

EQUIVALENCE IN PROMOTING EQUALITY

THE IMPLICATIONS OF THE MULTI-PARTY
AGREEMENT FOR THE FURTHER DEVELOPMENT
OF EQUALITY MEASURES FOR NORTHERN
IRELAND AND IRELAND

by Colm O'Conneide



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Equality Commission for Northern Ireland

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FOREWORD

“Equivalence in Promoting Equality” is a joint initiative of the Equality Authority and the Equality Commission for Northern Ireland. It is a reflection of the continuing cooperation between the two organisations that seeks to enhance our response, and our capacity to respond, to shared concerns in relation to inequality and discrimination in Ireland and Northern Ireland.

The Multi-Party Agreement signed in Belfast in 1998 provides a backdrop to the establishment and work of both the Equality Commission for Northern Ireland and the Equality Authority. “Equivalence in Promoting Equality” is an exploration of the requirement on the Irish Government under the Agreement to “further strengthen the protection of human rights in its jurisdiction” and to ensure “at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.

“Equivalence in Promoting Equality” identifies significant requirements on the Irish Government under the Agreement if an equivalent level of protection of equality rights is to pertain in Ireland as pertain in Northern Ireland. These requirements include:-

1. The need to address limitations within the Irish European Convention of Human Rights Acts 2003 as compared to the UK Human Rights Act 1998. These limitations relate in particular to the scope of remedies available under the Irish Act compared to those available under the UK Act.
2. The need to address limitations in the scope of the Irish equality legislation as compared to equality legislation in Northern Ireland. These limitations relate to:-

a. Disability

Where the Irish legislation limits the requirements on service providers to make reasonable accommodation for customers with disability by means of a nominal cost exemption; in Northern Ireland the Disability Discrimination Act 1995 requires both employers and service providers to provide reasonable adjustments and to incur reasonable expenses where necessary in making such reasonable adjustments.

b. Public Function

Where the Irish legislation does not explicitly apply to the performance of public functions - public authorities exercising particular power that are specific and reserved to state bodies including immigration controls or policing; in Northern Ireland the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 and the Disability Discrimination Act prohibit discrimination in the performance of public functions.

c. Political Opinion

Where the Irish legislation does not cover the ground of political opinion; the Northern Ireland fair employment legislation does include this ground.

d. Enforcement and Remedies

Where compensation that can be awarded under the Irish legislation is limited by maximum levels established in the legislation. In Northern Ireland there is no upper level on the amount of compensation that can be awarded.

3. The need to address limitations in the treatment of transsexual people and gay and lesbian people in Ireland compared to legislative provisions that apply in Northern Ireland. The Transsexual Act 2004 and the Civil Partnership Act in the UK find no matching provisions in Ireland.
4. The need to address the absence of positive duties to promote equality in the Irish equality legislation. Section 75 of the Northern Ireland Act requires public bodies to have due regard to equality in carrying out their functions. The objective of this positive duty is to change how public authorities perform their functions by making equality a central goal of their day to day activities. There are no such provisions in Ireland.

The Equality Authority and the Equality Commission for Northern Ireland are grateful to Colm O’Cinneide for his work in researching and writing this publication. His thorough, expert and patient work has ensured a publication of stature and standing that should stimulate and support necessary change.



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The views expressed in this report are those of the author and do not necessarily represent those of the Equality Authority or the Equality Commission for Northern Ireland.



1 INTRODUCTION

The Multi-Party Agreement¹ signed in Belfast in April 1998 is a negotiated agreement designed to create a framework for a peaceful resolution to the conflict in Northern Ireland. It is composed largely of three Strands: Strand One being concerned with internal political arrangements within Northern Ireland; Strand Two being concerned with bilateral relations between Ireland and Northern Ireland; and Strand Three being concerned with multilateral relationships between Northern Ireland, Ireland and the United Kingdom. This Multi-Party Agreement (MPA) is accompanied by an agreement between the governments of the United Kingdom and Ireland, by which both affirm their commitment to the peace process and their willingness to “support, and where appropriate, to implement” the Multi-Party Agreement.² This agreement, referred to as the “British-Irish Agreement” (BIA), taken together with the MPA comprises the full “Agreement” in its entirety (popularly known as the “Belfast” or “Good Friday” Agreement, and referred to here throughout as the “Agreement”, meaning both the MPA and BIA taken together).³

The Agreement contains significant commitments on the part of both the UK and Irish governments, as well as the other parties to the document, to implement measures to ensure the protection of human rights and in particular to promote equality of opportunity. These commitments are integral parts of the structural framework of the Agreement, and underpin its core provisions. The nature, extent and content of these commitments, and what they mean for the development of equality and human rights policy in Ireland and Northern Ireland, deserve close attention.

This dimension to the Agreement has however been often overlooked in the political debates surrounding its signing and implementation. Some innovative measures have been introduced by both governments, in line with the Agreement’s provisions. However, other provisions have been at best partially implemented, and the wider equality dimension of the Agreement, as well as its provisions in respect of ‘equivalence of rights’, have been largely neglected in political and media debates. These commitments are key elements of the Agreement, and deserve closer attention. The Agreement requires substantial alterations in law, policy and practice on *both* sides of the border, with its crucial ‘equivalence’ provision having particular relevance for Ireland. *All* the parties to the Agreement have committed themselves to this general objective, and this integral element of the Agreement should not be marginalised or disregarded.

¹ *Agreement Reached in the Multi-Party Negotiations* (Cm 3883, 1998); 37 I.L.M. 751 (1998).

² The text of the Agreement was annexed to this inter-state treaty agreement, which was dated 10 April 1998.

³ I am indebted to Austen Morgan for his discussion of the distinction between the two agreements: see A. Morgan, *The Belfast Agreement: A Practical Legal Analysis*, available at www.austenmorgan.com (last accessed 9th November 2003).



2 THE NATURE AND LEGAL STATUS OF THE MULTI-PARTY AGREEMENT

What the Agreement requires of its signatory parties is a source of considerable debate, and its meaning and interpretation has been contested both at the political and academic level. There is a lack of political consensus in Northern Ireland as to the status and contents of the Agreement,⁴ and it looks unlikely that any clear common position on the Agreement and its implementation will be agreed in the short to medium term. However, academic analysis has attempted to identify the core elements of the Agreement and to describe its impact and scope. Brendan O’Leary and Colin Harvey have characterised the Agreement as essentially a “consociational agreement” with external and cross-border dimensions, providing for internal and cross-border political arrangements permitting cross-community power-sharing within a human rights framework.⁵ Colin Harvey has in particular treated the Agreement as embodying the principle of deliberative democracy within Northern Ireland’s constitutional arrangements and as reconstituting the fundamental constitutional basis of its relationship with both the UK and Ireland.⁶

⁴ See C. Harvey, “Governing After the Rights Revolution” [2000] 27 (1) *Journal of Law and Society* 61–97, 79: “while the support for the Agreement was substantial it has remained unclear to what precisely people had given their consent... in order to reach agreement at the time, a measure of ambiguity was permitted to develop”.

⁵ See B. O’Leary, “The Nature of the Agreement” (1999) 22 *Fordham International Law Journal* 1628; C. Harvey, “The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland”, in C. Harvey (ed.), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart, 2001), pp. 9-53; B. O’Leary, “Comparative Political Science and the British-Irish Agreement” in J. McGarry (ed.) *Northern Ireland in a Divided World* (Oxford: OUP, 2001) 53; P. Bew, “The Belfast Agreement of 1998: From Ethnic Democracy to a Multicultural, Consociational Settlement?” in M. Cox, A. Guelke and F. Stephen (eds.) *A Farewell to Arms? From ‘Long War’ to Long Peace in Northern Ireland* (Manchester: Manchester University Press, 2000). For an analysis of the cross-border element in the Agreement’s governance arrangements, see D. Byrne, “An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics” (1999) 22 *Fordham International Law Journal* 1206.

⁶ Harvey, “The New Beginning”, pp. 33-36. See also C. Harvey, “Governing After the Rights Revolution” [2000] 27 (1) *Journal of Law and Society* 61-97. John Morison has in contrast described the Agreement in more negative terms as a “large-scale institutional settlement” based upon conventional and inevitably limited forms of constitutionalism: see J. Morison, “Democracy, Governance and Governmentality: The Role of the Voluntary Sector in the Democratic Renewal of Northern Ireland”, in Harvey (ed.), above at n. 6, 249-275.

Others have emphasised the role of the Agreement as an “innovative blend of individual and communal rights” and “the development of a set of principles” to govern community relations in Northern Ireland.⁷ This analysis is invaluable in showing how the Agreement, as argued by Campbell, Ní Aoláin and Harvey, is “best understood as a hybrid, containing elements of constitutional settlement and international legal discourse” that is “transformative” in nature and “constitutive” of a new “emerging state practice”.⁸

Much of this academic analysis has understandably mainly focussed on the Agreement’s impact upon Northern Ireland, and on the role of the British and Irish governments as midwives to the Agreement.⁹ This perspective tends to overlook its implications for Ireland. The Agreement imposes wide-ranging, transformative obligations upon Ireland as well as Northern Ireland and the UK in general: it should not be seen as intended to transform Northern Ireland while leaving Ireland largely untouched.

This academic analysis has also tended to focus upon the nature of the Agreement as a quasi-constitutional and transformative document, and its overarching emphasis on human rights. While this is an important and invaluable perspective, there is also a need to identify the exact legal status of the Agreement’s provisions, which remains uncertain. It is not at all clear what parts of the Agreement can be defined as having *legal*, as distinct from *political*, effect. Austen Morgan has argued that the Multi-Party Agreement is a purely political agreement between various political parties and the two governments, while the British-Irish Agreement is an agreement binding in international law, which only recognises inter-state treaties.¹⁰

⁷ See S. Livingstone, “The Judiciary and Legal Profession in Transition”, in Harvey (ed.), above at n. 5, 159. In the same book, see C. McCrudden, “Equality”, pp. 75-113, especially 86-92.

⁸ See C. Campbell, F. Ní Aoláin and C. Harvey, “The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland” [2003] 66(3) *Modern Law Review* 317-345.

⁹ Even when the Agreement is examined in terms of its impact outside the immediate sphere of Northern Ireland, it has often been only considered in terms of how it fits into existing domestic constitutional arrangements. The document is therefore for example sometimes analysed just in terms of its impact on Ireland’s territorial claims to Northern Ireland and on the UK’s devolution and constitutional reform agenda. This narrow perspective tends to disregard its wider implications for both the UK and Ireland. See e.g. the limited discussion in the otherwise comprehensive J. Casey, *Constitutional Law in Ireland* (3th ed.) (Dublin: Round Hall, 2000) 35-37; and see also the critique of the limited nature of much UK constitutional analysis of the Agreement in B. Hadfield, “The Belfast Agreement, Sovereignty and the State of the Union” [1998] *Public Law* 599. See also C. Campbell, F. Ní Aoláin and C. Harvey, “The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland” [2003] 66(3) *M.L.R.* 317-345 for an extensive critique of the limitations of viewing the Agreement as a devolution process within the UK. See also G. Anthony, “Public Law Litigation and the Belfast Agreement” [2002] 8 (3) *European Public Law* 401-422.

¹⁰ See the discussion in A. Morgan, *The Belfast Agreement: A Practical Legal Analysis*, available at www.austenmorgan.com (last accessed 9th November 2003).

This interpretation would mean that the commitments entered into under the Agreement as a whole are only binding in international law as treaty commitments upon the two governments, to the extent provided for in the British-Irish Agreement. However, as the British-Irish Agreement commits both governments to “support, and where appropriate implement, the provisions of the Multi-Party Agreement”,¹¹ it would appear that at the least, both governments are by virtue of their treaty obligations required to adhere to the general terms of the Agreement. (This issue of when it is “appropriate” to implement a provision of the Agreement is discussed in the next section).

However, the Agreement, or even the British-Irish Agreement as an international treaty, cannot be directly applied *per se* in the legal systems of either the UK or Ireland. The “dualist” system applying in both jurisdictions requires that any treaty be incorporated into domestic law before it can have direct legal effect, which has not been done with the British-Irish Agreement, let alone the full Multi-Party Agreement.¹² This means that neither document is legally binding within either legal system. Nevertheless, this does not deprive the Agreement of any legal status in either system. However, in both jurisdictions, the courts apply a standard presumption in interpreting legislation that the legislature will be deemed to intend to adhere to its international legal obligations.¹³ Therefore, according to well-established precedent in both countries, 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.¹⁴ The Agreement, as a set of commitments binding upon both countries 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.¹⁵ Thus, the Law Lords in *Robinson v. Secretary of State for Northern Ireland*¹⁶ and the Northern Irish Court of Appeal in *De Brun*¹⁷ viewed the

¹¹ See *British-Irish Agreement*, Article 2.

¹² See *R v Secretary of State for Home Department, ex p. Brind* [1991] 1 AC 696; Article 29.6 of Bunreacht na hÉireann; *Re Ó Laighléis* [1960] I.R. 93; *Application of Woods* [1970] I.R. 154; J. Casey, *Constitutional Law in Ireland* (Dublin: Sweet & Maxwell, 2000) 196-203.

¹³ See *Desmond v. Glackin (No.1)* [1993] 3 I.R. 1; *Saloman v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116; *Fothergill v. Monarch Airlines* [1981] A.C. 251; *R v Home Secretary, Ex parte Leech (No.2)* [1994] QB 198, [1993] 4 All ER 539; *R v Ministry of Defence, Ex parte Smith* [1996] QB 517' [1996] 1 All ER 257.

¹⁴ See *State (D.P.P.) v Walsh* [1981] I.R. 412, 440; *Ó Domhnaill v Merrick* [1984] 1 I.R. 151, 159.

¹⁵ See *Fothergill v. Monarch Airlines* [1981] A.C. 251 for the application of this interpretative principle in another context.

¹⁶ [2002] UKHL 32. *In re Williamson* [2000] NICA 7 (6th April, 2000)

¹⁷ *Re an Application for Judicial Review (Bairbre de Brun and Martin McGuinness)* (2002) N.I.C.A. 43 (05 October 2001), Carswell LCJ. See also *In re Williamson* [2000] NICA 7 (6th April, 2000), and the discussion in G. Anthony, “Public Law Litigation and the Belfast Agreement” [2002] 8 (3) *European Public Law* 401-422.

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. In *Robinson*, the Law Lords treated the Agreement in Lord Bingham's words as "in effect a constitution", to which a purposive and generous interpretation should be given, "bearing in mind the values which the constitutional provisions [of the Agreement] are intended to embody".¹⁸ This approach views the Agreement as a constitutional agreement that, while not directly incorporated into UK law, should be used as the major guiding reference point in interpreting measures designed to give it effect.¹⁹ The Northern Irish courts have made it clear that the executive branches of government are not usually under any obligation to have regard to international agreements that have not been incorporated into UK law.²⁰ However, applying the approach in *Robinson* and *De Brun*, the Agreement may be used by the courts in interpreting legislation such as the Northern Ireland Act 1998 which are designed to implement its provisions, and by extension in reviewing executive acts done under the authority and scope of this legislation.

The courts in Ireland have been a little more cautious in making use of the Agreement as an interpretative tool. The Supreme Court in *O'Neill and Quinn v Governor of Castlerea Prison*²¹ reaffirmed their earlier decision in *Doherty v Governor of Portlaoise Prison*²² that the Agreement did not confer any individual rights in Irish law and was not incorporated as part of domestic law. In *O'Neill*, Keane C.J. stated that the Agreement's "language... is wholly irreconcilable with that proposition". The Supreme Court in both cases refused to interpret the relevant legislation with reference to the Agreement, despite certain provisions of the Agreement having been included in a schedule to the Act in question (the Criminal Justice (Release of Prisoners) Act 1998).²³

This approach seems to contrast with that adopted by the Law Lords, as the Supreme Court refused to use the text of the Agreement to interpret legislation which was designed to give effect to certain of its provisions, whereas in *Robinson* the Law Lords were happy to use the Agreement as an interpretative tool for implementing legislation.

¹⁸ [2002] UKHL 32.

¹⁹ For an analysis of this 'constitutional' dimension of the Agreement, see C. Campbell, F. Ní Aoláin and C. Harvey, "The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland" [2003] 66(3) M.L.R. 317-345; see also C. Harvey, "The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland" in C. Harvey (ed.), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (OUP: Hart, 2001) 9-51.

²⁰ See *Re Adams* [2001] N.I. 1, *Re an Application for Judicial Review (Northern Ireland Commissioner for Children And Young People)* [2004] N.I.Q.B. 40 (23 June 2004).

²¹ [2004] IESC 7 (29 January 2004).

²² [2002] 2 IR 252.

²³ The Court did recognise that Ireland could be considered bound in *international law* by the British-Irish Agreement.

