three grounds, and in theory extending beyond community relations between the two main communities, there is little reference in any of the advice examined on good relations to minority ethnic groups.

Objective social need and good relations

In relation to submissions on housing, in the context of ongoing inequalities, there are often tensions between housing provision on the basis of objective need and provision which seeks to address good relations imperatives on shared housing and desegregation. ECNI advice to public authorities does tend to be consistent in highlighting that there is a hierarchy between the duties. Advice consistently cites a paragraph in ECNI guidance that in relation to tensions between the duties the equality duty takes primacy. This paragraph was replaced in current ECNI guidance which emphasises both duties have to be discharged. It therefore remains to be seen if it is still possible for the ECNI to take such a clear stance in the future, or whether the advice will shift. Nevertheless to date the advice has been consistent with the hierarchy in the legislation.

More problematic however in ECNI EQIA advice on housing and regeneration is the deferral to good relations imperatives on tackling segregation rather than inequality. This is often done through reference, by the ECNI or by public authorities, to the provisions in the ECNI’s ‘*Statement on Key Inequalities in Northern Ireland*’.²²⁸ Whilst the section on housing in this report makes a generic reference to inequality, deprivation and severe housing need the section covering ‘community background’ does not make reference to any inequality, rather it focuses exclusively on the issues of segregation and polarisation between the two communities.²²⁹ This is despite

²²⁶ ECNI Corporate Plan 2009-12, page 21. March 2009.

²²⁷ A survey of 1101 members of the general public undertaken by Social Market Research on the Commission’s behalf during September 2011; report published June 2012 found that public confidence levels increased: 65% confident in Commission’s ability to promote equality for all; 73% confident that the Commission provides a valued source of expert advice on equality issues (an increase of 7 percentage points over 2008 level); 68% satisfied that the Commission treats members of the public equally irrespective of their background; 64% agreed that the Commission is respected equally by all sections of the community in Northern Ireland (an increase of 11 percentage points since 2008). And that ‘In respect of the above results, responses indicate that there is no difference by way of community background in confidence levels.’ Source Equality Awareness Survey 2011, data provided by ECNI.

²²⁸ Equality Commission ‘Statement of Key Inequalities’ October 2007.

²²⁹ Similar observations can be made of the ECNI submission to the NI-Executives draft anti-sectarianism strategy, the ECNI advice in general focuses more on interpersonal relationships than inequality, and in relation to housing there is again a

evidence of ongoing housing inequalities between the two main communities discussed in further detail in the case study.

CAJ research and other studies of official statistics have highlighted that, notwithstanding the success of fair employment legislation there remain significant inequalities between the two main communities.²³⁰ There are other significant gaps beyond the sphere of housing in the identification of religious/political inequality in the Commissions 'key inequalities' document. There is considerable discussion of community background in the section on employment citing 'significant improvement' in Catholic employment rates and ongoing 'aggregate differentials' without identifying sectors where inequality remains. The only group on religious/political grounds singled out as being in particular disadvantage anywhere else in the document are Protestant boys in the section on education. No specific inequalities between the two main communities are identified in other areas of public sector provision.

The ECNI as an equality body does have an explicit mandate to conduct research which it regards as 'necessary or expedient' to discharge its functions.²³¹ The Commission can also rely on official research and the research of others to inform its policy positions. The ECNI as a body conducts substantial research with over 60 research reports published on its website.²³² The ECNI produces detailed fair employment monitoring reports profiling the monitored workforce in Northern Ireland further to its explicit duties under legislation to identify and keep under review such patterns.²³³ The ECNI did also commission and publish overarching research into the economic downturn which does cover issues of employment on grounds of community background, as well as other grounds.²³⁴ Beyond this there appear to be few research/investigation reports dealing with differentials between the two main communities. It does not appear there are any reports on areas such as housing and the criminal justice sphere. The only specific reports on the website focusing on community background relate to the field of education, focusing on the 'teacher exemption' and 'educational migration and non-return'.²³⁵ Such reports on education have been accompanied by press and media activity on the same issue by the ECNI including 'platform pieces' by the then Chief Commissioner in the *Belfast Newsletter* newspaper which tend to stress issues of Protestant disadvantage.²³⁶ This issue is not raised to question the integrity of the research conducted by the ECNI and others

focus on promoting shared housing rather than reducing inequality (Response to CSI Strategy, Equality Commission, October 2010).

²³⁰ In 2006 CAJ issued a briefing on religious/political differentials, which relied on official data. Whilst making clear that Catholics/nationalists did not have a monopoly on disadvantage, the briefing finds considerable continuing differentials for Catholics, with lower employment rates, economic activity rates and higher levels of unemployment. Significant inequalities were also found in housing, community infrastructure, investment and deprivation. (CAJ s172 Briefing on Religious/Political Differentials, March 2006). For more recent data highlighting ongoing inequalities see reference to Community Relations Council Peace Monitoring Report 2, 2013 in the socioeconomic case study.

²³¹ See for example Fair Employment and Treatment (Northern Ireland) Order 1998 article 8(1)(d).

²³² Accessed August 2011.

²³³ Fair Employment and Treatment (Northern Ireland) Order 1998 article 10.