However, Keane C.J. distinguished between the approach of the Law Lords in *Robinson* to the Northern Ireland Act 1998 and the legislation in question in *O'Neill*, on the basis that unlike the UK Act the Irish legislation was not “strictly speaking... required to in order to enable the State to meet [its obligations under the Agreement]”. This leaves open the possibility that legislation expressly designed to specifically implement the Agreement might be interpreted by the Irish courts with reference to its provisions, in line with the approach of the Law Lords in *Robinson*. In particular, this approach may be adopted when interpreting legislation such as the Employment Equality Acts, Equal Status Acts (which reflect the commitment to implement enhanced employment equality legislation and to introduce equal status legislation) and the Irish European Convention on Human Rights Act that was introduced in formal compliance with the specific terms of the Agreement.

In addition, the Supreme Court has in the past been open to using the European Convention on Human Rights and other international instruments in interpreting the scope of constitutional rights:²⁴ given that the Agreement is also a binding treaty commitment, this leaves open the possibility that the Agreement may be used as a persuasive authority in the process in interpreting and applying constitutional rights. Finally, it should not be forgotten that where legislative ambiguity exists, the Agreement could be used to resolve the interpretation issue at stake, as the interpretation that prevents conflict with the Agreement should be preferred.

To summarise, it is important to be clear as to the extent to which the Agreement can be said to be legally binding in nature. In the *domestic law* of both jurisdictions, its text may serve as an aid in interpreting legislation and reviewing consequent executive acts in certain circumstances. In *international law*, the British-Irish Agreement can be considered a binding treaty, which by virtue of its provisions obliges the two governments to “support” the provisions of the Multi-Party Agreement, and “implement” them if possible.

²⁴ See *State (Healy) v Donoghue* [1976] I.R. 325, 351; *O'Leary v Attorney-General* [1993] 1 I.R. 102.



3 THE CONTENTS OF THE AGREEMENT

The key question that next arises is whether and to what extent the Agreement can be said to impose definite obligations that have been accepted by some or all of the signatories, and especially the two governments. The Agreement may have some legal status, but does it have any concrete content capable of application in a legal context? Or should its contents be solely considered as rhetorical or political commitments, devoid of the precision and specificity necessary to establish definite requirements that the parties must undertake to comply with the Agreement?

If the text of the Agreement is examined, it is apparent that all the parties have entered into certain *general* commitments which are open-ended and uncertain in scope, and *specific* commitments which are definite and tangible in nature. For example, all parties to the Agreement “reaffirm”, “recognise” or undertake to “respect” certain general principles, such as their acceptance of fundamental rights norms, while certain specific and concrete steps are required to be taken by particular parties, such as the UK government’s commitment to introducing a general equality duty in Northern Ireland (see below).

All parties to the Agreement have agreed to be bound by both general and specific commitments. However, the nature of the general commitments means that that it is very difficult to identify what is required to be done to implement them in practice. Keane C.J. in *O’Neill* made clear that the Irish Supreme Court considered that much of the language used in the Agreement was “imprecise and aspirational”. In contrast, the specific commitments are usually definite in scope and extent. Therefore, the specific commitments can be treated as binding, concrete and ascertainable obligations, while general commitments largely remain “aspirational” in nature. Both sets of commitments are binding as treaty obligations under international law but only the specific commitments impose definite obligations which must be implemented.

The British-Irish Agreement recognises this distinction, with the two governments obliged in general to “support” the provisions of the Agreement, but to “implement” these commitments “where appropriate”.²⁵ The two governments are clearly only obliged to give effect to those concrete and specific commitments which are clearly identified in the Agreement. As a *legal* instrument capable of use in interpreting legislation and binding in international law, the Agreement cannot be read as an open-ended source of specific obligations which are not specified in its text.²⁶

²⁵ British-Irish Agreement, Article 2.

²⁶ See e.g. the discussion in A. Morgan, “Legal Case Against Suspension Falls Flat”, *The Irish Times*, 10 March 2000.

However, it would be a mistake to simply disregard the general commitments as mere rhetoric. The purpose, aims and general nature of the Agreement (as reflected in the nature and content of the general commitments) can be used to interpret the specific provisions to which the parties have committed themselves, as well as any implementing legislation. The Law Lords have already adopted this approach in *Robinson*. The general commitments constitute a framework of agreed norms and values shared by all the parties to the Agreement, which can be used to interpret and flesh out the specific commitments which the parties have entered into. The general commitments could also be seen as programmatic requirements, requiring consistent, demonstrative and substantive progress towards their implementation: a failure to take account of these general commitments could be seen as a repudiation or undermining of the core principles of the Agreement. It should also be emphasised that the specific commitments are precise, carefully delineated and require particular action by either or both governments. Where Article 2 of the British-Irish Agreement commits both governments to implementing provisions of the Agreement “where necessary”, this clearly refers to these specific commitments, whose implementation therefore is a treaty commitment.

It is also worth emphasising that whereas the Agreement may only impose certain specific legal obligations on signatory parties, it may make practical and political sense to introduce other policy initiatives and new legislation to give effect to its broad transformative agenda. These additional steps may not be formally required by the precise terms of the Agreement: however, they may be necessary and useful measures, given its general thrust and purpose. Therefore, while examining what the Agreement requires from a legal perspective, it is important to also consider what additional measures may be usefully introduced to complement the obligations which the signatory parties have accepted.

In summary, the Agreement contains both very specific commitments which the parties have agreed to implement, and general commitments which, while broad-ranging and imprecise in nature, can be used to interpret and guide how the specific commitments are implemented.





4 HUMAN RIGHTS AS BASIC FRAMEWORK PRINCIPLES OF THE AGREEMENT

Much of the debate that has surrounded the Agreement has tended understandably to concentrate upon its provisions concerning disarmament, self-governance and other aspects of the political compromise struck between the differing parties in 1998. However, this emphasis has tended to ensure that the Agreement's broader human rights dimensions have to a degree been overlooked and underemphasised (and in particular the equivalence provisions, as discussed below). This part of the contents of the Agreement, and its relationship with the overall nature, legal status and contents of the Agreement as a whole, deserves closer attention, as does its potential legal and political impact.

The Agreement is explicitly founded upon a set of foundational general principles. These include the recognition of “partnership, equality and mutual respect” as the basis of relationships within Northern Ireland, between North and South, and between “these islands”²⁷; the acknowledgement that the democratic will of both major communities is to be reflected in the governance of Northern Ireland and its future constitutional destiny²⁸; acceptance of the importance of “parity of esteem” for both major communities²⁹; the commitment to peaceful means by all parties³⁰; and the recognition of the importance and necessity of cross-border and cross-community partnership.³¹

The text of the Agreement also requires the participants to commit themselves to the “protection and vindication of the human rights of all” as another underpinning foundational principle.³² This *general commitment* is fleshed out in the Agreement by

²⁷ See Multi-Party Agreement, *Declaration of Support*, para. 3.

²⁸ See Multi-Party Agreement, *Constitutional Issues*, para. 1 (i) – (vi); *Strand One*, especially paras. 1 and 5.

²⁹ See the Agreement, *Constitutional Issues*, para. 1 (v). See also the *Declaration of Support*, para. 3, and *Rights, Safeguards and Equality of Opportunity*, para. 4, where this principle is couched in terms of respect for the identity and ethos of the different communities.

³⁰ See Multi-Party Agreement, *Declaration of Support*, para. 4; *Decommissioning*, para. 3.

³¹ Multi-Party Agreement, *Declaration of Support* paras. 3 and 5.

³² Multi-Party Agreement, *Declaration of Support*, paras. 2 and 3. See also *Rights, Safeguards and Equality of Opportunity*, para. 1. See C. Harvey, “Governing After the Rights Revolution” [2000] 27 (1) *Journal of Law and Society* 61-97, 75-97. See also C. Campbell, F. Ní Aoláin and C. Harvey, “The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland” [2003] 66(3) M.L.R.

all the parties agreeing to respect a set of *specific* listed rights.³³ The British and Irish governments in the BIA also reaffirmed their commitment to “the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions”.³⁴

Human rights are therefore mainstreamed within the Agreement³⁵, and all the signing parties have committed themselves to respect and uphold this core element of the Agreement. It is also apparent that this general commitment to uphold fundamental rights extends further than the set of rights contained in the European Convention on Human Rights (ECHR), despite the importance of that particular rights instrument in the overall scheme of the Agreement. This is evident in the recognition by all parties that the power of the sovereign government with jurisdiction in Northern Ireland should be founded on the “principles of full respect for, and equality of, civil, political, social and cultural rights”, as well as “freedom from discrimination for all citizens”.³⁶ It is

317-345. See also C. Harvey, “Complex Conversations: Legality, Politics and Constitutionalism in Northern Ireland (2000) 3 *Contemporary Issues in Irish Law and Politics* 70; B. Hadfield, “The Belfast Agreement, Sovereignty and the State of the Union” [1998] *Public Law* 599; B. O’Leary, “The Character of the 1998 Agreement: Results and Prospects” in R. Wilford (ed.) *Aspects of the Belfast Agreement* (Oxford: OUP, 2001) 49.

³³ Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para. 1. The mutual commitment of the parties to this base of principles is reinforced by their commitment in relation to constitutional issues that the power of the sovereign government with jurisdiction in Northern Ireland shall be founded on the “principles of full respect for, and equality of, civil, political, social and cultural rights” and “freedom from discrimination for all citizens”, as well as “parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities”. See Agreement, Constitutional Issues, (v). See also the Pledge of Office to be taken by Ministers of the Northern Ireland Executive, Strand One, Annex A, which includes a pledge to “act in accordance with the general obligations on government to promote equality and prevent discrimination”.

³⁴ See the BIA Preamble.

³⁵ See P. Mageen and M. O’Brien, “From the Margins to the Mainstream” (1999) 22 *Fordham International Law Journal* 1389.

³⁶ Multi-Party Agreement *Constitutional Issues*, para. (v). The range of these rights commitments goes much further than the ECHR’s scope, especially in the recognition of cultural rights and freedom from discrimination, which is considerably wider than the narrow and limited Article 14 right to equality in the ECHR. See also the responsibility placed upon the Northern Irish Human Rights Commission to consult and advise on the “scope for defining, in Westminster legislation, rights supplementary” to those in the European Convention on Human Rights, which would reflect the “particular circumstances” of Northern Ireland and taken together with the ECHR rights would constitute a Bill of Rights for Northern Ireland. The Commission in this process are to draw “as appropriate on instruments and experience”, and such additional rights as may be identified by the Commission in this process are to reflect the core principles of mutual respect for the identity and ethos of both communities”. Among the issues to be considered by the Commission in this process are to be “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 spheres”.

also evident by the inclusion in the Agreement of specific rights commitments in respect of Northern Ireland relating to economic, social and cultural rights³⁷, as well as the specific requirement upon the Irish government to ratify the Framework Convention on National Minorities and to draw upon international instruments (including but not limited to the ECHR) in ensuring “equivalence of rights”.³⁸

The civil, political, socio-economic, cultural and minority rights thus recognised in the Agreement reflects the contents of the international human rights instruments which both governments have already ratified and accepted as binding in international law. The Agreement in no way alters or varies these basic human rights obligations. It does however provide that these obligations should be taken seriously, given real effect and reflected in the implementation of the Agreement in Northern Ireland and Ireland: this general commitment applies to all the signatory parties.³⁹

The Agreement also contains a set of *specific* commitments to take particular concrete steps to ensure greater respect for human rights.⁴⁰ These are the operable, binding and specific rights elements of the Agreement: however, how these specific commitments are interpreted and applied should reflect the underlying general commitment to respect the full spectrum of recognised human rights, which should be seen as the background interpretative context.

The UK undertook to incorporate the European Convention on Human Rights and ensure that the UK courts had the power to overrule Assembly legislation on grounds of inconsistency.⁴¹ The UK government also undertook to establish a Northern Ireland Human Rights Commission (NIHRC).⁴² The Irish government in turn undertook

³⁷ These commitments concern in particular economic growth, development, the promotion of social inclusion (including the “advancement of women in public life”), linguistic diversity and to strengthening anti-discrimination legislation, reviewing related national security-related provisions and developing a new focused Targeting Social Need initiative. See Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, paras. 1-4.

³⁸ It also recognises the importance of addressing the full range of issues that have contributed to the Northern Irish conflict, including the denial of full socio-economic, minority and civil and political rights to many members of all the different communities. See C. Harvey and S. Livingstone, “Human Rights and the Northern Ireland Peace Process” [1999] *European Human Rights Law Review* 162-177; see also Mageen and O’Brien, “From the Margins to the Mainstream” (1999) 22 *Fordham International Law Journal* 1389.

³⁹ This interpretation of the Agreement as meshing with international human rights law is supported by the explicit statement in the *Constitutional Issues* provisions recognising the “equality” of civil, political, social and economic rights, which reflects the position adopted in the UN Vienna Declaration.

⁴⁰ See C. Harvey and S. Livingstone, “Human Rights and the Northern Ireland Peace Process” [1999] *European Human Rights Law Review* 162-177 for a comprehensive account of the rights provisions of the Agreement.

⁴¹ See Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 2. This was accomplished by the Human Rights Act 1998 and the Northern Ireland Act 1988.

⁴² See Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 5. The NIHRC has been established in the Northern Ireland Act 1998.

specific obligations “to strengthen the protection of human rights in its jurisdiction”.⁴³

Most importantly, the Irish government is required to “further strengthen the protection of human rights in its jurisdiction”, by bringing forward measures “to strengthen and underpin the constitutional protection of human rights”, drawing upon the European Convention on Human Rights and other “international legal instruments in the field of human rights” to ensure “at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.⁴⁴ This concept of ‘equivalence’ is of prime importance, as discussed below in detail. For now, it suffices to say that its major impact is to link the protection of rights in Ireland with the level of protection available in Northern Ireland.

The Agreement also attempts to make provision for a linked approach to fundamental rights across the whole island of Ireland by stating that a joint committee formed by the Irish Human Rights Commission and the Northern Ireland Human Rights Commission would consider amongst other matters the possibility of establishing a charter “reflecting and endorsing agreed measures for the protection of fundamental rights for everyone in the island of Ireland”.⁴⁵

All of these human rights provisions are a core element of the commitments that all the parties to the Agreement have entered into, and this element of the Agreement should not be seen as separate, subsidiary or secondary. All of the specific provisions of the Agreement should be interpreted and applied in a purposive manner in line with the general human rights commitments it contains, as should all implementing legislation, as these are integral provisions of the Agreement.⁴⁶ In addition, all of the specific human rights-related commitments set down in the Agreement are binding, and need to be fully implemented.

It should also be borne in mind that to give real and lasting effect to these general human rights commitments, sufficiently robust, resourced and well-implemented policy and legal measures may have to be introduced, to supplement those specified in the document. There are no strict legal obligations in the text of the Agreement that require that such “additional” measures are necessary. Nevertheless, the introduction of additional human rights-friendly policies and legislation may be both necessary and desirable to translate rhetorical respect into concrete observance.

⁴³ See Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 9. In particular, it committed itself to set up an Irish Human Rights Commission, to ratify the Council of Europe Framework Convention on National Minorities (already ratified by the UK) and entered into a general commitment to “continue to take further steps to demonstrate its respect for the different traditions in the island of Ireland”.

⁴⁴ Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 9.

⁴⁵ See Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 10.

⁴⁶ See C. Harvey, at n. 4 above, 86-87.





5 EQUALITY – A FUNDAMENTAL RIGHT UNDER THE AGREEMENT

The importance of the scope of the Agreement's human rights provisions is particularly apparent when its relevance for equality issues is considered. The importance of the equality principle to the overall framework of the Agreement cannot be underestimated. Harvey has argued that "equality underpins any dialogic model of constitutionalism, for the existence for inequality has distorting effects...if there is a core value which underpins the Agreement, it is equality".⁴⁷ This "core value" is recognised in the general commitments made by the parties to respect "the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity" and "the right of women to full and equal political participation".⁴⁸

This right to equal treatment that is recognised in the text of the Agreement appears to be analogous to that recognised in Articles 2 and 26 of the International Covenant on Civil and Political Rights, as well (albeit in a much more circumscribed form) in the interpretation of the European Court of Human Rights of Articles 3, 8 and 14 of the European Convention on Human Rights.⁴⁹ The Agreement recognises this general right to equality as a crucially important principle, and it should be recognised and reflected in how the Agreement's specific commitments are read and applied.

⁴⁷ C. Harvey, "Governing After the Rights Revolution" [2000] 27 (1) *Journal of Law and Society* 61-97, 81.

⁴⁸ *Ibid.*, *Rights, Safeguards and Equality of Opportunity*, para. 1. The mutual commitment of the parties to this base of principles is reinforced by their commitment that the power of the sovereign government with jurisdiction in Northern Ireland shall be founded on the "principles of full respect for, and equality of, civil, political, social and cultural rights" and "freedom from discrimination for all citizens", as well as "parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities". See Agreement, *Constitutional Issues*, (v). See also the Pledge of Office to be taken by Ministers of the Northern Ireland Executive, Strand One, Annex A, which includes a pledge to "act in accordance with the general obligations on government to promote equality and prevent discrimination". Both the UK and Irish governments in their accompanying treaty agreement have also reaffirmed their commitment to "the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions".

⁴⁹ For the applicability of the Article 3 guarantee of freedom from inhumane and degrading treatment to equality issues, see *East African Asians* (1973) 3 European Human Rights Reports 76. For the scope of Article 8, see *Smith & Grady v UK* (2000) 29 European Human Rights Reports 493. For the limited scope of the Article 14 right to equal treatment, see *Abdulaziz v UK* (1985) 7 European Human Rights Reports 471. This basic right to equality is also recognised in the provisions of the Convention for the Elimination of Discrimination Against Women (CEDAW), the Convention for the Elimination of Racial Discrimination (CERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Framework Convention on Minorities. See A. F. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law" (1990) 11 *Human Rights L. J.* 1.

In a recent Dáil debate, Minister Willie O’Dea T.D. expressed the view that Ireland’s commitment to ensure an equivalence of human rights protection as applying in Northern Ireland did not extend to ensuring an equivalence of “equality provisions”.⁵⁰ The meaning of this statement is unclear, and is discussed further below. However, if the Minister is suggesting that the right to equality of treatment is somehow not covered by the Agreement’s human rights provisions, this is plainly not correct. Equality is a core human right, and therefore the specific requirement to secure an equivalence of human rights has to be interpreted to include achieving an equivalence of equality rights. Equality and human rights cannot be disentangled. The parties have made this clear in the Multi-Party Agreement, especially in their commitment to respect the right to “equal opportunity in all social and economic activity”.

In addition to this general commitment to the equality principle, the Agreement contains, as part of its specific rights provisions, several binding commitments to enhance existing equality legislation. The British government committed itself to introducing what is now the statutory duty to promote equality on public authorities in Northern Ireland, introduced by s. 75 of the Northern Ireland Act 1998, and also to establishing a new single Equality Commission for Northern Ireland.⁵¹ The Irish government in turn committed itself to introduce enhanced employment equality legislation and equal status legislation in Ireland.⁵²

Other specific rights commitments in the Agreement also have considerable importance for equality issues. Articles 3 and 14 of the ECHR (incorporated in the UK and Ireland as a partial result of the Agreement) guarantee a degree of protection against discriminatory treatment, while (as discussed below) the “equivalence of rights” provisions of the Agreement have considerable implications for equality rights. Again, however, it should be emphasised that these specific binding rights provisions are to be interpreted and applied in light of the overall commitment by all parties to respect fundamental rights principles, which include the comprehensive right to equality recognised throughout international human rights law, as well as in Article 40.1 of *Bunreacht na hÉireann*.⁵³ Without such a commitment, the necessary degree of mutual respect and trust needed to make the Agreement’s political arrangements work will be difficult to achieve and to sustain.

However, as Harvey has argued, “there are different shades of equality”.⁵⁴ There are many different and often conflicting interpretations as to what the right to equal treatment

⁵⁰ Equality Bill 2004 [Seanad]: Report and Final Stages (1 July 2004).

⁵¹ The UK government had previously made a commitment to introduce both policies in the White Paper *Partnership for Equality* in March 1998. See C. McCrudden, “Equality”, above at n. 8, 86-92, for the background and contents of the White Paper.

⁵² Similar provisions had been included in legislation passed by the Oireachtas prior to the Agreement but which had been found to be unconstitutional in certain respects by the Supreme Court, in the decision of *In the matter of Article 26 of the Constitution of Ireland and in the Matter of the Employment Equality Bill* [1997] 2 I.R. 321.

⁵³ As emphasised in the recent High Court decision in *Equality Authority v Portmarnock Golf Club*. [2005] IEHC 235: note in particular the comments by O’Higgins J. on the scope and importance of the Article 40.1 guarantee of equality.

⁵⁴ See n. 5 above.

requires. Different interpretations and policy approaches may be adopted depending on the type of equality principle that is considered to apply, or that is believed to reflect the overall nature and contents of the Agreement.⁵⁵ It is difficult to identify with precision what a particular approach to equality requires. However, a strong argument can be made that the Agreement in its provisions tends to adopt a “substantial equality” approach, with its emphasis on assisting and empowering disadvantaged or excluded groups and individuals to become full participants in political, social, cultural and economic activity. For example, the positive equality duty introduced in Northern Ireland by virtue of the Agreement is based upon this concept of “substantive equality”,⁵⁶ and this approach is also reflected in its emphasis on attempting to secure “equal opportunity in all social and economic activity”.

In contrast, an approach based on what Fredman has described as “formal equality” or “equality as consistency”, would require that “fairness requires consistent treatment”,⁵⁷ and would require only that law and policy did not make arbitrary distinctions between different groups. However, approaches to equality in policy or legislation that are based upon the formal equality principle are of limited use in breaking down deep-rooted structural obstacles to equality. This is because such approaches emphasise sameness of treatment rather than the removal of obstacles to equal participation in society by these groups.⁵⁸ Therefore, interpreting and applying the Agreement’s equality provisions with reference to the substantive equality approach is entirely consistent with its provisions, thrust and objectives. Its “transformative” ambitions are not compatible with a narrow formalist approach to equality.⁵⁹

As Anne Phillips and other have argued⁶⁰, substantive equality approaches rest upon a core set of principles, defined by Zappone as “equal worth as different human beings”, the “recognition of social group differences”, “mutual respect” directed towards altering

⁵⁵ See C. McCrudden, “Theorizing European Equality Law and the Role of Mainstreaming” in E. Barry and C. Costello (eds.) *Equality as Diversity* (Dublin: ICEL/Equality Authority, 2003). For an analysis of these tensions in the context of the consultation process in the preparation of a Northern Irish Bill of Rights, see C. McCrudden, “Not the Way Forward: Some Comments on the Northern Ireland Human Rights Commission’s Consultation Document on a Bill of Rights for Northern Ireland” (2001) 52 (3&4) *Northern Ireland Legal Quarterly* 372-384.

⁵⁶ See C. McCrudden, “Equality”, above at n. 7 for a thorough discussion of this.

⁵⁷ See S. Fredman, *Discrimination Law* (Oxford: OUP, 2002), p. 7 – 11.

⁵⁸ See Fredman, op cit. See also C. Barnard, “Gender Equality in the EU: A Balance Sheet” in P. Alston (ed.) *The EU and Human Rights* (Oxford: Oxford University Press, 2000), 215.

⁵⁹ The phrase “equality of opportunity” is used in the text of the Agreement: see *Rights, Safeguards and Equality of Opportunity*, para 1. This phrase is of course frequently interpreted in a multiplicity of ways in different contexts. Given these multiple meanings, it would be erroneous to interpret the use of this phrase in the context of the Agreement according to one specific philosophical or jurisprudential theory. It makes better sense to give “equality of opportunity” a broad, purposive meaning, and to use specific equality measures set out in the Agreement as indicators of what this phrase is intended to convey in this particular context, as this paper does.

⁶⁰ See A. Phillips, *Which Equalities Matter?* (London: Polity, 1999); S. Fredman, *The Future of Equality in Britain*, EOC Working Paper Series No. 5, (Manchester: EOC, 2002); R. Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 1986).

social practices to make such respect real and tangible, “diverse political participation and representation” and a sufficient emphasis on minimising the impact of economic inequalities.⁶¹ The Agreement in its general and specific commitments attempts to make provision for all of these principles, as part and parcel of the process of making the “new beginning” promised by the Agreement a political reality throughout the island of Ireland.⁶²

The Agreement furthermore adopts what Katherine Zappone has described as an “inclusive definition of equality”,⁶³ which recognises the array of different identities within the island, the special needs of different groups, and the need to promote substantive equality of treatment across a wide range of facets of democratic and socio-economic life. This is evidenced where the Agreement recognises the importance of “equal worth in difference” in culture, socio-economic position, ethnic and religious identity, sexuality, age and other facets of the interaction of individuals with society.⁶⁴ In particular, the Agreement emphasises “parity of esteem” between the two major communities in Northern Ireland.⁶⁵

However, as crucial as this provision is, the Agreement itself in its extensive equality provisions does not confine its scope to achieving parity between the two communities

⁶¹ K. Zappone, *Charting the Equality Agenda: A Coherent Framework for Equality Strategies in Ireland, North and South* (Dublin: Equality Authority and Equality Commission for Northern Ireland, 2001), available at <http://www.equalityni.org/uploads/pdf/kzreport.pdf>

⁶² See also I. M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), Ch. 6; see also H. Collins, “Discrimination, Equality and Social Inclusion” [2003] *Modern Law Review* 16; for the impact of inequality on poverty in Ireland, see J. Baker, “Equality” in S. Healy and B. Reynolds, *Social Policy in Ireland: Principles, Policies and Problems* (Dublin: Oak Tree Press, 1997); K. Lynch, J. Baker and S. Cantillon, “The Relationship between Poverty and Inequality” (Dublin: Equality Studies Centre, 2000); see also the excellent and comprehensive analysis in J. Baker, K. Lynch, S. Cantillon and J. Walsh, *Equality: From Theory to Action* (Basingstoke: Palgrave-Macmillan, 2004). This may involve critically examining conventional assumptions as to group identity. See A. Finlay and N. McDonnell, “Pluralism, Partitionism and the Controversy Generated by a Proposed Orange Parade in Dublin” (2003) 11(1) *Irish Studies Review* 17-32 for an insightful discussion of the limitations of approaches to issues of equality and pluralism in the Irish context that depend upon political definitions of who is a “victimised” minority. The authors register an objection to the “notion...that admission to the emerging multicultural order in Ireland is dependant upon one’s ability to claim social or cultural victimisation”: see p. 30. A substantive equality approach as set out here would reject such limited concepts of pluralism in favour of an equality-based approach which requires both the elimination of disadvantage and the recognition of difference.

⁶³ K. Zappone, *Charting the Equality Agenda: A Coherent Framework for Equality Strategies in Ireland, North and South* (Dublin: Equality Authority and Equality Commission for Northern Ireland, 2001), available at <http://www.equalityni.org/uploads/pdf/kzreport.pdf> (last accessed 14 November 2003), 2.4, pp. 25-30.

⁶⁴ See the British-Irish Agreement Preamble, with its reference to “full respect for, and equality of, civil, political, social and cultural rights”.

⁶⁵ As e.g. seen in the use of the d’Hondt formula in the Strand One arrangements to allocate places in the executive concentrates upon cross-community partnership between the unionist and nationalist communities. Multi-Party Agreement, *Strand One*, paras. 4-8, 12-16.

alone. An exclusive emphasis upon securing “parity of esteem” just for the two major communities may result in the neglect of groups that are not defined as members of one community or the other.⁶⁶ Instead, the Agreement provides for comprehensive equality legislation and commits its signatory parties to respect for equality of opportunity for all.

However, even within the parameters of this inclusive substantive equality approach, many disagreements can exist as to how to apply the specific equality commitments it contains. There may be circumstances where equality claims made by reference to the principle of “parity of esteem” may come into tension with other equality claims.⁶⁷ There will inevitably be divergent views as to how far equality approaches should apply in areas such as socio-economic entitlements, or group rights. There may be disputes as to the appropriateness of adopting a substantial equality approach, or what applying such an approach would mean in practice.

However, all the parties to the Agreement have made a general commitment to respect fundamental equality rights as part of their broader human rights commitments. The specific rights commitments contained in the document need to be interpreted and applied in the light of this general undertaking, the Agreement’s purposes and goals, and its aspirations to ensure genuine, substantive and meaningful equality of opportunity on both sides of the border for all individuals and groups within the island of Ireland. This equality dimension of the Agreement’s rights provisions should not be neglected, and it must be made effective, real and tangible in impact.

⁶⁶ The meaning and scope of “parity of esteem” is very uncertain and has the potential to generate dispute: see C. McCrudden, “Not the Way Forward: Some Comments on the Northern Ireland Human Rights Commission’s Consultation Document on a Bill of Rights for Northern Ireland” (2001) 52 (3&4) *Northern Ireland Legal Quarterly* 372-384. See also C. Bell and K. Cavanaugh, “‘Constructive Ambiguity’ or Internal Self-Determination? Self-Determination, Group Accommodation and the Belfast Agreement” (1999) *Fordham International Law Journal* 1345. Adopting an interpretation that solely defines the different communities in terms of unitary ethnic groups can also gloss over differences within “communal blocks”, reinforce divisions between communities, and lock communal divisions into stone. See C. Harvey, “The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland”, in C. Harvey (ed.), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (OUP: Hart, 2001), pp. 9-53, 35.

⁶⁷ This may in particular happen if “parity of esteem” is used to support claims that particular policies or legislation are necessary to maintain the identity or forms of cultural expression of one or more community. Such claims may come into conflict with other equality claims. A possible example that affects both communities in the Northern Irish context as well as Ireland is the “teacher exemption” from the scope of fair employment legislation in Northern Ireland (see Article 71 of the Fair Employment and Treatment (NI) Order 1998), and the similar exception for teaching staff employed in religious schools in Ireland contained in the Employment Equality Acts 1998 and 2004. Maintaining the autonomy and practices of particular community institutions, in this case religious schools, has been described as necessary to ensure the self-identity of particular religious communities in both parts of Ireland: see S. Dunn and T. Gallagher, “The Exception of Teachers from the Fair Employment & Treatment (Northern Ireland) Order 1998” (Belfast: ECNI, 2002). This exemption however carves out a considerable exception from the scope of anti-discrimination laws, which is currently the subject of an investigation by the Equality Commission for Northern Ireland. See the discussion in Equality Commission for Northern Ireland, *Investigation of the Teachers Exception under the Fair Employment and Treatment (NI) Order 1998* (Belfast: ECNI, 2003).



6 “EQUIVALENCE OF RIGHTS” AND THE NORTH-SOUTH DIMENSION

The Agreement also makes provision for compliance with these commitments in Northern Ireland and Ireland to be linked, to ensure that a minimum standard of respect for rights (and for equality rights in particular) is in place both in Northern Ireland and Ireland. This reflects its transformative aspirations. In the absence of what Charles Taylor has described as mutual recognition of other perspectives, identities and cultural traditions⁶⁸ by all parties to the document, and in particular in the laws and policies of Ireland and Northern Ireland, then the Agreement may flounder.⁶⁹ The concept of “equivalence of rights” as used in the Agreement is intended to ensure that this minimal level of rights protection is in place in Ireland, but it also has potential implications for the entire island of Ireland.

There has again been little focus on this important dimension of the Agreement. Some progress has been made by the Northern Ireland Human Rights Commission and the Irish Human Rights Commission in producing a consultation paper on the scope and contents of a proposed charter of rights for the entire island,⁷⁰ in line with one of the Agreement’s permissive clauses. However, while NGOs have tentatively begun to engage with this process, there has been little political, media or even academic attention to this development. The equivalence requirement is an important element of the Agreement, and deserves much greater analysis, in particular in terms of its implications for equality issues.

(A) Ireland and “Equivalence of Rights”

The Irish government entered on signing the Agreement into a general commitment to “continue to take further steps to demonstrate its respect for the different traditions in the island of Ireland”.⁷¹ This is reinforced, as discussed above, by the Agreement also

⁶⁸ C. Taylor, “The Politics of Recognition” in A. Gutmann (ed.), *Multiculturalism and ‘The Politics of Recognition’* (Princeton, NJ: Princeton University Press, 1992), 25-73. See also I. M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990).

⁶⁹ This has particular relevance for Ireland, as well as for Northern Ireland. As Desmond Clarke has argued, the Agreement represents a shift away from traditional nationalist discourses north and south of the border towards greater recognition of the possibility of different identities existing within a common frame of citizenship. See D. Clarke, “Nationalism, the Irish Constitution and Multicultural Citizenship” [2000] 51 (1) *Northern Ireland Legal Quarterly* 100. Clarke argues that the Agreement opens up the possibility of the development of a “cultural nationalism” that is compatible with a wide range of political structures which respect and accommodate multicultural citizens”.

⁷⁰ See B. Dickson, “A Charter of Rights for the Island of Ireland”, paper delivered at Law Society, Dublin, 18 October 2003.

⁷¹ Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 9.

requiring the government of Ireland as a specific, binding commitment to “further strengthen the protection of human rights in its jurisdiction”, by bringing forward measures “to strengthen and underpin the constitutional protection of human rights”, drawing upon the ECHR and other “international legal instruments in the field of human rights” to ensure “at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.⁷² By virtue of Article 2 of the British-Irish Agreement, where the two governments pledged to “support, and where appropriate, implement” the Multi-Party Agreement’s provisions, this equivalence requirement binds Ireland.