²³⁴ Professor Ron McQuaid, Dr Emma Hollywood and Dr Jesus Canduela 'Employment Inequalities in an Economic Downturn' ECNI July 2010

²³⁵ The Teacher Exception Provision and Equality in Employment in Northern Ireland - Research Report, 2002; Equality Commission, 'Educational Migration and Non-return in Northern Ireland', 2008;

²³⁶ For example in October 2011, the Chief Commissioner drew attention to Protestant under-representation in higher education, as "an issue I have commented on frequently over the past six years." (Collins, Bob 'Facing the Education Challenge' *The Newsletter*, 25 October 2011).

on this subject, nor the importance of addressing such matters, but rather that it would be problematic to raise and highlight such issues in isolation of others. In discussion with CAJ on this research the Commission did highlight that it was working to tackle inequalities between the two main communities in other sectors such as the criminal justice system. This is an area where other official studies on matters such as prison provision have identified Catholic disadvantage.²³⁷ This work appears to be less prominent or publicly highlighted than for example the above matters with, for example, no equivalent columns highlighting such matters in the *Irish News*. In the context of a divided society it would appear unwise to pursue an approach of highlighting to each community areas where 'they' suffer disadvantage, rather than seeking to highlight inequality issues across the board. CAJ in the past has raised concerns about direct rule Government anti-poverty initiatives which had set aside objective need but had focused only on the Protestant community, on the stated grounds that whilst there was greater Catholic deprivation there was 'weaker community infrastructure' in Protestant areas, despite this claim itself being contradicted by official studies.²³⁸ CAJ was concerned both that such schemes had not been effective in tackling Protestant deprivation and, in setting aside Catholic deprivation, had succeeded only in sectarianising the debate, alienating both communities.²³⁹

It is the case that the phenomenon of inequality between the two main communities remains a politically contested area, as indeed are other equality issues such as the rights of LGBT persons. Raising Catholic/nationalist disadvantage can still be regarded as a 'taboo' subject, best avoided to prevent appearances of being 'divisive'. Such an approach in lay terms effectively involves maintaining 'good relations' over and above addressing inequality. It appears less contentious to publicly and rightly raise areas of comparative Protestant disadvantage, which from a 'good relations' perspective could be seen as a method to court greater buy-in to the equality agenda from political unionism. Such an approach would become problematic however if it is also predicated on playing down or overlooking Catholic disadvantage. By contrast CAJ has consistently held that addressing inequality on the basis of objective need is the key to good community relations. In such a political context it is all the more important to have a robust and independent Equality body to conduct research and objectively put forward the equality case. It also is unclear how, for example a focus on good relations imperatives rather than inequality in areas such as housing provision, can be reconciled with the ECNI's equality based mandate.

²³⁷ For example the recent independent review of prisons drew attention to Catholics being disproportionately overrepresented in matters relating to prison discipline 'Review of the Northern Ireland Prison Service: Conditions, management and oversight of all prisons', (Owers Report), Final Report of the Prison Review Team, 2011, p38; Despite comprehensive equality monitoring having been recommended some time ago by the Criminal Justice Review (another product of the Belfast/Good Friday Agreement) there remain significant gaps in its collection one more recent official review concluding 'very little' s75 equality data was in fact being collected in relation to service users of the criminal justice system (Criminal Justice Inspection for Northern Ireland 'The impact of Section 75 of the Northern Ireland Act 1998 on the criminal justice system in Northern Ireland' May 2009 page vi.)

²³⁸ See commentary on the Taskforce for Working Class Protestant Communities, p112-118 Rhetoric and Reality, CAJ, 2006.

²³⁹ CAJ Rhetoric and Reality, Executive Summary, December 2007, p5.

Recommendations

Recommendation One: The process to develop draft legislation to implement commitments in the Together Building a United Community Strategy should:

- Consider whether the proposed changes to EQIAs and the ECNI can be accomplished in a manner which is not retrogressive to the equality duties and broader international obligations, including those under the Belfast/Good Friday Agreement;
- Ensure any resultant addition of good relations impact assessments should be underpinned by a legislative framework which ensures good relations have an appropriate methodology which is duly subordinate to and compatible with equality assessments and international obligations;
- Develop a definition of 'good relations' which draws on and is compatible with international standards, including human rights treaties and the framework provided by the Belfast/Good Friday Agreement, and place an obligation on the ECNI to interpret the duty in such a manner;
- Consider taking forward commitments to single equality legislation, in a manner which ensures upward harmonisation along with the extension of the present three 'good relations' categories to the other equality groups;
- Ensure that any changes to the remit of the Equality Commission are compatible with international obligations, best practice and are not regressive in relation to the institution's equality function. This would include incorporating safeguards in the legislation to ensure the maintenance of the primacy of the equality function.

Recommendation two: the UK Government, in addition to its remit in relation to the above, given the relevance to providing a framework for good relations, should:

- Implement its commitments within the Belfast/Good Friday Agreement and the Joint Declaration to legislate for a Bill of Rights for Northern Ireland, inclusive of the Human Rights Commission's formulation of a duty for equality of treatment for the identity and ethos of the two main communities and its provisions in relation to minority rights, equality and non-discrimination;
- Implement its commitment under the St Andrews Agreement 2006 to an Irish Language Act.

Recommendation three: the Equality Commission should review:

- Its decision to recommend the addition of good relations to EQIAs and screening using the same methodology which had been designed to assess equality impacts;
- Its EQIA advice to public authorities in order to eliminate the inconsistencies, problems and ambiguities identified in this research and ensure that such advice is compatible with its own guidance and international standards and obligations, in particular those relating to positive action to tackle socioeconomic disadvantage and the rights of linguistic minorities under binding Council of Europe treaties;

- Its application of the concept of 'adverse impact' in EQIAs to ensure the Commission only advises its threshold has been met when there is objective evidence based on equality indicators and challenges the incorrect application of the concept in public authority EQIAs;
- Its interpretation and definition of the concept of good relations in its strategic guidance on Section 75 to one which draws on international standards, including the rights and equality provisions of the Belfast/Good Friday Agreement;
- Its statement of key inequalities and related research to remedy the omissions in relation to inequalities between the two main communities.