The tendency in legal and political debate in Ireland has been to confine consideration of the concept of “equivalence of rights” to the comparatively narrow (if important) issue of how to incorporate the European Convention on Human Rights into its domestic law. However, as previously argued, the Agreement’s requirements should be interpreted with reference to the full spectrum of human rights instruments which the two state parties have ratified. Ireland’s commitment to achieving an “equivalence of rights” does not therefore just require the provision of the same level of protection as the Human Rights Act does in Northern Ireland, i.e. it does not just extend to the incorporation in some form of the European Convention on Human Rights. The wording of the Agreement supports this interpretation, with its reference to “other international legal instruments” in addition to the European Convention on Human Rights as relevant to ensuring an equivalent level of protection.⁷³ Therefore, Ireland is obliged to ensure equivalence in the effective protection of the spectrum of core fundamental rights that are set out in ratified international human rights instruments, including equality rights.

The other specific measures required from the Irish government by the Agreement, such as the introduction of enhanced equality legislation and the incorporation of the European Convention on Human Rights, should be seen as specific steps that contribute to achieving this desired level of equivalent protection. They should not be seen as the *only* measures required under the Agreement. This is again confirmed by the text of the Agreement, with its requirement that Ireland “further strengthen” existing protection being clearly intended to refer to action supplemental to and additional to the other specific requirements set out in the Agreement.⁷⁴

If the comments of Minister Willie O’Dea T.D. (referred to above)⁷⁵ that the rights equivalence requirement does not apply to “equality provisions” were meant to imply that *the right to equal treatment* was not covered by the equivalence requirement, then this again appears inconsistent with the clear thrust and wording of the Agreement, and the normal understanding of the contents of international human rights guarantees. As discussed, the right to equality is a core part of international human rights law: therefore, the requirement to ensure equivalence in the protection of human rights has to obviously extend to the right to equal treatment.

⁷² Multi-Party Agreement, *ibid.*

⁷³ Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 9

⁷⁴ *Ibid.*

⁷⁵ Equality Bill 2004 [Seanad]: Report and Final Stages (1 July 2004).

Alternatively, the Minister could have intended to suggest that the equivalence requirement only required that the abstract right to equal treatment be protected by means of a formal *rights instrument* (such as the recently incorporated European Convention on Human Rights, or a constitutional guarantee), and did not extend to specific equality rights introduced by *legislation or other measures* in Northern Ireland. (The Minister's comments were made in the context of a debate about whether the equivalence provision required the introduction in Ireland of equality duties similar to the Northern Ireland equality duty imposed by s. 75 of the Northern Ireland Act 1998: see below for further discussion of this specific point.) This interpretation, if intended, is again inconsistent with the Agreement's purpose and provisions.

Disregarding the role legislation and other measures play in rights protection will gut the equivalence guarantee of any meaningful content or coherence. A rights instrument, such as the Bunreacht's rights provisions or the European Convention on Human Rights, may provide in theory a wide scope of protection for rights. However, in the absence of clear legislative provisions and statutory remedies, the protection conferred by the Constitution may be insufficiently precise and enforceable. Equality legislation grants individuals and groups tangible rights and entitlements, which are enforceable in law. These legislative entitlements may supplement and reinforce the right to equality as protected in a rights instrument, but nevertheless provide vital protection against violations of the right to equal treatment and are an essential part of human rights protection.

Excluding these key legislative guarantees from the equivalence requirement would leave out a central part of how rights are protected *in reality*. This would be incompatible with the scope of the general equality commitments in the Agreement as outlined above, and with the emphasis on ensuring that *effective* protection for the right to equality is put into place. There should be equivalence not alone in respect of *formal* levels of rights protection, but also in the actual degree and content of rights protection, and also as to the ability of individuals and groups to enforce their rights.

This is what a substantive approach to equality would require, and what is necessary to put an equivalence of rights into place in a meaningful fashion. If an excessively narrow, formalistic interpretation is adopted that ignores the key role legislation and other measures play in effectively protecting fundamental rights, it will appear that Ireland is neglecting its commitments in the Agreement to respect rights and to ensure a meaningful equivalence of rights exists. Such a narrow approach would appear to be at variance to the purpose and thrust of the Agreement. It would also ensure that no equivalence of rights between Ireland and Northern Ireland would exist in actual, practical terms, given the centrality of legislation and other measures in protecting rights in Northern Ireland.

In addition, much discrimination is caused by private bodies and individuals that may not be directly subject to the control of human rights guarantees.⁷⁶ Anti-discrimination legislation in applying to both private and public bodies is the legal tool that provides effective protection in such cases to fundamental equality rights, and therefore an

⁷⁶ See C. O'Connell, "Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and The European Convention on Human Rights" [2003] 4 *Hibernian Law Journal* 77-108.

equivalence approach has to extend to ensuring that an equivalent level of legislative protection is in place. It may also be very difficult (perhaps even impossible) for certain disadvantaged individuals and groups to challenge discriminatory practices under constitutional or human rights guarantees, due to cost factors. Often equality legislation will provide the only accessible remedy.

The actual wording of the Agreement supports this wider interpretation. Its text at no point confines the equivalence guarantee just to the introduction of equivalent protection at the level of rights instruments. In fact, the Agreement seems to contemplate expressly that the equivalence clause would result in existing rights instruments being supplemented with additional legislative and other measures. It requires that the Irish Government is to “bring forward measures to *strengthen and underpin* [author’s italics] the constitutional protection of human rights”.⁷⁷

A broader interpretation of equivalence should therefore be adopted, in line with the Agreement’s text and purpose, requiring the provision of the same *effective* degree of rights protection in Ireland as available in Northern Ireland, in its totality. This may require new legislative measures, in addition to the introduction of the new equality legislation and the incorporation of the European Convention on Human Rights: again, the equivalence requirement is intended to supplement and “further strengthen” existing guarantees, as well as the new forms of protection specifically required by the Agreement.

This does *not* mean that Ireland has to always implement precisely the same rights and equality measures as those adopted north of the border. The different economic, legal, political and cultural contexts in Northern Ireland and Ireland will mean that different legislative and policy approaches may be required to address various types of rights. Equivalent rights protection does not necessarily have to be interpreted as requiring the introduction of identical forms of rights protection. To give an example of differential approaches, the existence of the 50% Catholic recruitment quota for the Northern Irish police service may be a necessary measure to ensure equality and parity of esteem in the context of Northern Ireland, but no similar quota would make sense in the context of Ireland.

Achieving equivalence should be about ensuring the same *degree and extent of effective protection*, even if different *forms* of protection are occasionally utilised to achieve this aim. In the context of the police, introducing appropriate equality training for the Garda Síochána, establishing suitable independent investigatory mechanisms and mainstreaming equality considerations in police practice and recruitment may be all suitable steps to ensure equivalent levels of rights protection in Ireland as those measures such as the “Patten quotas” introduced in Northern Ireland.

Can it then be argued that it is solely up to the Irish government to determine what gaps exist that require action to ensure equivalence, and what measures are required to close any gaps? In other words, while it is possible to interpret the general scope of the equivalence requirement, does it actually impose any meaningful, clear and binding commitments on Ireland? Or is it a purely aspirational provision that the Irish government can choose to interpret as it sees fit?

⁷⁷ Multi-Party Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 9.

In response, it is possible to identify instances of where rights protection in particular areas is greater in Northern Ireland than in Ireland. As discussed below, these are particularly apparent in the context of equality rights, where substantial divergences in protection exist. In such instances, it is easy to demonstrate a clear lack of equivalence. Where this is the case, it is apparent that a specific, legally binding obligation exists upon the Irish government to take remedial action to close this gap in protection, given the thrust of the Agreement, the binding commitment in the British-Irish Agreement to implement provisions of the Multi-Party Agreement “where appropriate”, and the strong emphasis on equality and rights throughout the Agreement.

A margin of discretion may be left as to how this should be achieved: but the basic obligation to take action remains to ensure that an effective equivalence of rights is achieved. If this approach is not applied, there is a real danger that Ireland will be seen as unwilling to take seriously the need for it to transform its political and legal culture in line with the Agreement’s provisions, and that it is not ready to impose upon itself the measures for protecting rights that successive Irish governments have called for in the Northern Ireland context.

Equivalence could be achieved by several different methods, such as appropriate judicial interpretation of legislative provisions, or government action to ensure an effective equivalent level of protection, or the introduction of new legislation. Although the equivalence requirement is, like the rest of the Agreement, not incorporated in Irish law, this requirement is a clear, specific and binding part of the treaty obligations assumed by the Irish government. As such, the courts should be prepared to refer to this commitment in interpreting and applying relevant legislative instruments, especially those introduced to implement specific commitments in the Agreement, like the equality legislation and the European Convention on Human Rights Act. The Irish government should also be prepared to act on this equivalence commitment, as should the Oireachtas.

(B) Levelling up to a Common Standard

The equivalence requirement only requires the strengthening of existing Irish rights guarantees to match the level of protection available in Northern Ireland. Therefore, it would appear that achieving equivalence is solely a matter for Ireland. The Agreement contains no parallel legal requirement to ensure an equivalence of rights in Northern Ireland as that applying in Ireland. The Agreement cannot be read as supporting an interpretation that would require the equivalence requirement to apply throughout the whole island.

Nevertheless, rights and equality standards north and south of the border are in practice gradually converging and levelling up to a common standard.⁷⁸ Partly this is the inevitable result of the common floor of rights and equality obligations imposed on both the UK and Ireland by EU legislation, in particular the equality Directives; by the

⁷⁸ For a general discussion of convergence at a European level, see N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: OUP, 1999); N. Walker, “European Constitutionalism and European Integration” [1995] *Public Law* 266.

indirect effect of the EU Charter of Fundamental Rights and the recognition of fundamental rights as general principles of EC law; and the requirements of international human rights law, including in particular the ECHR.

It can also be argued that the purpose and thrust of the Agreement suggest that achieving an equivalence of rights north and south of the border should perhaps be seen as an important *policy* objective (as distinct from a formal legal commitment). For the Agreement to work, there is a need for genuine respect for the diversity of communities to be in place throughout the island of Ireland, and that a parallel culture of respect for basic rights exists in both Ireland and Northern Ireland. Without this, there is a danger that differential implementation of the rights and equality dimension of the Agreement will deepen suspicion and tensions between the different communities. There is also a danger that in the absence of policies that link progress on both sides of the border, gains in the protection of equality and rights on one side will not be duplicated on the other.

This is not to say that all rights protection needs to be made equivalent north and south of the border, or that it would be possible to do so. However, the adoption on both sides of the border of best practice from each jurisdiction and the “levelling-up” of protection in respect of the mainstream of essential human rights, makes good policy sense. This in no way involves “power-sharing” or “co-sovereignty”. It is simply a sensible political strategy which should stem from the mutual commitment in the Agreement by all parties to partnership and equality of respect for the diversity of traditions within Ireland; the common historical, social and economic factors that apply north and south of the border; and the inevitable need for any long-term solution to the Northern Irish problem to be rooted upon a common recognition and equivalent protection of basic rights throughout the island.

The principal element of the Agreement which recognises the need for a cross-border common standard of rights is the provision for a joint committee of both human rights commissions to consider the possibility of establishing a charter “reflecting and endorsing” agreed measures for the protection of fundamental rights. This provision recognises the value of developing such a common cross-border standard. However, as discussed below, other routes may exist for putting a common equivalence policy into practice. Again, it is possible to identify definite areas where uneven rights protection exists, and where a common levelling-up might be an effective step in giving effect to the Agreement and its emphasis on substantive equality.





7 WHAT EQUIVALENCE REQUIRES

The Agreement therefore commits the parties to respecting and giving effect to fundamental human rights, and in particular to ensuring equality of respect for all individuals and groups within the island of Ireland. It also ensures that Ireland is obliged to maintain an equivalence of rights protection as that applying in Northern Ireland. There are also substantial policy considerations that would support a common equivalence approach on both sides of the border, which might be given concrete form in the proposed charter of rights and in parallel legislation on both sides of the border. This approach is not required by the Agreement, but would suit its purpose and thrust where applied.

What specific steps then does the equivalence requirement require the Irish government to adopt to ensure at least an equivalence of rights protection as existing in Northern Ireland, with specific reference to the right to equality as interpreted in accordance with the substantive equality approach of the Agreement? In what areas might an emphasis on achieving an equivalence of equality protection on both sides of the border fit with the purposes of the Agreement?

In a number of key areas, there is a greater degree of equality protection in Northern Ireland than there is in Ireland, and where no action has been taken to ensure equivalence.

(A) **Removing the Limitations of Existing Rights Guarantees: Article 40.1, the European Convention on Human Rights and Judicial Interpretation**

The first area of concern surrounds Ireland's existing recognition of fundamental rights and its incorporation of the European Convention on Human Rights. The right to equality recognised by Art. 40.1 of the Bunreacht is capable of being protected by the Irish courts, which have the power to strike down parliamentary legislation and executive decisions that conflict with this principle. In contrast, the UK courts can only apply the more circumscribed equality rights protected by the European Convention on Human Rights, and have no power to strike down parliamentary legislation (only to grant a "declaration of incompatibility"). At first glance, it would therefore appear that no equivalence concern arises.

However, the Irish Supreme Court has in the past tended to adopt a cautious and formalist approach in interpreting and applying Art. 40.1, as evidenced in its decision in the Employment Equality Bill reference⁷⁹, the *Norris* case⁸⁰ and other

⁷⁹ *In the matter of Article 26 of the Constitution of Ireland and in the Matter of the Employment Equality Bill* [1997] 2 I.R. 321.

⁸⁰ *Norris v. Attorney-General* [1984] I.R. 36.

decisions.⁸¹ This approach has given rise to successful challenges before the European Court of Human Rights. For example, in *Norris*, the Supreme Court held that Art. 40.1 had not been breached by the legislative prohibition of homosexual acts, while the Strasbourg court found a breach of Article 8 of the ECHR. Similarly, the detailed and sensitive judgment by the High Court in the case of *Foy* nevertheless found no breach of Article 40.1, while the Strasbourg court in the following week in similar circumstances found a breach of Article 8 in *Goodwin v. UK*.

The existence of a constitutional guarantee of equality is no indication that the guarantee will be applied in a manner that gives appropriate relief to complainants where necessary. Art. 40.1 may in theory grant a high level of protection to the right to equality of treatment, but in actuality its interpretation and application has often lagged behind the standards set by the European Court of Human Rights. As the Convention was not incorporated into Irish law prior to the European Convention on Human Rights Act 2003, and the case-law of the Strasbourg court was at best of persuasive value, this meant that a lack of equivalence of protection existed in respect of the effective protection of the right to equal treatment. From 1998 the UK courts were applying the more extensive and rigorous Strasbourg jurisprudence as part of domestic UK law, while the Irish courts were confined to applying the occasionally narrower scope of the Art. 40.1 guarantee as interpreted by the Supreme Court.⁸²

The European Convention on Human Rights Act 2003 now partially remedies the lack of equivalence. However, certain well-canvassed problems exist with respect to the provisions of the Act. The scope of remedies available under the Act when a breach is held to exist appears in section 3 to be limited to damages, which in many cases may deprive litigants of effective relief.⁸³ In contrast, the Human Rights Act 1998 enables the UK courts to award a wide range of remedies, including injunctive and declaratory relief. Similarly, the Act requires the UK government to make a declaration on the compatibility or otherwise of any legislation with the ECHR, and provides for a special fast-track parliamentary procedure when a court finds a measure to be incompatible. No such provision exists in the Irish Act, nor is there provision for the establishment of a parliamentary committee to vet legislation for compatibility with ECHR standards, unlike in the UK.

Similarly, the obligation in section 2(1) of the Act to interpret any “statutory provision or rule of law” as far as possible in a manner compatible with the European Convention on Human Rights Act is reined in by being made subject to “rules of law relating to

⁸¹ See also A. Connelly, “The Constitution” in A. Connelly (ed.) *Gender and the Law in Ireland* (Dublin: Oak Tree Press, 1993); J. Casey, *Constitutional Law in Ireland* (3rd ed.) (Dublin: Sweet & Maxwell, 2000), 450-452; G. Hogan, “The Supreme Court and the Equality Clause” [1998] *Bar Review* 116-120; O. Doyle, *Constitutional Equality Law* (Dublin: Round Hall, 2004).

⁸² For a comprehensive and ground-breaking discussion of this, see O. Doyle, *Constitutional Equality Law* (Dublin: Round Hall, 2004).

⁸³ See Irish Council for Civil Liberties, “European Convention on Human Rights Bill”, submission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women’s Rights, 16 January 2003, available at www.iccl.ie/constitution/hr/03_echr_submission.html (last accessed 4 November 2003), p. 5.

such interpretation and application”: this may be weaker than the Human Rights Act, which allows the UK courts to disregard existing rules of interpretation to give effect to Convention rights.⁸⁴ Courts are also not included in the definition of public authorities in section 1 which are subject to the requirement to adhere to the Convention, unlike the UK courts. This may mean that they will not be bound by ECHR requirements in awarding remedies⁸⁵, unlike the UK courts, which have already applied this requirement in the case of *Ghaidan v. Mendoza* to support a re-interpretation of the Rent Acts to read the definition of “spouse” as including “homosexual partner”.⁸⁶ It is also not clear if private or semi-private bodies performing public functions are also subject to the European Convention on Human Rights Act.

None of these deficiencies in the Act may become a problem, if the Irish courts give it a flexible and purposive interpretation. In applying the Act, the equivalence provision should be borne in mind: it was designed to ensure an equivalent level of protection as applying in Northern Ireland. Therefore, the Irish court should not narrow artificially the impact of the Act where the effect of this would be to make available a lower level of protection of rights than applying in Northern Ireland under the Human Rights Act. It is important that an adequate judicial scrutiny process exists, to review the compatibility of government legislation and policies with core fundamental human rights, and that the extent of this scrutiny in practice should not fall short of that applying in Northern Ireland. This could be particularly important in interpreting the nature of the remedies available to Irish courts under the European Convention on Human Rights Act 2003, and the extent to which the Act requires the courts to give the European Convention on Human Rights horizontal effect in Irish law, i.e. whether it applies to private parties.⁸⁷

In addition, as previously discussed, the Supreme Court has in the past been open to using the ECHR and other international instruments in interpreting the scope of constitutional rights.⁸⁸ This leaves open the possibility that the Agreement could be used as a persuasive authority in the process in interpreting and applying Article 40.1. O’Higgins J’s judgment in *Equality Authority v Portmarnock Golf Club* recognised that the Oireachtas was “entitled to legislate positively to vindicate and promote the value of equality”, and affirmed the centrality of equality as a prime constitutional value, citing Barrington J. in *An Blascaod Mór Teoranta v. Commissioners of Public Works (No. 3)*⁸⁹ to the effect that Ireland “is a democratic society committed to the principle of

⁸⁴ See H. Fenwick and G. Phillipson, “Breach of Confidence”, paper delivered at the Symposium on Freedom of Expression, TCD, Dublin, 6 December 2003, pp. 10-11.

⁸⁵ See R. Murphy, “The Incorporation of the ECHR into Irish Domestic Law” [2001] 6 *European Human Rights Law Review* 640. For the UK position, see the influential article by Murray Hunt, “The Horizontal Effect of the Human Rights Act” (1998) *Public Law* 423.

⁸⁶ *Ghaidan v Mendoza* [2004] UKHL 30.

⁸⁷ See C. O’Cinneide, “Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights”, [2003] 4 *Hibernian Law Journal* 77-108.

⁸⁸ See *State (Healy) v Donoghue* [1976] I.R. 325, 351; *O’Leary v Attorney-General* [1993] 1 I.R. 102.

⁸⁹ [2000] 1 I.R. 6.

equality”.⁹⁰ The Agreement, and in particular the equivalence requirement, could play a valuable role in fleshing out the prime importance of equality in the Irish constitutional order, and helping shape how Article 40.1 is applied in years to come.

(B) Extending the Scope of Equality Legislation

Obvious discrepancies exist in the scope of application of existing anti-discrimination legislation as between Ireland and Northern Ireland. The scope of Ireland’s legislation is generally wider, extending as it does across the nine prohibited grounds to the provision of goods and services, accommodation and education, while the Northern Irish legislation varies in scope of application across the different grounds and often has a more limited extent than the Irish equality legislation. However, in certain important areas, the legislative protection of rights in Northern Ireland is considerably more extensive than that applying in Ireland. The following discussion identifies key areas of concern.

Disability

A clear equivalence issue arises in the context of disability discrimination. Due to the Supreme Court’s decision in the employment equality legislation reference⁹¹ that private employers could not be required to bear “excessive burdens” by legislative requirements to make reasonable accommodation for disabled persons, equality legislation in Ireland has only required employers and service providers to incur “nominal costs” to satisfy these requirements.⁹² However, in Northern Ireland (and throughout the UK), the Disability Discrimination Act 1995 (DDA) requires both employers *and* service providers to incur reasonable expenses where necessary in making reasonable accommodation, i.e. costs can be more than “nominal” and still be required to be incurred.

Section 9 of the recent Equality Act 2004 now obliges *employers* to make reasonable accommodation except where to do so would impose a “disproportionate burden”. Section 9 may thus have now equalised the position in Ireland and Northern Ireland, depending on what interpretation is given to the term “disproportionate burden”: the equivalence requirement could be used in this context in interpreting this relatively imprecise provision as requiring an equivalent approach to be taken as under the DDA in Northern Ireland, given that the provision of reasonable accommodation is a core element in achieving equality for disabled persons.

However, section 9 was introduced to implement the terms of the EU Framework Equality Directive, which only extends to employment and occupation, and the Irish government in framing the Equality Act 2004 felt that it was still constrained by the

⁹⁰ *Ibid.*, at p. 19.

⁹¹ *In the matter of Article 26 of the Constitution of Ireland and in the Matter of the Employment Equality Bill* [1997] 2 I.R. 321.

⁹² See s. 16(3) (c) of the Employment Equality Act 1998, and s. 4(2) Equal Status Act 2000.

Supreme Court decision where the Directive did not apply. Therefore, providers of education, goods and services, and housing (i.e. those areas where the Equal Status Act 2000 applies) are still only obliged to incur nominal costs in making reasonable accommodation. In contrast to the DDA requirements in Northern Ireland which apply equally to employers and service providers.

Therefore, a lack of equivalence persists when it comes to service providers. This may only be remedied if the Supreme Court revisits or clarifies its earlier decision, or if a new Directive is introduced. However, the equivalence requirement could be taken into account in any future re-assessment of the *Employment Equality Bill* decision. In the interim, the equivalence requirement can be used by tribunals and courts in interpreting “nominal cost” in such a way as to minimise divergent levels of rights protection. This would also have the practical advantage of making sure that greater legal clarity would be introduced, as the decisions of tribunals and courts in the UK would increasingly be available as guidance to help employers and service providers ascertain what is required in different circumstances by way of reasonable accommodation. While precedents and guidance already exist in Ireland, the greater the amount of equivalence, the greater the amount of practical examples and thus the greater the extent of legal clarity as to what is required.

Public Functions

Another equivalence issue of some importance arises in respect of the application of anti-discrimination controls to public authorities when performing core public functions, such as immigration control or policing. Legislation in the Ireland, Britain and Northern Ireland prohibits discrimination across a wide range of activities, including the specific fields of employment, housing, the provision of goods and services and areas of social interaction. However, the extent to which anti-discrimination legislation applies to public authorities performing public functions or exercising particular powers that are specific and reserved to state bodies has generated considerable legal uncertainty, as these functions and powers are often not explicitly made subject to anti-discrimination legislation.

In Britain, the majority of the Law Lords in *Amin Amin v Entry Clearance Officer, Bombay*,⁹³ in interpreting the Sex Discrimination Act 1975 in the context of a challenge to an immigration decision, drew a distinction between the provision of services to members of the public by public bodies, and the performance by public bodies of public functions, such as immigration control, policing and the maintenance of national security. As the legislation did not specifically apply to the performance of public functions, the Law Lords considered that public authorities were not bound by the anti-discrimination legislation when they were engaged in performing such functions: the legislation was held only to apply to public bodies when they provided services that were similar in nature to those provided by private bodies, or when employment issues were at stake. This meant that substantial areas of activity of public bodies, such as immigration control and policing polices, were not subject to British anti-discrimination legislation.

⁹³ [1983] 2 AC 518 (HL).

Since the Macpherson Report with its exposure of institutional discrimination in how the Metropolitan Police Force was conducting its policing function, the UK government has amended the Race Relations Act and the Disability Discrimination Act to prohibit discrimination in the performance of public functions in Britain, with exceptions being made for certain judicial, prosecutorial and legislative acts.⁹⁴ The forthcoming Equality Bill will make similar provision for sex discrimination. The amendment of the race relations legislation has already been applied by the Law Lords in *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre*⁹⁵ to find that the use of special procedures to process Roma seeking leave to enter the UK at Prague Airport constituted direct race discrimination and was therefore illegal.

The Northern Ireland sex discrimination legislation has not yet been amended to apply to the performance of public functions. However, as the Disability Discrimination Act applies throughout the entire UK, disability discrimination in the performance of public functions is now prohibited in Northern Ireland. Section 76 of the Northern Ireland Act goes further than British legislation and also prohibits direct discrimination on grounds of religious belief and political opinion in the performance of public functions. The promised review of equality legislation (see below) will in all likelihood see the amending of the race and sex discrimination legislation to achieve the same result.

In any case, to ensure compliance with the Race Directive's requirement that race discrimination in social advantages be prohibited, Regulation 20 of the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 now prohibits race discrimination in the performance of public functions that involve the provision of any form of social security, healthcare, any other form of social protection, or any form of social advantage, with exceptions again being made for certain judicial, prosecutorial and legislative acts.⁹⁶

The position is more uncertain in Ireland. The Equal Status Act 2000, while prohibiting discrimination on the nine grounds in the provision of goods and services, education, housing and other key areas, does not explicitly apply to the performance of public functions. If a similar approach as that adopted by the majority in *Amin* is followed by the Irish courts in interpreting the 2000 Act, then this could mean that public authorities when performing certain public functions would not be covered by the legislation. However, the distinction made by the *Amin* majority between the provision of services and the performance of public functions has been severely criticised as an artificial distinction that did not reflect the true intent of the drafter of the British legislation.⁹⁷ As a result, the Irish courts may decide not to adopt a similar approach,

⁹⁴ See C. O'Connell, "The Race Relations (Amendment) Act 2000" [2001] *Public Law* 220

⁹⁵ [2004] UKHL 55.

⁹⁶ http://www.ofmdfmi.gov.uk/race2003_341.pdf (last accessed 12 September 2005).

⁹⁷ See the dissent by Lord Scarman in *Amin*; see also the comments of Lord Lester of Herne Hill Q.C. at H.L. Deb., Vol. 608, cols. 546-547, January 11, 2000. See also Equality Commission for Northern Ireland, *Response to OFMDFM Consultation Paper, 'A Single Equality Bill for Northern Ireland'* (Belfast: Equality Commission for Northern Ireland, 2004), para. 7.4, 37.

and take the view that the provision of services encompasses the performance of most if not all of public functions. However, in the absence of a clear decision, the position remains uncertain.

If the Act is interpreted as not applying to the performance of public functions, then a clear lack of equivalence would exist as between Northern Ireland and Ireland, in that discrimination in the performance of public functions on the grounds of disability, religion and political opinion would be prohibited in Northern Ireland and not in Ireland. It is also likely that this equivalence gap will soon also apply to the race ground and the gender ground.

However, as discussed above, the Equal Status Act could be interpreted by reference to the Agreement's provisions so as to "cure" this gap: the obligation on the Irish government to achieve equivalence taken with the presumption that the Oireachtas did not mean to breach its international law commitments could be used to lend support to the Irish courts choosing not to follow the much-criticised *Amin* approach. Alternatively, the Act could be amended to close this gap.

It could be argued that Article 40.1 of the Irish Constitution or the European Convention on Human Rights Act could provide an effective remedy for any abuses that might close this equivalence gap. However, given the limited nature of Article 14 of the Convention, and the uncertain extent and scope of the Article 40.1 guarantee of equality (see above), this is far from certain (although the existence of an equivalence gap could again be a factor in how both articles are interpreted and applied by the Irish courts). Given the possible existence of a failure to ensure equivalence, reliance on either Article 40.1 of the Irish Constitution or the European Convention on Human Rights Act appears unsatisfactory. There is a need for legal certainty and a definite legislative position: the scope of anti-discrimination controls should not remain unclear.

It is also very important both from a symbolic and a practical point of view that anti-discrimination law does extend to cover public functions. Public authorities should conduct their activities without the use of discriminatory distinctions, and should be subject to enforceable and clear anti-discrimination controls, as has been increasingly recognised in Britain and in Northern Ireland. Exceptions to this general principle should be narrow, justified and clearly delineated. It would go against the grain of the commitment in the Agreement to achieving equivalent levels of protection if the Irish government were unwilling to provide an equivalent level of protection against the abuse of state power as currently is being applied in Northern Ireland. A clear case for adjusting legislation, or seeking a suitable interpretation, therefore appears to exist here.

In any case, the Race Directive requires that race discrimination in the provision of "social opportunities" be prohibited. This was the reason for the specific extension of the Northern Ireland race discrimination legislation in 2003 to cover social security, healthcare, any other form of social protection, or any form of social advantage. Irish courts are expected to interpret legislation in a manner that will ensure compatibility with EC law, so in all likelihood, the 2000 Act will be interpreted to cover a similar range of functions, even if the exact scope of the Directive is not clear. This

interpretative requirement for now only applies to the race ground, although similar requirements may be introduced in the near future in EC legislation for sex discrimination. It would be unsatisfactory if constant new judicial re-interpretations of the legislation were to be necessary to keep pace with EC law requirements.

It is also unsatisfactory that ensuring compliance with the Directive will have to be achieved via the uncertain route of judicial interpretation, rather than through legislative amendment: the failure to clarify the scope of the legislation in the Equality Act 2004 is to be regretted. The requirements of the Race Directive mean that anti-discrimination legislation will have to apply to cover at least the range of public functions that are linked to the provision of “social opportunities”. This means that it makes sense to clarify that the legislation does cover the performance of public functions, introduce what limited exceptions may be necessary, and thereby to comply with the Agreement’s equivalence provisions.

Political Opinion

The Northern Irish fair employment legislation is broader in scope in one respect than the Equal Status and Employment Equality Acts in Ireland, in that it extends to *political opinion*, not just religious belief (except where political opinion supports the use of violence).⁹⁸ Despite the difficulties that might arise at first glance in defining the scope of “political opinion”, this does not raise any particular difficulties that do not arise with any form of religious belief (and in any case, the religious/political distinction may be very difficult to define in practice). The Northern Irish courts have not found great difficulty in defining the term, with for example political opinion been taken to include opinions that are “broadly left”.⁹⁹

In the absence of legislation in Ireland covering this ground, there is a lack of protection for potential victims of discrimination based upon their political beliefs;¹⁰⁰ therefore legislation similar to the Northern Irish provisions in this area could be viewed as required to ensure equivalent levels of protection for individuals and groups. Extending Ireland’s legislation to this ground would have the practical advantage of prohibiting unequal treatment that may arise directly or indirectly from individual or group political beliefs about the Northern Ireland conflict (as well as other political controversies), and therefore may complement the implementation of the Agreement.

The extension of anti-discrimination legislation to the ground of political opinion is not unproblematic: real concern must exist that this may protect holders of extremist views in particular circumstances. The rights of individuals to be free from racial, sexual or

⁹⁸ See Fair Employment and Treatment (NI) Order 1998.

⁹⁹ *McKay v NIPSA* [1994] NI 103.

¹⁰⁰ The equality rights protected by Article 40.1 of the Bunreacht and Article 14 of the ECHR may give some level of protection to individuals and groups who are subject to discrimination based on their political beliefs: however, the restricted nature of both articles as interpreted by the courts, combined with their uncertain impact upon *private sector* employers and service providers means that this level of protection is not very effective.

other forms of harassment at work must be maintained. The argument could also be made that as equivalence does not require identical protection, and that the problem of discrimination on the grounds of political opinion is a severe one in Northern Ireland but much less pronounced south of the border, extending the coverage of anti-discrimination laws to political opinion is not a pressing priority. Nevertheless, it could have some symbolic value, especially as it would demonstrate that Ireland was willing to prohibit types of discrimination that are also prohibited in Northern Ireland.

Enforcement and Remedies

Equivalence issues also arise in the context of the remedies that can be awarded for a finding of discrimination. Effective rights protection depends upon the existence of effective remedies, as nominally extensive rights protection may without matching effective remedies lack any real teeth or force: therefore, if Ireland provides less effective remedies than are available in Northern Ireland, a lack of equivalence exists in the scope of actual rights protection.

The possible compensation that can be awarded by the Equality Tribunal in Ireland under the 1998 and 2000 Acts is limited. In equal pay claims an order for equal pay and arrears in respect of a period not exceeding three years can be made. In other cases under the Employment Equality Acts an order for equal treatment and compensation of up to a maximum of two years pay can be made. This is limited to €12,700 where the person was not an employee. The maximum award that can be made in cases under the Equal Status Acts is €6,350. This is a serious limitation. While gender cases under the Employment Equality Acts can be brought to the Circuit Court and therefore greater damages can be awarded, this possibility does not exist for the other equality grounds.

In contrast, in Northern Ireland, as with the rest of the UK, there is now no upper level to the amount of compensation that can be awarded in discrimination cases, irrespective of whether a case is handled by county courts or employment tribunals.¹⁰¹ While massive damage awards involving aggravated and exemplary damages are relatively rare in the UK, they are not unknown, with £1.4 million damages being awarded in *Barton v Schroeder Securities Ltd*,¹⁰² and the House of Lords confirming in *Kuddus (AP) v Chief Constable of Leicestershire Constabulary*¹⁰³ that exemplary damages could be awarded in suitable cases.

¹⁰¹The Sex Discrimination and Equal Pay (Remedies) Regulations 1993 S.I. No. 2978 and the Race Relations (Remedies) Act 1994 removed previous caps on damages.

¹⁰²*Equal Opportunities Review* 102 (2002).

¹⁰³[2001] UKHL 29.

Ireland's legislation does have wider scope than that of the UK, and equality tribunals can make a wider range of remedial orders than their counterparts in Northern Ireland and the UK as a whole. However, the restrictions on the amount of damages awardable in Ireland represent a considerable lack of equivalence. Low awards for those who have experienced discrimination may both prove inadequate to compensate them for their losses, and severely reduce the deterrent force of equality legislation. Achieving equivalence would require the removal of the cap on damages, which would also ensure better fit with the requirements in EC law that remedies be effective and have adequate deterrent effect.¹⁰⁴

(C) Transsexual and Lesbian and Gay Partnership Rights

A lack of equivalence in legal rights is arguably emerging when it comes to the treatment of transsexual people and lesbian and gay people in Ireland and Northern Ireland. With the coming into force of the Transsexual Act 2004, transsexuals now have marriage and other rights in the UK (including Northern Ireland) that are not available in Ireland. Similarly, with the decision of the Law Lords in *Ghaidan v Mendoza*¹⁰⁵ that lesbian and gay partners could be treated as “spouses” for the purposes of landlord and tenant legislation, and the passage of the Civil Partnerships Act through the UK Parliament, lesbian and gay couples now have broadly equivalent rights as those enjoyed by married couples. Ireland, by failing to introduce similar measures, will not be providing an equivalence of rights for lesbian and gay people and transsexual people when this legislation takes effect in Northern Ireland on the 5th of December 2005.

This means that Ireland needs to consider levelling-up by introducing similar legislation, as called for by recent Equality Authority and National Economic and Social Forum reports.¹⁰⁶ It also raises the question as to whether Ireland should take action to eliminate unequal treatment of homosexual couples in social welfare, taxation and other areas where the UK has already taken steps to ensure equality of treatment. For example, the provisions of the Irish Social Welfare Bill 2004, in disadvantaging same sex couples as distinct from married and opposite sex couples, are at variance with the measures introduced in recent years in the UK to eliminate such inequalities, and especially the provisions of the Civil Partnerships Act.

But is this change required by virtue of the Agreement's binding provisions? It may be objected that these arguments represent an excessive extension of the equivalence principle: why should a principle introduced as part of the Agreement be extended to apply to this type of lack of equivalence? More specifically, given that the Agreement

¹⁰⁴See *Von Colson and Kamann v Land Nordrhein Westfalen*, Case 14/83 [1984] ECR 1891, especially 1919. See also I. Higgins, “Enforcement and the New Equality Directives” in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (Dublin: 2003, Ashfield/ICEL/Equality Authority).

¹⁰⁵[2004] UKHL 30.

¹⁰⁶Such legislation may be in the course of being prepared: see M. Sheehan and D. McDonald, “Property and Tax Rights for Gay Couples”, *The Sunday Times*, 6 June 2004.

refers to ensuring an equivalence of “protection of rights”, does this only involve securing equivalence in how equality rights as recognised in international law are protected in anti-discrimination law and human rights provisions, as all the previous examples of lack of equivalence cited in this paper have involved? Or does it extend to requiring equivalence in every aspect of how disadvantaged groups are treated.

It would make little sense for every measure introduced in Northern Ireland which provides legal entitlements for every disadvantaged group, including women, the disabled, older persons and so on, to require an equivalent response in Ireland. The equivalence requirement is designed to protect fundamental rights, not to link every aspect of social welfare or family law. However, the case-law of the European Court of Human Rights is increasingly establishing that the denial of equality of treatment in the form of equal legal rights to lesbian and gay and transsexual people is in fact a violation of human rights norms. The *Goodwin* decision has already been referred to: the denial of marriage rights to transsexuals was held in this decision to be contrary to Articles 8 and 14 of the Convention. Similarly, in *Karner v Austria*¹⁰⁷, the Court has recently held that the denial of equal housing rights to lesbian and gay couples constitutes a breach of the same articles.

Therefore, the legislation introduced in the UK to remove restrictions upon the rights of transsexuals and lesbian and gay couples to equality of treatment and respect for their private life is largely designed to grant legal recognition to their rights as recognised by the Strasbourg court. In other words, *this legislation is being introduced to protect rights recognised in international human rights law, not just granting particular benefits to disadvantaged groups*. Therefore, Ireland is not alone obliged under the European Convention on Human Rights to take similar steps, it is also obliged under the equivalence requirement to introduce measures to ensure an equivalence of rights as introduced in Northern Ireland. These measures may not need as yet to extend the provision of full equality of treatment as between lesbian and gay couples and married couples, as the European Convention on Human Rights does not as yet require this step.¹⁰⁸

This may mean that the equivalence requirement does not extend to every aspect of the UK civil partnership legislation. However, the legislative recognition of the right to equality of treatment has taken in Northern Ireland for transsexual people and lesbian and gay couples does appear to largely come within the scope of the equivalence requirement. In any case, Ireland is also bound by the *Goodwin* and *Karner* decisions, and it would in all likelihood be bad policy to introduce a watered-down version of the UK partnership legislation that will inevitably have to be adjusted as the Strasbourg jurisprudence rapidly evolves in this area.

¹⁰⁷(2003) 2 FLR 623.

¹⁰⁸*Fretté v France* (2003) 2 FLR 9.

The details of legislation granting equal rights to transsexuals and lesbian and gay couples could of course be adjusted to reflect the specifics of the particular constitutional, legal and social context in Ireland: it need not precisely replicate the UK legislation. However, legislation is required to protect and give effect to the right to equal treatment of transsexual people and lesbian and gay couples under the equivalence requirement. As discussed above, the equality dimension of the Agreement extends to all groups on the entire island of Ireland, and Ireland must not shy away from the agreement's transformative impact in this respect, just as it would not accept a reluctance to make changes on the part of other parties to the Agreement.

(D) Positive Duties and Mainstreaming

The equivalence principle also comes into play when the role that equality duties play in the protection of rights in Northern Ireland is contrasted with the absence of such duties in Ireland. This is perhaps the area of greatest lack of equivalence as between the two parts of the island. Despite the recent doubts expressed by Minister Willie O'Dea T.D., it is clear that a coherent interpretation of the equivalence principle requires Ireland to introduce a positive equality duty (or a similar set of duties) as that applying in Northern Ireland.

To clarify why this is the case, it is important to examine what positive duties are designed to achieve and the role they play in protecting rights. As discussed above, the Agreement can be interpreted as requiring a substantive approach to equality that aims to ensure genuine equality of opportunity for all. However, to implement a substantive equality approach in practice, individual-orientated reactive complaint procedures need to be reinforced by proactive methods of removing group disadvantages and of breaking down structural forms of discrimination.¹⁰⁹ Otherwise, enforcement of equality legislation is limited by the willingness and ability of individual victims to bring cases, and compliance with the law tends to be purely reactive rather than anticipatory.¹¹⁰ In the public sector, equality is simply often not given sufficient priority in planning, policy design and practice.¹¹¹ Anti-discrimination law is an important part of securing rights protection. However such legislation needs to be supplemented with strategies and policies that encourage a sustained and significant focus by public sector bodies on equality.

Mainstreaming is the policy tool that has been extensively used in both Ireland and the UK to implement this type of meaningful proactive equality strategy in the public

¹⁰⁹See Fitzpatrick, Hegarty and Maxwell, "A Comparative Review of Fair Employment and Equality of Opportunity Law" in D. Magill and S. Rose, *Fair Employment Law in Northern Ireland: Debates and Issues*, (Belfast: SACHR, 1997), p. 158.

¹¹⁰See C. O'Conneide, *Taking Equal Opportunities Seriously: Extending Positive Duties* (London: Equality and Diversity Forum, 2004), Part 1.

¹¹¹ *Ibid.*

sector.¹¹² McCrudden has identified two main components of effective mainstreaming: impact assessment, concentrating on the impact of policies on disadvantaged groups, and the participation of these groups in decision-making processes.¹¹³ Rees also emphasises the importance of due regard for the individual, representative structures and adequate institutional and financial support structures.¹¹⁴

Both governments have committed themselves to mainstreaming initiatives over the last decade. The Agreement clearly requires that equality and respect for rights are mainstreamed in the governance of Northern Ireland.¹¹⁵ In combination with this equality focus, anti-poverty strategies are also intended to be mainstreamed via the Targeting Social Needs (TSN) initiative,¹¹⁶ which is also specifically provided for in the Agreement. Equality mainstreaming is also increasingly being utilised throughout the UK public sector, at least in theory.¹¹⁷

Similarly, Ireland has progressively implemented a set of mainstreaming initiatives, commencing with gender mainstreaming in the National Development Plan 2000-06¹¹⁸ and the development of “poverty proofing” from 1998 as part of the National Anti-Poverty Strategy and later as part of the National Action Plan for Social Inclusion.¹¹⁹ “Equality proofing” across the different equality grounds has been developed and applied initially in specific areas of the public sector as part of the process initiated under the Partnership 2000 national agreement,¹²⁰ and an equality focus has been

¹¹²See M. Pollack and E. Hafner-Burton, “Mainstreaming Gender in the European Union”, (2000) 7 *Journal of European Public Policy* 3, 432-457, and T. Rees, *Mainstreaming Equality in the European Union* (London: Routledge, 1998).

¹¹³C. McCrudden, “Mainstreaming Equality in the Governance of Northern Ireland” (1999) 22 (4) *Fordham International Law Journal* 22.

¹¹⁴See T. Rees, *Mainstreaming Equality in the European Union* (London: Routledge, 1998).

¹¹⁵See C. McCrudden, “Equality” in C.J. Harvey (ed.), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart, 2001), 75-131.

¹¹⁶See E. McLaughlin and P. Quirk, “Targeting Social Need”, in McLaughlin and Quirk (eds.) *Policy Aspects of Employment Equality in Northern Ireland* (Belfast: SACHR, 1996); Northern Ireland Office, *Vision Into Practice: The First New TSN Annual Report* (Belfast: NIO, 1998).

¹¹⁷See O’Cinneide, *Taking Equal Opportunities Seriously*, Part 2.

¹¹⁸S. Mullally and O. Smith, *Gender Proofing and the European Structural Funds: Outline Guidelines* (Dublin: Department of Justice, Equality and Law Reform, 1999).

¹¹⁹See The National Economic and Social Forum, *The National Anti-Poverty Strategy*, Opinion No. 8 (Dublin: NESF, 2000); Government of Ireland, *The National Anti-Poverty Strategy* (Dublin: Stationery Office, 1997); Government of Ireland (2002), *Building an Inclusive Society*, Review of the National Anti-Poverty Strategy under the Programme for Prosperity and Fairness, (Dublin: Department of Social, Community and Family Affairs, 2002).

¹²⁰See S. Mullally and O. Smith, *Equality Proofing: Report of the Partnership 2000 Working Group* (Dublin: Department of Justice, Equality and Law Reform, 1999); S. Mullally, “Mainstreaming Equality in Ireland: A Fair and Inclusive Accommodation?” (2001) *Legal Studies* 99; The National Economic and Social Forum, *Equality Proofing Issues* (Dublin: Stationery Office, 1996); The National Economic and Social Forum, *Partnership 2000: Development of the Equality Provisions*, Forum Opinion No. 1 (Dublin: Stationery Office, 1997).

incorporated in the poverty proofing process, which constitutes a recognition of the link between inequalities and poverty.¹²¹ The Irish government and the social partners in the partnership agreement *Sustaining Progress: Social Partnership Agreement 2003-05* have again committed themselves to a substantive equality approach, with an emphasis on strengthening and expanding the scope of equality and poverty proofing.¹²²

This gradual implementation of mainstreaming initiatives in both the UK and Ireland is welcome and very valuable, as has the recognition of its importance in ensuring effective and meaningful rights protection. However, the process has advanced much further in Northern Ireland and has been placed on a firm legal basis, as equality mainstreaming in Northern Ireland is based upon the section 75 statutory duty, which imposes a positive duty upon public bodies to implement effective mainstreaming measures. No similar measure exists in Ireland.

The significance of the duty is that it is designed to compel action by public authorities, even in the absence of firm political will. Mainstreaming throughout the EU and Commonwealth states such as Australia has all too frequently suffered from recurring problems of sustainability, excessive emphasis on procedure, dependence upon political will, inadequate organisational capacity and lack of internal prioritisation.¹²³ Implementation of equality and poverty proofing in Ireland has suffered from a lack of commitment and resources.¹²⁴ Without a firm legal basis, mainstreaming often resembles nothing more than good intentions.

¹²¹ Equality Authority and Combat Poverty Agency, *Poverty & Inequality: Applying an Equality Dimension to Poverty Proofing* (Dublin: Equality Authority and Combat Poverty Agency, 2003). See also P. Kirby, "Inequality and Poverty in Ireland: Clarifying Social Objectives", in S. Cantillon, C. Corrigan, P. Kirby and J. O'Flynn, *Rich and Poor: Perspectives on Tackling Inequality in Ireland* (Dublin: Oak Tree Press and Combat Poverty Agency, 2001). The National, Economic and Social Forum's strategy policy framework for equality issues and its subsequent report on implementing greater equality for lesbian, gay and bisexual people are good practice models of mainstreaming approaches. See NESF, *A Strategic Policy Framework for Equality Issues* (Dublin: NESF Report No. 23, March 2002), and NESF (Dublin: NESF, 2003).

¹²² *Sustaining Progress: Social Partnership Agreement 2003-05*, Part 5 (Dublin: Stationery Office, 2003).

¹²³ For a general survey of the outcomes and limitations of EU gender mainstreaming policies, see the European Expert Group on Gender and Employment Report to the Equal Opportunities Unit, DG Employment, <http://www2.umist.ac.uk/management/ewerc/egge/egge.html> (last accessed 23 November 2003); see also A. E. Woodward, *Gender Mainstreaming in European Policy: Innovation or Deception?* Discussion Paper, (Berlin: WZB Research Unit Organization and Employment, 2001). For the Australian context, the *Access and Equity: Annual Report 2002* (Canberra: Department of Immigration and Multicultural Affairs, 2003), at p. 42.

¹²⁴ Equality Authority and Combat Poverty Agency, *Poverty & Inequality: Applying an Equality Dimension to Poverty Proofing* (Dublin: Equality Authority and Combat Poverty Agency, 2003), p. 6.

Positive duties are designed to counteract these deficiencies. The introduction of positive duties in Northern Ireland was largely driven by the limited impact of previous mainstreaming and proofing initiatives.¹²⁵ The legally binding nature of positive duties gives them real bite.¹²⁶ Their objective is to change how public authorities perform their functions by making equality a central goal of their day-to-day activities, and to prevent the side-lining of equality concerns by imposing a statutory requirement to take proactive action.¹²⁷

The single most extensive positive duty imposed in the UK is that provided for in Northern Ireland by section 75, which imposes a duty on specified public authorities to have “due regard to the need to promote equality of opportunity” across all the equality grounds, including religion, political opinion, race, age, marital status, sexual orientation, gender, disability and family status, in carrying out their public functions. A duty to promote good relations is imposed in respect of race, religion and political belief. A wide range of Northern Irish authorities are subject to the legislation, with some important exceptions, including many of the UK Ministries.

Schedule 9 of the Act specifies the measures required to comply with the duty, in particular the requirement that all authorities to which the duty applies are required to prepare an “Equality Scheme”. This scheme is required to set out the impact assessment, monitoring, consultation, training and information access arrangements, including the preparation of equality impact assessments (EQIAs), that the authority intends to take to implement the duty.

¹²⁵The Policy Appraisal and Fair Treatment (PAFT) guidelines were introduced in Northern Ireland in January 1994, and were designed to promote fair treatment by ensuring that policies and programmes being developed or reviewed did not discriminate unjustifiably against a broad range of social groups. However, the guidelines suffered from problems of interpretation and implementation by public authorities, with little detailed guidance being given to departments or other public bodies. Compliance was voluntary and patchy, and a report by the Standing Advisory Commission on Human Rights in 1996 was highly critical of the operation of PAFT. See C. McCrudden, “Equality” in C. Harvey (ed.), *Human Rights, Equality and Democratic Renewal In Northern Ireland*, (Oxford: Hart, 2001). See also C. McCrudden, “The Equal Opportunity Duty in the Northern Ireland Act 1998: An Analysis”, in *Equal Rights and Human Rights – Their Role in Peace Building* (Committee on the Administration of Justice, 1999), 11-23. Similar problems have afflicted the Policy Appraisal for Equal Treatment guidelines introduced in Britain in 1996, and similar mainstreaming initiatives elsewhere.

¹²⁶See C. O’Cinneide, “Taking Equal Opportunities Seriously: Extending Positive Duties” (London: Equality and Diversity Forum, 2004).

¹²⁷*Ibid.* See also B. Hepple, M. Coussey, and T. Choudhury, *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford: Hart, 2000) (the ‘Hepple Report’), para. 3.9, p. 60. Policy impact assessment, consultation with relevant groups, training initiatives, the provision of reasonable access, and the monitoring of educational attainment, user satisfaction and employee numbers are all examples of initiatives that can be utilised to satisfy the requirements of the duty.

The section 75 duty requires all equality schemes to be submitted for approval to the Equality Commission for Northern Ireland, which if dissatisfied with a scheme can refer the authority in question to the Secretary of State for Northern Ireland, who can impose an alternative scheme if necessary. The Commission can also investigate the extent of compliance with the duty or with a specific scheme, as well as investigate complaints about non-compliance from individuals. If the authority fails to respond to action recommended by the Commission following such an investigation, the Commission can refer the matter to the Secretary for State.¹²⁸ Enforcement via judicial review and auditing mechanisms is also possible.¹²⁹

The ultimate impact of the section 75 duty will depend on whether the generally adequate compliance with the Schedule 9 requirements is translated into real outcomes. What is clear however even in the first few years of its application is that the existence of the section 75 duty has brought equality issues to the forefront of public authority concerns in Northern Ireland. Equality mainstreaming in Northern Ireland is therefore founded on a firm statutory basis with a strong enforcement mechanism. Similar steps have been taken in Britain, with the introduction of a race equality duty in the Race Relations (Amendment) Act 2000. General equality duties have also been imposed upon the Welsh Assembly and the Greater London Authority. An “enabling” power has been introduced in Scotland, allowing the Scottish Parliament to impose duties on authorities performing devolved functions, and the UK government is now introducing disability and gender equality duties modelled upon the race equality duty.

In contrast, equality proofing in Ireland is based upon commitments in National Agreements and in the National Development Plan and lacks any real enforcement dimension. This represents a significant lack of equivalence. The Agreement refers to an equivalence of “protection of rights”, and as discussed above, the concept has to be interpreted in the light of the broader equality and rights dimension of the document. Positive duties are designed to give effect to the substantive equality approach required by the Agreement. They create a right of due consideration of equality concerns and consultation with disadvantaged groups. Under the section 75 duty in Northern Ireland, individuals have a right to expect public authorities to take appropriate steps to eliminate discrimination and promote equality of opportunity, and to make a formal complaint to the Equality Commission for Northern Ireland if they believe authorities are not complying with the duty. The section 75 duty is therefore a central part of the protection of rights in Northern Ireland. No similar mechanism exists in Ireland, and therefore a lack of equivalence exists.

¹²⁸ See the *Report on the Implementation of the Section 75 Equality and Good Relations Duties by Public Authorities 1 January 2000 - 31 March 2002* (Belfast: Equality Commission for Northern Ireland, 2003), available at www.equalityni.org/uploads/word/280503FinalFullS75Report.doc

¹²⁹ The Equality Commission has recently prepared a progress report on the implementation of the duty up to March 2002. Its conclusions were generally positive, finding good levels of procedural compliance with the requirements set out in Schedule 9 despite extensive slippages in timetables and varying degrees of implementation.

The adoption of equality mainstreaming strategies in Ireland is not a sufficient stopgap for the absence of a duty, because of the absence of any enforcement mechanism, or of any legal obligation requiring authorities to take mainstreaming initiatives seriously. The absence of any specific requirement on Ireland to introduce a duty in the Agreement should also not be read as excluding the need to establish such a duty. As discussed above, the wording of the equivalence provision makes it clear that the specific measures required to be introduced by Ireland do not in themselves satisfy the obligations that the Agreement imposes.

What counts is whether the existing level of protection for rights in Ireland at least matches existing levels of protection in Northern Ireland in all aspects of the protection of core rights, and the lack of positive duties in Irish law means that the equivalence requirement indicates that such a statutory duty similar in scope and effect (if not necessarily in detail) to the section 75 duty should be introduced in Ireland.

(E) Private Sector Duties

The potential of positive duties is by no means confined to the public sector. Positive duties can also be applied to the private sector, in the form of legislative duties requiring proactive action on the part of private employers to eliminate discrimination. Different considerations do apply in designing positive duties for the private sector in comparison to the public sector, as there is a particular need to reduce compliance costs and regulatory burden. However, positive equality duties have been introduced with considerable success and a relatively light regulatory burden in the USA¹³⁰, Canada¹³¹, Australia, Norway¹³², Sweden¹³³ and Northern Ireland. However, when the

¹³⁰For an analysis of the US use of contract compliance initiatives in the race context, see P.E. Morris, "Legal Regulation of Contract Compliance: An Anglo-American Comparison" (1991) 19 *Anglo-American Law Review* 87-144, 87-90. US Executive Order 11246 requires federal government contractors with fifty or more employees and contracts of more than \$50,000 to abstain from unlawful discrimination and to take positive action to increase the representation of racial minorities in their workforce, including the implementation of positive action plans. The Office of Federal Compliance Programs enforces these contract compliance requirements by audits, enforceable conciliation agreements and ultimately by seeking judicial sanctions that can debar contractors from government work. It also requires contractors to file annual reports and to monitor the composition of their workforce.

¹³¹See at federal level the Employment Equity Act 1986. See also H. C. Jain, P. J. Sloane and F. M. Horwitz, *Employment Equity and Affirmative Action: An International Comparison* (London: M.E. Sharpe, 2003), 22-27.

¹³²The Norwegian Gender Equality Act 2002 covers both public and private enterprises, and imposes a general positive duty upon employers to promote gender equality within their enterprises. This is reinforced by a requirement to report on progress towards gender equality in annual corporate reports or budgets, which must include detailed information on planned and implemented measures to promote gender equality and prevent differential treatment. This is supervised and monitored by the gender ombudsman and the company law authorities. See K. Mile, "Mainstreaming Equality – Models for a Statutory Duty", in *Mainstreaming Equality: Models for a Statutory Duty – Conference Report*, (Dublin: Equality Authority, 2003), available at www.equality.ie

¹³³Equal Opportunities Act 1991: see http://www.ilo.org/public/english/employment/gems/eoo/law/sweden/l_eoas.htm (last accessed 22 November 2003).

Northern Irish fair employment duties are examined, it becomes clear that the question as to whether the equivalence requirement applies in this context is much more unclear than is the case with the imposition of positive equality duties upon the public sector.

Such private sector duties usually require employers of a particular size to monitor the composition of their workforce and pay levels, to identify patterns of unequal treatment or practices which could cause such treatment, and to take proactive measures where appropriate and necessary to remove these identified obstacles to equality. They are no different in principle than the requirement to provide reasonable access for disabled persons: both are positive obligations to take proactive steps.

By imposing positive requirements, these private sector duties circumvent the need to rely upon individual ad hoc enforcement and remedies. They are designed to be proactive, simple to implement, anticipatory and based upon the principle of ensuring substantive equality. Such duties mirror precisely in nature, form and content what is generally accepted to be best equal opportunities human resources practice by employers' organisations in the UK and Ireland.¹³⁴

In Northern Ireland, the Fair Employment Act 1989 imposed a positive duty on employers with ten employees or more to take measures to ensure a fair proportion of Catholics and Protestants in their workforce.¹³⁵ The duty has since been extended and modified by the Fair Employment and Treatment (Northern Ireland) Order 1998 ("FETO"). Employers are required to monitor annually the composition and pay scales of their workforce, and every three years to review their recruitment, promotion and training practices. If patterns of discriminatory treatment are identified in the monitoring process, employers (after consultation with the Equality Commission) are required to take appropriate positive action measures.¹³⁶

Enforcement of this duty is ensured by the requirement that employers "file" their monitoring returns and equality plans with the Equality Commission for Northern Ireland for approval, who can seek court orders to bring recalcitrant employers into line. The Commission can also launch investigations into employment composition and practices, and this "Article 55 review" continues to be the key mechanism to promote equality in this area.¹³⁷ The Commission can also enter into enforceable affirmative

¹³⁴ See C. O'Connell, *Taking Equal Opportunities Seriously: Extending Positive Duties* (London: Equality and Diversity Forum, 2004), Part 8.

¹³⁵ See C. McCrudden, "The Evolution of the Fair Employment (Northern Ireland) Act 1989 in Parliament" in R. J. Cormack and R. D. Osborne (eds.), *Discrimination and Public Policy in Northern Ireland* (Oxford: OUP, 1991).

¹³⁶ These can include the setting of goals and timetables, implementing equal opportunities policies, reviewing employment policies, practices and procedures, and taking steps to attract applicants from the under-represented community.

¹³⁷ Equality Commission for Northern Ireland, *Annual Report 2000-2001*, p.25.

action agreements with employers.¹³⁸ Non-compliance with the provisions of the duty is penalised primarily by the denial of government grants and exclusion from state tendering processes.¹³⁹

There is a general perception that the Northern Irish duty has proved in the main largely successful, which is backed by statistical evidence.¹⁴⁰ Some positive results have also been generated by a general federal employment equity duty extending across all the equality grounds in Canada, and by gender duties in Norway and Sweden.¹⁴¹ Based on this evidence, the Cambridge Independent Review into the Enforcement of Anti-Discrimination Law (the “Hepple Report”) recommended the introduction of a similar set of duties across the different equality grounds in Britain.¹⁴² As part of its response to the initial consultation on the proposed single equality bill for Northern Ireland, the Equality Commission for Northern Ireland has similarly called for the FETO duty to be extended or modified so as to extend across all the equality grounds now covered by the section 75 positive duty.¹⁴³

Therefore, the FETO duty is a key element of protecting rights in Northern Ireland, and as with the section 75 duty, the FETO duty is a major component part of equality legislation in Northern Ireland. There are also sound policy reasons and comparative experience that support the introduction and extension of such duties across all the equality grounds, on the basis that this may result in substantially enhanced protection against discrimination.

However, it is far from clear that the equivalence requirement creates a legal obligation on Ireland to introduce an equivalent private sector duty to the FETO duty, let alone to introduce cross-strand equality duties. As already discussed, the equivalence requirement does not oblige Ireland to introduce identical legislation as that applying in Northern Ireland, just to provide equivalence in terms of the real and effective protection of rights. Due to the different social and ethnic context in Ireland, it would

¹³⁸At the end of March 2001, the Equality Commission had agreed 301 affirmative action agreements with employers, 72 of which were legally enforceable: it also carried out formal reviews with 31 employers implementing such agreements during the year 2000-2001, and reported that “the majority of the concerns had made good faith efforts to implement the programme and that there were some encouraging improvements in workforce composition”. *Ibid.*, p. 25.

¹³⁹See P.J. Sloane and D. Mackay, “Employment Equity and Minority Legislation in the UK After Two Decades: A Review” (1997) 23 *International Journal of Manpower*, 18.

¹⁴⁰See H. C. Jain, P. J. Sloane and F. M. Horwitz, *Employment Equity and Affirmative Action: An International Comparison* (London: M.E. Sharpe, 2003), 31. The House of Commons Northern Ireland Affairs Committee reported in 1999 that “the extent to which employers have complied with the regulatory requirements of the legislation appears to be impressive”. See House of Commons Northern Ireland Affairs Committee Fourth Report (1999), para. 48.

¹⁴¹See C. O’Cinneide, *Taking Equal Opportunities Seriously: Extending Positive Duties*. (London: Equality and Diversity Forum 2004) Part 8.

¹⁴²The Hepple Report, paras. 3.37-3.40, pp. 69-71.

¹⁴³See ECNI, *Position Paper: The Single Equality Bill*, September 2001, Part 9.

make little sense to introduce an exact equivalent to the FETO duty, given that it is confined to religious equality: while problems of religious discrimination do exist in Ireland, they do not take the same forms and levels of severity as has been the case in Northern Ireland. Introducing a private sector duty in respect of religious discrimination alone in Ireland would do little in real terms to provide an equivalent level of rights protection as that provided by the FETO duty in Northern Ireland.¹⁴⁴

A general private sector equality duty, similar to that sought by the Equality Commission, could in contrast ensure a considerably higher level of effective rights protection in both Northern Ireland and Ireland. If it was introduced in Northern Ireland, then the equivalence requirement would kick in and oblige Ireland to introduce a similar measure. The equivalence requirement would apply here just as it does in the case of the section 75 public sector duty. This public sector duty extends across all the equality grounds, and, if introduced in Ireland, would be capable of effectively enhancing rights protection in respect of many key equality issues: therefore, an obligation exists at present for Ireland to introduce such an equivalent measure, just as it would if a general private sector duty existed in Northern Ireland, for the same reasons. However, in the absence of such a duty in Northern Ireland, there may be no obligation as yet on Ireland just to introduce a duty in respect of religious discrimination.

There are nevertheless strong policy reasons which support the introduction of a general equality private sector duty in both Ireland and Northern Ireland, both in terms of the impact this could make on enhancing protection of rights, and also because of how it would complement and reinforce the transformative scope of the Agreement and its focus on achieving equality of respect throughout the island of Ireland. Patterns of disadvantage and exclusion that stem from the actions or neglect of private individuals and bodies are as problematic as those that stem from the public sector. The same difficulties that reduce the impact of anti-discrimination law apply in the private as well as in the public sector, such as excessive reliance upon individual enforcement. Private sector duties extending across all the equality grounds could be an important tool in protecting rights in Ireland and Northern Ireland.¹⁴⁵

¹⁴⁴A similar argument could be made in respect of extending Irish anti-discrimination law to cover political opinion: see above.

¹⁴⁵For a strong argument in favour of introducing such duties in Ireland, and how they link with a “reasonable accommodation” model, see J. Walsh, “Enforcement Models and the Equality Bill 2004: Prevention or Cure?” in the Equality Coalition Seminar Report, *Equality Bill 2004*, 16 February 2004, available at www.iccl.ie.





8 THE CROSS-BORDER DIMENSION

The potential impact of positive duties in both Northern Ireland and Ireland demonstrates how the same equality issues arise on both sides of the border. This shows the desirability of developing cross-border equality policies to formulate parallel mechanisms for protecting rights. Northern Ireland and Ireland share common problems and challenges, that may be best solved by mutual exchanges of experience and a common commitment to establishing an agreed minimum floor of equivalent rights protection in both parts of the island of Ireland. Such a mutual equivalence approach, while as discussed above not legally required under the Agreement, would also have the advantage of providing a common standard of respect for rights that would apply to all participants in the Agreement's cross-border processes. This would have both symbolic value, by reaffirming the commitments made in the Multi-Party Agreement by all parties to ensure effective and meaningful respect for basic rights, and practical value, by recognising the value in common solutions to common problems of disadvantage and exclusion, and the similar socio-economic context that both parts of the island find themselves in.



9 FUTURE PERSPECTIVES FOR EQUIVALENCE: THE BILL OF RIGHTS AND SINGLE EQUALITY BILL

Interesting issues surround the debate on the proposed Bill of Rights for Northern Ireland, as well as the current ongoing consultation on the proposed Single Equality Bill. Both are internal issues for Northern Ireland, yet both because of Ireland's binding obligation to ensure equivalence may have a considerable impact in Ireland.

The proposed Bill of Rights for Northern Ireland is intended to raise the level of rights protection in line with international standards, as the Northern Ireland Human Rights Commission has emphasised, and is apparent from the text of the Agreement itself.¹⁴⁶ The process and implementation of the Bill will therefore draw upon and be informed by international best practice and the full spectrum of international rights instruments, in line with the Agreement's overall approach. At present, the Northern Ireland Human Rights Commission is still trying to move the process forward: however, the nature, content and legal status of any future Bill of Rights remains undecided and unresolved.

However, if a Bill is agreed and given legal status, its contents will have a considerable impact in Ireland, via the binding equivalence requirement. The debate surrounding the Bill of Rights in Northern Ireland deserves much closer attention in Ireland than it has received. This process should provoke a similar debate in Ireland as to how to meet international standards, and how an equivalence of rights can be sustained if and when Northern Ireland introduces a comprehensive Bill of Rights.¹⁴⁷

¹⁴⁶See the Multi-Party Agreement *Constitutional Issues*, para. (v), in particular the responsibility placed upon the Northern Irish Human Rights Commission to consult and advise on the "scope for defining, in Westminster legislation, rights supplementary" to those in the European Convention on Human Rights, which would reflect the "particular circumstances" of Northern Ireland. The Commission in this process are to draw "as appropriate on instruments and experience", and such additional rights as may be identified by the Commission in this process are to reflect the core principles of mutual respect for the identity and ethos of both communities".

¹⁴⁷See B. Dickson, "Introduction" (2001) 52 (3&4) *Northern Ireland Legal Quarterly* 229-234. For an interesting alternative perspective, see A. Morgan, "What Bill of Rights?", in the same volume, 234-269.

This will be especially important if the scope and nature of the rights protected by the new instrument considerably exceed those protected under the Irish Constitution.¹⁴⁸

Among the issues to be considered by the Northern Ireland Human Rights Commission in this process are to be “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 spheres”.¹⁴⁹ Equality is thus intended to be at the heart of the Bill of Rights process, and should therefore have a central role in the debate on how rights protection should be fully embedded into the constitutional frameworks of both Northern Ireland and Ireland.

The Northern Ireland Executive in its Programme for Government in 2001 committed itself to consulting about the potential introduction of a Single Equality Bill.¹⁵⁰ This process has recently been re-opened by the Secretary of State for Northern Ireland. This proposal arises out of the equality dimension of the Agreement, and again has considerable potential implications for Ireland due to the equivalence requirement. While Ireland has single equality legislation in place, levels of protection vary considerably across the different grounds, there is an absence of any positive duty provisions, and there is every possibility that a Single Equality Bill if introduced in Northern Ireland will require considerable alterations in existing equality law in Ireland to maintain equivalence.

Again, the consultation process occurring in Northern Ireland should therefore trigger a similar re-assessment of existing protection in Ireland. Ultimately the contents of both the proposed Bill of Rights and the Single Equality Bill will be a matter for civil society and the citizens of Northern Ireland at large. However, there needs to be an engagement with similar issues in Ireland, and a focus on what the future shape of a cross-border equivalence of rights protection in line with the general commitments of the Agreement would involve.

¹⁴⁸Note that the consultation document prepared by the two Irish Human Rights Commissions specifically mentions this possibility in its outline of the potential contents of the proposed Charter of Rights for the island of Ireland: see B. Dickson, “A Charter of Rights for the Island of Ireland”, Dublin, Law Society, 18 October 2003, 12.

¹⁴⁹See the Multi-Party Agreement *Constitutional Issues*, para. (v).

¹⁵⁰*Programme for Government: Making a Difference 2001-2004* (Belfast: Northern Ireland Executive, 2001).





10 COMMON EQUIVALENCE

However, pending the introduction of a Bill of Rights or Single Equality legislation in Northern Ireland, it is worth identifying particular areas in which a common approach in Northern Ireland and Ireland may yield real results.

(A) The Harmonisation of Existing Legislation

A policy approach that aimed to level equality protection on both sides of the border and to learn from the experiences of both Northern Ireland and Ireland could focus upon the difficulties presented by incoherent and disparate equality legislation. The lack of unified legislation in Northern Ireland and throughout the UK has been extensively highlighted in the existing academic literature.¹⁵¹ The lack of harmonisation between the different equality grounds creates artificial hierarchies of discrimination, sends mixed messages as to the fundamental nature of the right to equality and the equal importance of each of the equality grounds, creates unnecessary difficulties for those who suffer multiple discrimination, and is confusing for complainants, employers, policy-makers and any others required to differentiate between the different grounds.¹⁵²

Ireland's legislation in contrast adopts a unified approach across the various equality grounds, with some particular provisions for specific equality grounds. However, the scope of some of these strand-specific provisions is so considerable as to effectively re-create a hierarchy of equality grounds. Requirements in relation to reasonable accommodation apply only to the disability ground. Gender discrimination cases can be brought in the Circuit Court and higher damages awarded: as discussed above, this is not true of the other grounds. Considerable exemptions have been carved out by the 2004 Act in respect of discrimination on the basis of nationality. The scope of these provisions has in general made the supposedly uniform Irish equality legislation more of a patchwork quilt, riddled with gaps and holes.

Zappone has convincingly argued that a uniform and harmonised approach to equality legislation is preferable to a fragmented approach.¹⁵³ The lack of harmonisation in Northern Ireland ensures lesser protection against particular forms of discrimination, such as sexual orientation, which constitutes a denial of equality of respect and

¹⁵¹ See e.g. S Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 *Oxford Journal of Legal Studies* 65-86. For a European perspective, see M Bell and L Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 *European Law Review* 349.

¹⁵² See K. Zappone, *Charting the Equality Agenda: A Coherent Framework for Equality Strategies in Ireland, North and South* (Belfast: Equality Authority and Equality Commission for Northern Ireland, 2001), available at <http://www.equalityni.org/uploads/pdf/kzreport.pdf> (last accessed 14 November 2003), pp. 39-43; Equality Commission for Northern Ireland, *Position Paper: Single Equality Bill* (Belfast: ECNI, 2001) paras. 4.1-4.3.

¹⁵³ *Ibid.*

esteem, contrary to the tenor and content of the Agreement's provisions. Ireland's more uniform approach nevertheless also produces unnecessary inconsistencies.

Due consideration should therefore be given to extending and harmonising equality legislation in Northern Ireland and Ireland, to establish a common level of minimum protection throughout the island of Ireland. The Northern Irish Single Equality Bill may be the principal vehicle for bringing about change in Northern Ireland, and Ireland may need to adjust its legislation accordingly in line with the equivalence principles: nevertheless, the issue of harmonising and extending legislation should also be addressed in the cross-border fora and in political debate throughout the island. What aspects of Ireland's nominally unified legislation provide useful precedents for the development of a unified approach in Northern Ireland? What has Ireland to learn from the extensive experience of Northern Ireland?

(B) New Grounds of Discrimination and Socio-Economic Status

Interesting questions arise as to whether a common equivalence approach could involve the extension of equality legislation to protect against other "new" forms of unjustified discrimination in addition to those already covered in Irish and UK law. The Agreement in its substantive equality approach recognises the need to address socio-economic exclusion and other factors that contribute to inequality and conflict. Should anti-discrimination law in Northern Ireland and Ireland also be modified to reflect this emphasis in the Agreement on the "wider" factors underpinning social exclusion and inequality?

Canadian and Australian state and federal legislation now protects, with some variation, against a wide range of forms of discrimination, including language, source of income, record of criminal conviction, breast-feeding, personal association, lawful sexual activity, trade or calling, industrial activity and dependence on alcohol or drugs.¹⁵⁴ Some jurisdictions adopt a broader approach. Quebec prohibits discrimination on the grounds of "social condition", while British Columbia from 1973 to 1984 went further in prohibiting all forms of discrimination unless "reasonable cause" existed.¹⁵⁵ In South Africa, a wide-ranging set of specific prohibited grounds are supplemented by a general "other status" provision allowing the case-by-case prohibition of unjustified forms of discrimination.

This area in general deserves more extensive consideration in Northern Ireland and Ireland. However, particular issues arise in respect of socio-economic status. The implementation of the specific commitments entered into by the UK government in the Agreement directed at addressing social exclusion, in particular the Targeting Social Needs (TSN) initiative,¹⁵⁶ was intended to ensure that public sector service delivery

¹⁵⁴ See J. Harrington, "Making Sense of Equality Law: A Review of the Hepple Report" (2001) 64 (5) *Modern Law Review* 757, 759; see also the extensive list in the Anti-Discrimination Act 1996, Northern Territories, Australia and the Discrimination Act 1991, Australian Capital Territories.

¹⁵⁵ Canadian Human Rights Commission, *Prohibited Grounds of Discrimination in Canada* (Ottawa, Minister of Public Works and Government Services Canada, 1988).

¹⁵⁶ See E. McLaughlin and P. Quirk, "Targeting Social Need", in McLaughlin and Quirk (eds.) *Policy Aspects of Employment Equality in Northern Ireland* (Belfast: SACHR, 1996); Northern Ireland Office, *Vision Into Practice: The First New TSN Annual Report* (Belfast: NIO, 1998).

targeted the particular needs of strongly disadvantaged groups, such as members of the Traveller community. While not required by the Agreement, the poverty proofing strategies¹⁵⁷ introduced in Ireland to mainstream anti-poverty approaches in the design and delivery of public sector services also aim to enhance the protection of fundamental rights, including socio-economic rights.¹⁵⁸

By addressing inequalities in economic entitlement, both Ireland's poverty proofing and the TSN initiative fit with the purpose of the Agreement, its transformative ambitions, and its recognition of the socio-economic dimension to inequality and the denial of rights protection. However, neither set of strategies is backed by any real substantive legal commitment, even if TSN strategies may in certain ways overlap with the requirements of the section 75 positive equality duty. Like other mainstreaming initiatives, doubts must exist as to whether they are capable of effecting change without the back-up of legal sanction.

Interesting issues therefore arise as to whether positive duties could be introduced to give a statutory backbone to anti-poverty mainstreaming. Poverty proofing in Ireland and the TSN initiative in Northern Ireland operate in a similar manner to equality proofing. It may be possible for these initiatives to be backed by positive duties similar to the section 75 equality duty, although the duty mechanism would have to be altered: for example, the duty would have to be worded in terms of having due regard to the need to reduce or eliminate poverty, and appropriate targets, definitions and implementing guidelines would have to be developed. McKeever and Ní Aoláin have argued for the introduction of such duties as an appropriate tool for enforcing and giving effect to socio-economic rights.¹⁵⁹ The potential problems with introducing such duties would be the difficulty of enforcing compliance, demonstrating default or finding any meaningful consensus on what measures were necessary and appropriate.¹⁶⁰

What is clear is that a common equivalence policy could do worse than to address the interface between poverty, inequality and the denial of rights. The Agreement commits all signatory parties to respecting the full spectrum of fundamental rights, requires change across the whole island of Ireland, and recognises the link between inequality and poverty. Is it then time for serious thought to be given to how to establish a minimum floor of rights protection in both Northern Ireland and Ireland that is capable of addressing both inequality and poverty?

¹⁵⁷ See The National Economic and Social Forum, *The National Anti-Poverty Strategy*, Opinion No. 8 (Dublin: NESF, 2000); Government of Ireland, *The National Anti-Poverty Strategy* (Dublin: Stationery Office, 1997); Government of Ireland (2002), *Building an Inclusive Society*, Review of the National Anti-Poverty Strategy under the Programme for Prosperity and Fairness, (Dublin: Department of Social, Community and Family Affairs, 2002).

¹⁵⁸ Equality Authority and Combat Poverty Agency, *Poverty & Inequality: Applying an Equality Dimension to Poverty Proofing* (Dublin: Equality Authority and Combat Poverty Agency, 2003). See also P. Kirby, "Inequality and Poverty in Ireland: Clarifying Social Objectives", in S. Cantillon, C. Corrigan, P. Kirby and J. O'Flynn, *Rich and Poor: Perspectives on Tackling Inequality in Ireland* (Dublin: Oak Tree Press and Combat Poverty Agency, 2001).

¹⁵⁹ See G. McKeever and F. Ní Aoláin, "Thinking Globally, Acting Locally: Enforcing Socio-Economic Rights in Northern Ireland" [2004] *European Human Rights Law Review* 158.

¹⁶⁰ See C. McCrudden, "Mainstreaming Human Rights", in C. Harvey (ed.) *Human Rights in the Community: Rights as Agents for Change* (Oxford: Hart, 2005).



11 GIVING EFFECT TO A CROSS-BORDER APPROACH

While developments in Northern Ireland may result in new obligations to achieve equivalence arising for Ireland, the development of common equivalence approaches could prove profitable. How then can in practical terms an equivalence approach to rights protection be developed, while respecting the sensitivities and complexities involved in any form of cross-border dialogue?

(A) Equality and Rights in the Work of the Cross-border Bodies

In the first place, the two national governments themselves need to be prepared to work with each other via the Anglo-Irish mechanisms in giving effect to their general commitments under the Agreement to respect rights. However, developing a cross-border approach cannot be a matter alone for the two governments. It is imperative that all the relevant parties including community organisations in Ireland and Northern Ireland are also engaged in this process.

It would also be useful if the rights dimension to the Agreement play a role in the work of the cross-border bodies, and be mainstreamed in their activities. There is no explicit equality dimension to the work of the cross-border bodies established under the Agreement, the Strand Two North/South Ministerial Councils, or the Strand Three British-Irish Council. However, these bodies can undertake initiatives on matters of “mutual interest”, opening up the possibility of equality being the subject of cross-border and inter-governmental co-operation throughout Ireland and the UK.

In addition, the provisions governing the British-Irish Intergovernmental Conference provide that the Conference would address “in particular, the areas of rights, justice...and will intensify co-operation between the two Governments on the all-island or cross-border aspects of these matters.”¹⁶¹ This both recognises the ongoing relevance of a common framework approach to rights and equality, and provides an institutional mechanism for addressing these issues.

Thus, in these bodies, the possibility exists for the development of an equivalence policy in relation to rights and equality as part of their discussions. As discussed above, it is particularly important that these issues are not just dealt with at the intergovernmental level: that is why it is important to engage the other cross-border bodies, to examine the possibility of exchanging information and adopting best practice from the other devolved regions of the UK, and to engage with civil society and the wider public in both countries.

¹⁶¹ Multi-Party Agreement, *Strand Three: British-Irish Intergovernmental Conference*, para. 6.

(B) The Charter of Rights

One other element of the Agreement which provides a vehicle for the development of such an equivalence approach on a cross-border basis is the provision for a joint committee of both human rights commissions to consider the possibility of establishing a charter “reflecting and endorsing” agreed measures for the protection of fundamental rights. The charter process has some potential to move forward a cross-border equivalence approach to rights protection, if it ever attains political momentum.

Firstly, the process of discussing and framing a charter of rights may help to flesh out the commitments entered into in the Agreement, and create debate on the level of protection of rights that should be guaranteed throughout the entire island of Ireland. Secondly, if a text of a charter is agreed, whether it is expressed to be declaratory, programmatic or legally binding, it will provide a standard against which the protection of rights and equal opportunities in Northern Ireland and Ireland can be assessed.

However, the relevant clause in the Agreement does not oblige the governments, or any other of the parties, to sign up to such a charter, or to give it legal status. Unlike the Northern Irish Bill of Rights provision, the charter is not required to be framed in the form of a legally enforceable Bill of Rights. This indicates that such a charter could be declaratory (by recognising a set of non-enforceable common rights) or programmatic (by establishing a set of target rights goals for both governments to move towards) in nature, and need not take a legal form. This interpretation has been adopted in the consultation document issued by the joint committee that has been formed by the two human rights commissions, which indicates a preference for a programmatic approach.¹⁶² Whichever type of document is adopted, the consultation document also proposes the insertion into the charter text of the Agreement’s equivalence requirement on Ireland, and also specifically suggests the inclusion of a reference to ensuring equivalence as to the rights to be protected in the Northern Irish Bill of Rights.¹⁶³ This is to be welcomed as a proposal.

However, the charter at present seems to be marooned in political apathy. In any case, it should not be seen as a necessary precursor instrument which has to be in place before the implementation of any further moves to implement cross-border equivalence or convergence measures. The equivalence requirement applies irrespective of the existence or otherwise of a charter, and a common equivalence approach can be developed without having to rely upon this particular mechanism.

In this context, the role of the two human rights commissions, the Equality Commission for Northern Ireland and the Equality Authority is very important. They may be able to push for a sustained focus upon the progressive implementation of the Agreement’s rights provisions, and to argue the case for the transformation of existing rights

¹⁶² See B. Dickson, “A Charter of Rights for the Island of Ireland”, paper delivered at Law Society, Dublin, 18 October 2003.

¹⁶³ *Ibid.*, 12.

provisions in Northern Ireland and Ireland. Two particular aspects could be stressed. Firstly, it is important that working towards a cross-border equivalence of rights is not linked to “power-sharing” nor is it linked to political agendas that can be divisive: the convergence of rights protection that equivalence aims to achieve is intended to remove the conditions of conflict and to ensure a common basis of trust and understanding. Secondly, the centrality of rights, and in particular equality rights, to the scheme, thrust and purpose of the Agreement needs to be emphasised. The rights dimension of the Agreement has been all too frequently glossed over: it needs to be re-emphasised, and the commitments of all signatory parties need to be similarly highlighted.





12 CONCLUSION

The Multi-Party Agreement imposes certain general requirements upon its signatories to respect fundamental rights that have been neglected, but which are wide-ranging, extensive and transformative in scope. Equality rights are a core component part of this range of rights, and the text of the Agreement commits the parties to the adoption of a substantive approach to equality that extends to all individuals and groups throughout the island of Ireland.

The Agreement imposes a binding obligation upon Ireland to ensure that at least an equivalence of rights protection is in place in Ireland as that applying in Northern Ireland. This specific obligation appears to require the strengthening and extension of some elements of anti-discrimination and human rights legislation in Ireland, as well as the introduction of some form of positive public sector equality duty.

Given the transformative purpose of the Agreement, the links between Ireland and Northern Ireland and the common socio-economic context existing in Ireland and Northern Ireland it is also apparent that strong reasons support the development of a common equivalence approach. While not a formal obligation under the Agreement, establishing an agreed level of minimum rights protection for the whole island of Ireland has considerable attractions. The charter of rights mechanism, the work of the cross-border institutions, the Northern Irish Bill of Rights and Single Equality Bill processes, are all appropriate vehicles for the discussion and development of such an approach. The rights dimension of the Agreement needs to be taken seriously, to ensure a common foundation of basic rights in Ireland and Northern Ireland.



THE EQUALITY AUTHORITY
AN tÚDARÁS COMHIONANNAIS



Equality Commission

FOR NORTHERN IRELAND